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March 12, 2009

Via Electronic Mail and Federal Express

Catrice C. Williams
Secretary
Department of Telecommunications and Cable
Two South Station
Fourth Floor
Boston, Massachusetts 02110

Re: D.T.C. 08-9, Petition for Arbitration of an Interconnection Agreement between Intrado Communications Inc. and Verizon New England Inc. d/b/a Verizon Massachusetts

Dear Secretary Williams:

Intrado Communications Inc. ("Intrado Comm"), by its attorneys, hereby respectfully submits its Reply Brief for filing in the above-referenced matter.

If you have any questions concerning this matter, please contact the undersigned.

Respectfully submitted,

Chérie R. Kiser

Counsel for Intrado Communications Inc.

Enclosures

cc: Service List

43635.1

Before the
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

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 Verizon New England Inc. d/b/a/ Verizon Massachusetts	)	D.T.C. 08-9

REPLY BRIEF OF INTRADO COMMUNICATIONS INC.

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Before the
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

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 Verizon New England Inc. d/b/a/ Verizon Massachusetts	)	D.T.C. 08-9

REPLY BRIEF OF INTRADO COMMUNICATIONS INC.

Intrado Communications Inc. ("Intrado Comm"), by its attorneys, hereby submits its Reply Brief in connection with Intrado Comm's Petition for Arbitration ("Petition") to Establish an Interconnection Agreement with Verizon Massachusetts ("Verizon") pursuant to Section 252(b) of the Communications Act of 1934, as amended ("Act").[1] The Massachusetts Department of Telecommunications and Cable ("Department") should adopt Intrado Comm's positions and proposed interconnection agreement language as set forth herein, in Intrado Comm's Initial Brief, and in the Joint Issues Matrix for the unresolved issues between the Parties.

INTRODUCTION AND SUMMARY

This is a case about the interconnection provisions of the Act and, therefore, it is a case about competition. Verizon's Initial Brief repeatedly urges the Department to ignore this crucial detail, which shapes every disputed issue in this interconnection arbitration along with the public interest and the policies underlying the Act. Verizon asserts the "Department cannot ignore governing federal law and instead decide the issue with respect to [point of interconnection]

[1] 47 U.S.C. § 252(b).

[("POI")] placement on policy grounds."[2] Of course, the public interest cannot overcome the absolutely clear language of a statute when no question exists as to its meaning. But the meaning of our laws is not determined in a vacuum. The policies that prompted the drafting and passage of the Act matter. As the Supreme Judicial Court of Massachusetts has explained,

> We construe a statute in accord with the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.[3]

Intrado Comm is not asking the Department to ignore governing law or to decide this case based on policy grounds alone. Rather, Intrado Comm is merely insisting that the Department reject Verizon's efforts to graft a non-existent requirement onto the Act obligating Intrado Comm to live by certain standards and restrictions that Verizon refuses to apply to its own business. The Act was intended to encourage competition, not stifle it. The meaning of the Act itself must be understood in that light. Verizon has provided no basis for rejecting these principles. Nor has Verizon provided any basis for rejecting the well-reasoned decisions of the Federal Communications Commission ("FCC") in the *King County Order*[4] or the Public Utilities Commission of Ohio in the *Embarq Arbitration Award*,[5] the *CBT Arbitration Award*,[6] the *CBT*

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[2] Verizon Brief at 21.

[3] *Champigny* v. *Commonwealth*, 422 Mass. 249, 251 (Mass. 1996) (citations and quotation marks omitted).

[4] *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Request of King County*, 17 FCC Rcd 14789, ¶ 1 (2002) ("*King County Order*").

[5] Ohio Case No. 07-1216-TP-ARB, *Petition of Intrado Communications, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with United Telephone Company of Ohio dba Embarq and United Telephone Company of Indiana dba Embarq Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Arbitration Award (Sept. 24, 2008) ("*Embarq Arbitration Award*").

[6] Ohio Case No. 08-537-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 Cincinnati Bell Telephone Company*, Arbitration Award (Oct. 8, 2008) ("*CBT Arbitration Award*").

Rehearing Award,[7] and the *AT&T Arbitration Award*.[8] Indeed, Verizon's Initial Brief virtually ignores those persuasive authorities, is replete with factual inaccuracies, and is devoid of meaningful legal authority or record evidence supporting its positions.

This Department should exercise its broad authority over the deployment of competition and 911 services generally as well as its jurisdiction under Sections 251(c) and 251(a) of the Act[9] — as other state commissions have[10] — to uphold Intrado Comm's interconnection rights and adopt Intrado Comm's interconnection proposals.[11] For example, in order to maintain industry-

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[7] Ohio Case No. 08-537-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 Cincinnati Bell Telephone Company*, Entry on Rehearing (Jan. 14, 2009) ("*CBT Rehearing Award*").

[8] Ohio 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 dba AT&T Ohio*, Arbitration Award (Mar. 4, 2009) ("*AT&T Arbitration Award*") (Attachment 3).

[9] Intrado Comm Brief at 10-12.

[10] *See, e.g.*, Ohio 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 (Feb. 5, 2008) ("*Certification Order*"), Order on Rehearing (Apr. 2, 2008) ("*Certification Rehearing Order*"). In the *Certification Order*, the commission confirmed "the importance of regulating competitive emergency services telecommunications carriers [("CESTCs")] in light of the significant public interest surrounding the provision of 9-1-1 service." *Certification Order* at Finding 7.

[11] *Embarq Arbitration Award* at 33; *CBT Arbitration Award* at 8-9; *AT&T Arbitration Award* at 34. Verizon also claims that the Department cannot exercise its authority under Section 253(b) because that section is not pertinent to Section 251. *See* Verizon Brief at 18-19. Verizon is mistaken. *See* Intrado Comm Brief at 10-12. The title of Section 253 is "Removal of Barriers to Entry," which was Congress' main goal in enacting Sections 251 and 252. *See* 47 U.S.C. § 253; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶ 16 (1996) ("*Local Competition Order*") ("Section 251(c) was intended to facilitate "[v]igorous competition," which Congress understood "would be impeded by technical disadvantages and other handicaps that prevent a new entrant from offering services that consumers perceive to be equal in quality to the offerings of [ILECs]."") (intervening history omitted), *aff'd*, AT*&T Corp. v. Iowa Utils. Bd*., 525 U.S. 366 (1999). Section 253 "set[s] aside a large regulatory territory for State authority" based on the partnership between the Federal Communications Commission and state commissions created by Sections 251 and 252. *See American Communications Services, Inc.; MCI Telecom. Corp.; Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecom. Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act of 1934, as amended*, 14 FCC Rcd 21579, ¶ 35 (1999). The Act makes clear that states play a significant role in the development of competitive telecommunications markets, including the competitive 911 market. *See The Public Utility Commission of Texas; The Competition Policy Institute, IntelCom Group (USA), Inc. and ICG Telecom Group, Inc., AT&T Corp., MCI Telecommunications Corporation, and MFS Communications Company, Inc.; Teleport Communications Group, Inc.; City of Abilene, Texas; Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd 3460, ¶ 52 (1997).

standard interconnection practices in the competitive market for 911 services to Ohio counties and public safety answering points ("PSAPs"), the Ohio commission has correctly determined that Section 251(a), along with the commission's broad authority over 911 service, supports the adoption of Intrado Comm's proposed interconnection arrangements.[12] The same holds true here. Verizon's attempt to have the Department ignore these important public interest findings and unnecessarily restrict its authority should be rejected.[13]

Intrado Comm's interconnection proposals are supported by law, public policy, and industry-accepted practices. And Verizon has not shown otherwise. While Verizon claims that Intrado Comm's interconnection proposals are for Intrado Comm's benefit,[14] Verizon is wrong. Intrado Comm's proposals are specifically designed to benefit Massachusetts public safety agencies and are consistent with the network arrangements Verizon has deemed to be the most reliable and suitable for 911 traffic.[15] Thus, Intrado Comm's proposed language and positions should be adopted for inclusion in the Parties' interconnection agreement to ensure that Massachusetts public safety agencies and Massachusetts citizens dialing 911 receive the most reliable, redundant, and diverse 911 network possible.

ARGUMENT

In December 2008, Verizon filed its response to Intrado Comm's Petition for Arbitration and had the chance to add as an issue whether Intrado Comm provides a telephone exchange service, but it did not.[16] The law is clear that the respondent, in this case Verizon, has an

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12 *Embarq Arbitration Award* at 15.

13 Verizon Brief at 4-5.

14 Verizon Brief at 8.

15 *See, e.g.*, Transcript at 110-11; *see also* Intrado Comm Brief at 17.

16 47 U.S.C. § 252(b)(3).

opportunity to provide additional information in its response to the petition and "the State commission shall limit its consideration of any petition . . . to the issues set forth in the petition and in the response, if any . . ."[17] Verizon did not because, as explained in its testimony and at the hearing, Verizon has not challenged Intrado Comm's right to a Section 251 agreement as a competitive local exchange carrier ("CLEC").[18] Thus, appropriately, neither Verizon's pre-filed direct testimony nor the Joint Issues Matrix identifying all of the disputed issues presented for arbitration include whether Intrado Comm provides telephone exchange service as an issue presented to the Department for arbitration.[19]

Now, months later, long after this Department has heard all of the evidence, Verizon has attempted to sideswipe Intrado Comm by disputing whether Intrado Comm is entitled to arbitration under Section 251(c). Verizon's obstructive, dilatory tactics provide yet another example of Verizon's unacceptable efforts to use its monopoly position as the predominant provider of 911/E-911 services in its territory to impede Intrado Comm's entry into the market. Verizon's attempt to challenge Intrado Comm's right to a Section 251(c) interconnection agreement should be rejected.[20]

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[17] 47 U.S.C § 252(b)(4)(A).

[18] Verizon Hearing Exhibit 1, Direct Testimony on behalf of Verizon Massachusetts at 7, lines 20-21 (filed Dec. 29, 2008) ("Verizon Panel Testimony") (noting that Intrado Comm "approached Verizon for negotiation of an interconnection agreement as any other CLEC would"); *see also, e.g.*, Verizon Direct Testimony in West Virginia Case No. 08-0298-T-PC at lines 172-74 (filed Sept. 9, 2008), *available at* http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=248548&NotType='WebDocket ("Verizon has agreed to negotiate and arbitrate an interconnection agreement with Intrado on the same basis it does with any CLEC") (Attachment 5).

[19] Intrado Comm Hearing Exhibit 2, Direct Testimony of Robert C. Currier, ENP on behalf of Intrado Communications Inc. at 9, lines 12-17 (filed Dec. 29, 2008) ("Currier"); Transcript at 64-66.

[20] Verizon Brief at 1-3. Verizon is also wrong when it claims that the Florida commission indicated that Intrado Comm "could provide its services through the use of commercial agreements." *See* Verizon Brief at 1. In fact, the Florida commission determined that Intrado Comm could obtain interconnection pursuant to Section 251(a). *See* Verizon Panel Testimony at Exhibit 1 (Intrado Comm/AT&T); Verizon Panel Testimony at Exhibit 2 (Intrado Comm/Embarq).

In addition to the fact that this issue is not before the Department as a matter for arbitration,[21] Verizon is wrong when its says that the Public Utilities Commission of Ohio determined in the *Embarq* and *CBT* arbitration proceedings that Intrado Comm was not entitled to Section 251(c) interconnection.[22] In fact, the Ohio commission has confirmed on at least four prior occasions that Intrado Comm's 911 service is a telephone exchange service and that Intrado Comm is entitled to all rights under Sections 251 and 252.[23] In the *Embarq Arbitration Award*, the Ohio commission rejected Embarq's attempt to re-litigate whether Intrado Comm offers telephone exchange services and specifically stated that "Embarq cannot generically deny Intrado its rights under Sections 251(c) and 252 of the 1996 Act and Ohio law by claiming that Intrado does not offer telephone exchange services."[24] The Ohio commission reaffirmed this conclusion in the *CBT Arbitration Award*[25] and the *CBT Rehearing Award*.[26] And more recently, the Ohio commission analyzed Intrado Comm's service and again concluded that "Intrado's 911 service is telephone exchange service" and therefore "AT&T must provide interconnection to Intrado for all services offered by Intrado under its certification."[27] Verizon's arguments to the contrary should therefore be rejected.[28]

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[21] 47 U.S.C. § 252(b)(4)(A); *see also* Currier at 9, lines 12-17; Transcript at 64-66.

[22] Verizon Brief at 2.

[23] *Certification Order* at Finding 7; *Embarq Arbitration Award* at 13; *CBT Arbitration Award* at 5; *AT&T Arbitration Award* at 15-16.

[24] *Embarq Arbitration Award* at 13; *see also AT&T Arbitration Award* at 15 (noting that the commission "rejected Embarq's attempt to resurrect its arguments" in the *Embarq Arbitration Award*).

[25] *CBT Arbitration Award* at 5.

[26] *CBT Rehearing Award* at 5 (determining that competitive 911 providers are generally entitled to all rights under Sections 251 and 252).

[27] *AT&T Arbitration Award* at 15, 17.

[28] In its Initial Brief, Verizon raised a Proposed Arbitration Decision issued on February 13, 2009 in Intrado Comm's arbitration proceeding with AT&T Illinois. *See* Verizon Brief at 2. The Proposed Arbitration Decision from Illinois is not relevant to this matter for the following reasons. *First*, the Proposed Arbitration Decision is not a

Nor is there any merit to Verizon's claim that the Department cannot analyze Intrado Comm's interconnection requests under Section 251(c) as well as Section 251(a) of the Act.[29] The Department has authority to arbitrate and oversee all Section 251 interconnection agreements, not just those pertaining to Section 251(c).[30] As Intrado Comm demonstrated in its Initial Brief, arbitration of issues outside of 251(b) and 251(c) is appropriate when the Parties have included those issues in the 251 agreement.[31]

I. ISSUE 1: WHERE SHOULD THE POINTS OF INTERCONNECTION BE LOCATED AND WHAT TERMS AND CONDITIONS SHOULD APPLY WITH REGARD TO INTERCONNECTION AND TRANSPORT OF TRAFFIC?

ISSUE 5: HOW SHOULD THE PARTIES ROUTE 911/E-911 CALLS TO EACH OTHER?

Verizon rants and raves that Intrado Comm's arguments concerning the appropriate POI are frivolous, bizarre, and desperate — telltale signs that Verizon prefers to rely on adjectives and distractions rather than the actual substance of its inaccurate position.[32] And while Verizon has little difficultly repeatedly citing one inaccurate decision on this issue by the West Virginia commission, Verizon never grapples with relevant decisions by the FCC or the purpose of the

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final decision and remains subject to review and revision by the full Illinois commission. Intrado Comm filed written exceptions (attached to Intrado Comm's Initial Brief) and reply exceptions to the decision (Attachment 4 hereto). A final decision from the full Illinois commission is expected either March 17 or March 25, 2009. *Second*, unlike Intrado Comm's arbitration proceeding with AT&T in Illinois, the issue of whether Intrado Comm is entitled to Section 251(c) interconnection is not a matter that has been presented to this Department for arbitration in this proceeding.

[29] Verizon Brief at 4.

[30] *AT&T Arbitration Award* at 16 ("Section 252 endows us with arbitration and enforcement authority over all Section 251 agreements"); *Embarq Arbitration Award* at 15 (finding the provisions of Section 252 "encompass all Section 251 interconnection agreements, and not just those pertaining to Section 251(c) of the Act"); *CBT Rehearing Award* at 11-12 ("The Commission agrees with Intrado that a state commission can use its Section 252 arbitration and enforcement authority over all Section 251 agreements."); *see also* Intrado Comm Brief at 12, n.50 (discussing other court and state commission decisions upholding state commission authority over all 251 agreements).

[31] Intrado Comm Brief at 12-13.

[32] Verizon Brief at 15-16.

Act — a crucial inquiry that must be performed when interpreting relevant statutory provisions.[33] Nor has Verizon presented any reasons why the Department should reject the Ohio commission's decisions in the *Embarq*, *CBT*, and *AT&T* arbitration proceedings. Consistent with those precedents, the POI should be located at the selective router of the 911/E-911 network provider.[34] As the Ohio commission recently determined in the *AT&T Arbitration Award*, Verizon "should deliver its end users' 911 calls destined for PSAP customers of Intrado to Intrado's selective router serving that PSAP" and "Intrado should deliver its end users' 911 calls destined for PSAP customers of [Verizon] to [Verizon's] selective router serving that PSAP"[35] with "each party bear[ing] the cost of getting to the point of interconnection."[36]

The FCC's ruling that the "cost-allocation point" for 911 traffic should be at the selective router further undermines Verizon's position.[37] Verizon's characterization of the FCC's *King County Order* as "an alleged FCC determination" is inaccurate.[38] The *King County Order* specifically addressed the placement of the POI for the exchange of 911 traffic.[39] As Verizon

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33 *Champigny* v. *Commonwealth*, 422 Mass. 249, 251 (Mass. 1996) ("We construe a statute in accord with the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated. When a literal reading of a statute would be inconsistent with legislative intent, we look beyond the words of the statute. The object of all statutory construction is to ascertain the true intent of the legislature from the words used. If a liberal, even if not literally exact, interpretation of certain words is necessary to accomplish the purpose indicated by the words as a whole, such interpretation is to be adopted rather than one which will defeat that purpose.") (citations and quotation marks omitted).

34 *See, e.g.*, *Embarq Arbitration Award* at 33.

35 *AT&T Arbitration Award* at 32.

36 *Embarq Arbitration Award* at 33.

37 *King County Order* ¶ 1; *see also* Intrado Comm Brief at 17-18.

38 Verizon Brief at 21.

39 *Cf.* Verizon Brief at 21.

itself admits, the location of the POI directly affects each Party's costs and therefore establishes the "cost-allocation point" in the network as that term was used in the *King County Order*.[40]

In addition, the Department should reject Verizon's suggestion that the POI and dedicated trunking arrangements Verizon has established within its own network for 911/E-911 traffic are not relevant or different.[41] 911 traffic has traditionally been treated differently than plain old telephone service ("POTS") traffic.[42] Indeed, Verizon's template interconnection agreement compels competitors to interconnect at every Verizon selective router to deliver 911 calls to Verizon's PSAP customers if they want their customers' 911 calls to be completed to Verizon served PSAPs.[43] Further, Verizon's template interconnection agreement requires competitors to interconnect to those selective routers using dedicated direct trunking.[44] Verizon admitted that competitors have routinely accepted the network interconnection arrangements contained in Verizon's template agreement for 911 traffic.[45] The record therefore reflects that Verizon itself has treated 911 traffic differently than POTS traffic for reliability and redundancy purposes.[46]

Many of the Intrado Comm proposed interconnection arrangements Verizon criticizes are arrangements also found in Verizon's 911 interconnection language. For example, Verizon claims that Intrado Comm is forcing Verizon to bear the costs of transporting 911 calls to Intrado

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40 Verizon Brief at 11 ("The location of the POI is a significant issue in part because the POI is the demarcation of financial responsibility; each carrier is financially responsible for the facilities to deliver its traffic to the POI.").

41 Verizon Brief at 10 ("[t]here are no special rules for interconnection of 911 traffic").

42 Intrado Comm Brief at 4-5.

43 Intrado Comm Brief at 19; *see also* Hicks at Attachment 5, 911 Attachment § 3.2.

44 Hicks at Attachment 5, 911 Attachment § 4.

45 Intrado Comm Brief at 22; *see also* Transcript at 99-102.

46 Intrado Comm Brief at 38-40.

Comm's network when Intrado Comm is serving the PSAP to which the call is directed.[47] Yet Verizon admits that competitors are not compensated when Verizon requires those carriers to transport their end users' 911 calls to the appropriate Verizon selective router.[48] Once a public safety agency designates a competitive carrier like Intrado Comm as its 911/E-911 service provider, Verizon should be put in the position of any other carrier with obligations to deliver its end users' 911 traffic over dedicated direct trunks to the appropriate selective router serving the PSAP to which the 911 call is directed.[49]

Verizon also complains that Intrado Comm's language would require Verizon to interconnect to Intrado Comm's network at unspecified locations.[50] But Intrado Comm has informed Verizon, and it is a matter of record evidence in numerous states, that Intrado Comm intends to place a minimum of two selective routers in each state in which it offers 911/E-911 service, including Massachusetts.[51] Moreover, the agreed-upon provisions of the Parties' interconnection agreement make clear that the agreement applies to the Commonwealth of Massachusetts, not other states.[52] Notably, Verizon's own interconnection agreement language does not specify the locations of the POIs Verizon seeks to have Intrado Comm establish; instead, the language merely states that Intrado Comm must interconnect "on Verizon's network"[53] — yet further evidence of Verizon's efforts to exploit its monopoly position to

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47 *See, e.g.*, Verizon Brief at 5.

48 Intrado Comm Brief at 18-19, 40; *see also* Transcript at 90, lines 1-15.

49 *Embarq Arbitration Award* at 8.

50 Verizon Brief at 29.

51 Intrado Comm Brief at 23.

52 Blackline ICA § 43.1.

53 *See, e.g.*, Blackline ICA § 1.3.1.

impose restrictions on Intrado Comm's entry into the telecommunications market that Verizon would never impose on itself.

Verizon does not deny that its proposals would undermine Intrado Comm's right to interconnection that is equal in quality; rather, it claims that the equal-in-quality requirements do not apply to Intrado Comm's proposals.[54] Verizon is wrong. The equal-in-quality requirements pertain to the design of interconnection facilities and arrangements as compared to those same facilities and arrangements in the incumbent's network.[55] Importantly, this obligation is not limited to considering the service quality as perceived by end users, but also includes service quality as perceived by Intrado Comm as the requesting carrier.[56] ***Where*** the POI is located and ***how*** traffic gets to that POI clearly implicate interconnection design as perceived by Intrado Comm.

But that is not all the equal-in-quality requirement is intended to address. In implementing rules for the 1996 amendments to the Act, the FCC noted that imposing disparate conditions between carriers on the pricing and ordering of services would violate the equal-in-quality requirement.[57] Such a condition has nothing to do with the limits Verizon attempts to impose on the requirement, *i.e.*, the design of interconnection facilities or technical standards.[58] Indeed, the FCC has recognized that the equal-in-quality requirement of the Act entitles competitors to receive interconnection for 911/E-911 services in the same manner that

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54 Verizon Brief at 13-18.

55 *Local Competition Order* ¶ 224.

56 47 C.F.R. § 51.305(a)(3).

57 *Local Competition Order* ¶ 224.

58 Verizon Brief at 15.

incumbents provide such service to themselves (*i.e.*, parity).[59] Moreover, the FCC specifically determined that Section 251(c)(2) requires incumbent local exchange carriers ("ILECs") like Verizon to provide competitors like Intrado Comm interconnection that is at least equal in quality to the interconnection Verizon provides itself for routing 911 and E-911 calls to PSAPs.[60]

Interconnection must be provided to a competitor "in a manner no less efficient than the way in which the [incumbent] provides the comparable function to its own retail operations."[61] Section 251(c)(2) of the Act was intended to prevent an incumbent from discriminating between itself and a requesting competitor with respect to the quality of the interconnection provided.[62] Verizon's attempt to shirk its responsibilities under the Act should therefore be rejected.[63]

Finally, Verizon's unsupported and unsubstantiated claims regarding the potential cost to implement Intrado Comm's interconnection proposals should also be rejected.[64] While Verizon claims that Intrado Comm should be responsible for any "expensive" form of interconnection it requests,[65] Verizon has provided no evidence supporting its allegation that implementing Intrado Comm's proposals would impose costs on Verizon. The sole consideration is whether Intrado Comm's interconnection proposals are technically feasible. Under the FCC's rules, the

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59 *Local Competition Order* ¶ 16.

60 *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, et al.*, 17 FCC Rcd 27039, ¶ 652 (2002) ("*Virginia Arbitration Order*").

61 *Local Competition Order* ¶ 218.

62 *Iowa Util. Bd.* v. *FCC*, 219 F.3d 744, 757 (8th Cir. 2000) (Attachment 1).

63 Verizon's claim that Congress "already decided" that there is no conflict between interconnecting on the ILEC network and the equal in quality requirement should likewise be rejected. *See* Verizon Brief at 15. First and foremost, Verizon provides no citation or support for its proposition. Second, there is no evidence that Congress considered 911 interconnection arrangements or the existing ILEC arrangements for such services when developing Section 251(c). And third, it is well-established that the Act is not a "model of clarity." *See AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999).

64 Verizon Brief at 30.

65 Verizon Brief at 33.

determination of technical feasibility does not include consideration of economic concerns.[66] Once Intrado Comm has demonstrated that its proposal is technically feasible, the burden shifts to Verizon to demonstrate, by clear and convincing evidence, that the proposal is not technically feasible or that "specific and significant adverse impacts" would result from Intrado Comm's requested interconnection arrangement.[67] Verizon has not met that burden here and thus its unsubstantiated claims should be rejected.

II. ISSUE 2: WHETHER THE PARTIES SHOULD IMPLEMENT INTER-SELECTIVE ROUTER TRUNKING AND WHAT TERMS AND CONDITIONS SHOULD GOVERN THE EXCHANGE OF 911/E-911 CALLS BETWEEN THE PARTIES?

Intrado Comm's Initial Brief addressed the majority of Verizon's arguments with respect to inter-selective router trunking,[68] so Intrado Comm responds only to those new issues that Verizon has raised in its Initial Brief. All of Verizon's arguments should be rejected.

First, as Intrado Comm explained in its Initial Brief, the FCC has recognized that 911/E-911 services are important to overall public safety and has therefore found that more detailed interconnection language is better suited for 911/E-911 interconnection arrangements.[69] Indeed, the FCC determined that "the need for greater detail" in relation to 911/E-911 services overrides Verizon's goal of "more uniform agreements."[70] The Public Utilities Commission of Ohio has ruled similarly, twice concurring with Intrado Comm that interconnection agreements "should contain the framework for interconnection and interoperability of the parties' 911 networks

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66 47 C.F.R. § 51.5 (defining technical feasibility).

67 *Local Competition Order* ¶¶ 198, 203.

68 Intrado Comm Brief at 30-33.

69 Intrado Comm Brief at 31.

70 *Virginia Arbitration Order* ¶ 660.

through inter-selective routing . . . to ensure inter-selective router capabilities can be provisioned once requested by an Ohio county or PSAP."[71]

Second, Verizon is wrong when it says that call transfer capability does not "even involve interconnection with the public switched telephone network [("PSTN")]."[72] The 911 network is interconnected to the PSTN, as the FCC has recognized,[73] and a wireless or wireline 911 call originates on the PSTN. Moreover, whether a call originates on the PSTN does not dictate whether a service is a telephone exchange service for the purposes of Section 251(c)(2). The FCC has explicitly stated that it "has never suggested that the telephone exchange service definition is limited to voice communications provided over the public circuit-switched network."[74] Rather, the FCC found that telephone exchange service includes "the provision of alternative local loops for telecommunications services, *separate from the public switched telephone network*, in a manner 'comparable' to the provision of local loops by a traditional local telephone exchange carrier."[75]

Finally, Verizon wrongly assumes that it would pay for any inter-selective router capabilities requested by the Parties' PSAP or government municipality customers.[76] A government municipality or PSAP requesting call transfer capabilities must pay for that service just like any other service the customer requests. Verizon would still be compensated for

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71 *AT&T Arbitration Award* at 38; *Embarq Arbitration Award* at 36.

72 Verizon Brief at 25.

73 47 C.F.R. § 9.3 (defining wireline E-911 network); *see also E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, ¶ 15 (2005) ("*VoIP E911 Order*").

74 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, ¶ 20 (1999) ("*Advanced Services Order*").

75 *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, ¶ 54 (1998) (emphasis added) (Attachment 2).

76 Verizon Brief at 25.

implementing PSAP-to-PSAP call transfers when it provides such functionality if Intrado Comm's proposed terms and conditions for inter-selective router trunking are included in the interconnection agreement.[77] Thus, no facts or laws support Verizon's claim that Intrado Comm's proposed language would require Verizon to pay to implement inter-selective router capabilities.

III. ISSUE 3: WHETHER THE FORECASTING PROVISIONS SHOULD BE RECIPROCAL?

Verizon incorrectly assumes that reciprocal forecasting language is unnecessary because no 911 calls will flow from Intrado Comm to Verizon.[78] As discussed in Intrado Comm's Initial Brief, numerous 911 calls will likely flow between the Parties' networks due to the popularity of mobile technologies and other types of calls that will need to be exchanged between the Parties' PSAP customers.[79] Thus, the inclusion of reciprocal forecasting language in the Parties' interconnection agreement will become even more important in the future. Accordingly, Intrado Comm's proposed language should be adopted.

IV. ISSUE 7: WHETHER THE AGREEMENT SHOULD CONTAIN PROVISIONS WITH REGARD TO THE PARTIES MAINTAINING ALI STEERING TABLES, AND, IF SO, WHAT THOSE PROVISIONS SHOULD BE

Automatic location information ("ALI") is not an information service when provided in conjunction with a complete 911/E-911 service.[80] Three integrated components are necessary to provide 911/E-911 service — the selective router, the database system that retains the ALI, and the transport of the 911 call to the PSAP. Under FCC precedent, *stand-alone* ALI may be

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77 *AT&T Arbitration Award* at 38.

78 Verizon Brief at 27.

79 Intrado Comm Brief at 36.

80 *Cf.* Verizon Brief at 43.

viewed as an information service.[81] But Intrado Comm's request for ALI steering capabilities has nothing to do with stand-alone ALI functions. ALI steering is needed to ensure interoperability between the Parties' 911 networks as contemplated by Section 251(c).[82] The switching and transmission components would be useless without the ALI functions, and 911 call routing to the appropriate PSAP could not occur without the processing necessary for the creation of ALI records. The FCC also has recognized that all of the various components combine to form an all-inclusive service offering known as the "wireline E-911 network."[83] The transfer of ALI information between the Parties is an integral component of the 911/E-911 service each Party provides to its PSAP customers and is therefore appropriate to include in the Parties' interconnection agreement.

Further, the existing commercial agreement between Intrado Comm's affiliate and Verizon does not address the arrangements Intrado Comm seeks here.[84] That commercial agreement does not govern the exchange of 911/E-911 service calls pursuant to a Section 251 interconnection agreement between carriers, the issue under review here. Interoperability between the Parties' networks, including the exchange of ALI, is a key component of ensuring that Massachusetts PSAPs have adequate call-transfer capabilities and that Massachusetts

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81 *Bell Operating Companies Petition for Forbearance from the Application of Section 272 of the Communications Act of 1934, as Amended, to Certain Activities*, 13 FCC Rcd 2627, ¶ 17 (1998) ("*Forbearance Order*"). But in a carrier-to-carrier relationship pursuant to Section 251, ALI databases are considered to be telecommunications services that ILECs are required to offer on an unbundled basis. *See* 47 U.S.C. § 251(c); 47 C.F.R. § 51.319(f); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 557 (2003) ("*Triennial Review Order*"), *aff'd in part, remanded in part, vacated in part, U.S. Telecom Ass'n* v. *FCC*, 359 F.3d 554, 587 (D.C. Cir. 2004) (subsequent history omitted).

82 47 U.S.C. § 251(c)(5).

83 *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).

84 Verizon Brief at 43-44.

consumers' 911 calls reach the appropriate PSAP.[85] Accordingly, Intrado Comm's proposed language should be adopted.

V. ISSUE 10: WHAT SHOULD VERIZON CHARGE INTRADO COMM FOR 911/E-911 RELATED SERVICES AND WHAT SHOULD INTRADO COMM CHARGE VERIZON FOR 911/E-911 RELATED SERVICES?

ISSUE 11: WHETHER ALL "APPLICABLE" TARIFF PROVISIONS SHALL BE INCORPORATED INTO THE AGREEMENT; WHETHER TARIFFED RATES SHALL APPLY WITHOUT A REFERENCE TO THE SPECIFIC TARIFF; WHETHER TARIFFED RATES MAY AUTOMATICALLY SUPERSEDE THE RATES CONTAINED IN PRICING ATTACHMENT, APPENDIX A WITHOUT A REFERENCE TO THE SPECIFIC TARIFF; AND WHETHER THE VERIZON PROPOSED LANGUAGE IN PRICING ATTACHMENT SECTION 1.5 WITH REGARD TO "TBD" RATES SHOULD BE INCLUDED IN THE AGREEMENT

ISSUE 12: WHETHER VERIZON MAY REQUIRE INTRADO COMM TO CHARGE THE SAME RATES AS, OR LOWER RATES THAN, THE VERIZON RATES FOR THE SAME SERVICES, FACILITIES, AND ARRANGEMENTS

In Verizon's discussion of Issue 1 (the POI issue), Verizon asserts that Intrado Comm would require Verizon to interconnect "anywhere on [Intrado Comm's] network that [Intrado Comm] wishes, within or outside Massachusetts."[86] Verizon's unfounded concern stems from the fact that the interconnection agreement does not specify exactly where Intrado Comm will place its selective routers. While the agreement does say that it applies only in Massachusetts (which entirely undermines Verizon's concern), and while Intrado Comm has repeatedly confirmed that it will put at least two selective routers in Massachusetts, even this level of specificity does not satisfy Verizon. Yet when it later comes time for Verizon to reveal what it will charge Intrado Comm for any services that Verizon may provide, Verizon refuses to provide any details at all. The hypocrisy is glaring: Verizon refuses to provide any semblance of certainty with respect to pricing, but then insists that Intrado Comm's far more detailed

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85 Intrado Comm Brief at 48-50.

86 Verizon Brief at 9.

representations and proposed language concerning the location of its selective routers are unacceptable — yet another example of Verizon's efforts to exploit its monopoly position to obstruct Intrado Comm's entry into the telecommunications market.

Verizon has presented no reason for this Department to reject the Ohio commission's rulings in the *Embarq*, *CBT*, and *AT&T* arbitration proceedings that Intrado Comm's proposed interconnection rates should be included in the interconnection agreements to govern those instances when Verizon will be interconnecting to Intrado Comm's network.[87] Indeed, Verizon fails to mention the fact that the Ohio commission made clear that Intrado Comm's proposed rates are "reasonable"[88] and that "when Intrado is the designated 911/E911 service provider, the interconnection agreement should contain rates, such as port charges, for [Verizon]'s interconnection to Intrado's network."[89] Nor does Verizon acknowledge the FCC's conclusion that Section 252 authorizes state commissions to determine whether the rates to be charged by the ILEC are just and reasonable, but provides no authority for a state commission to adjudicate a competitor's rates during a Section 252 proceeding.[90]

Further, there is no requirement that Intrado Comm benchmark its rates based on Verizon's rates.[91] As Intrado Comm explained in its Initial Brief, the Wireline Competition Bureau of the FCC and numerous other state commissions have confirmed that Intrado Comm is under no obligation to mirror Verizon's interconnection rates.[92] The benchmark requirements

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87 *Embarq Arbitration Award* at 8; *CBT Arbitration Award* at 21; *AT&T Arbitration Award* at 17, 21.

88 *CBT Arbitration Award* at 21.

89 *AT&T Arbitration Award* at 17.

90 *Virginia Arbitration Order* ¶ 588.

91 *Cf.* Verizon Brief at 53.

92 *Virginia Arbitration Order* ¶¶ 581-89; *see also* Intrado Comm Brief at 59-60.

cited by Verizon apply only to the rates for intercarrier compensation, not rates for interconnection.[93]

As Intrado Comm has explained, Section 252(d) sets forth the pricing standards for three categories of charges: (1) interconnection and network element charges; (2) transport and termination charges; and (3) wholesale telecommunications services charges.[94] Tariffs are not the appropriate mechanism for determining what Verizon may charge Intrado Comm under the Parties' interconnection agreement for interconnection arrangements concerning any of these categories.[95] Rather, an ILEC's rates for interconnection and unbundled network elements must meet the standards set forth in Section 252(d)(1) of the Act. The Ohio commission has agreed, confirming that Intrado Comm is entitled to Section 252(d) pricing for interconnection and network element charges, transport and termination charges, and wholesale charges.[96]

Instead of addressing the merits of Intrado Comm's position, Verizon sets up a straw man by claiming that Intrado Comm "suggests that everything Intrado may possibly order from Verizon must be priced at TELRIC [(total element long-run incremental cost)] . . . ."[97] Intrado Comm has said no such thing. The record evidence in this proceeding demonstrates that Intrado Comm recognizes there may be non-252(d)(1) services that Intrado Comm will purchase from Verizon and that such services will not be priced pursuant to ("TELRIC"), as required by Section 252.[98] Those services and the related pricing must also be identified with specificity in the

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93 *AT&T Arbitration Award* at 21; *see also* Intrado Comm Brief at 59.

94 47 U.S.C. § 252(d); *see also* Intrado Brief at 54.

95 *Southwestern Bell Tel., L.P.* v. *Missouri Pub. Serv. Comm'n*, 530 F.3d 676, 684 (8th Cir. 2008).

96 *AT&T Arbitration Award* at 20-21; *see also* 47 U.S.C. § 252(d).

97 Verizon Brief at 48.

98 Intrado Comm Brief at 58; *see also AT&T Arbitration Award* at 21.

interconnection agreement if they are to be applied to any services under the agreement. Intrado Comm understands that it may be efficient for Verizon to refer to the Parties' tariffs for specific services rather than repeat those terms and conditions in the interconnection agreement. But Intrado Comm seeks certainty in the Parties' interconnection relationship and cannot agree to unspecified terms and conditions that Verizon may later determine are "applicable" to the services being offered in the interconnection agreement.[99] Intrado Comm is not trying to circumvent Verizon's tariffs, as Verizon claims.[100] If Verizon seeks to have a specific tariff apply to the interconnection agreement for a non-252(d)(1) service, it should identify that tariff in the agreement rather than a generic reference to "applicable" tariffed rates, as Verizon proposes.

VI. IN MANY INSTANCES, VERIZON'S BRIEF PROVIDES LITTLE, IF ANY, LEGAL OR FACTUAL SUPPORT FOR ITS PROPOSED LANGUAGE (ARBITRATION ISSUES 4, 6, 8, 9, 13, 14, 15, AND 16)

For a significant majority of the outstanding issues between the Parties, Verizon's Initial Brief provides nothing new beyond its pre-filed testimony. As Intrado Comm explained in its Initial Brief, Intrado Comm's proposed language for each of these issues is reasonable and consistent with law and established industry practices.[101] Verizon has provided no evidentiary or legal support to the contrary. Thus, Intrado Comm's proposed language for these issues should be adopted.

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[99] Intrado Comm Brief at 57.

[100] Verizon Brief at 49.

[101] Intrado Comm Brief at 37 (addressing Issue 4), 47 (addressing Issue 6), 50-52 (addressing Issue 8), 52-53 (addressing Issue 9), 60-61 (addressing Issue 13), 62-63 (addressing Issue 14), 63-65 (addressing Issue 15), 65-66 (addressing Issue 16).

CONCLUSION

For the foregoing reasons and those contained in Intrado Comm's Initial Brief, Intrado Comm respectfully requests that the Department adopt Intrado Comm's positions and proposed contract language as set forth herein and in the Joint Issues Matrix.

Respectfully submitted,

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Dated: March 12, 2009

Its Attorneys

LIST OF ATTACHMENTS

Attachment Number	Description
Federal Court Decisions	
1	*Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000)
Federal Communications Commission Decisions	
2	*Federal-State Joint Board on Universal Service,* 13 FCC Rcd 11501 (1998)
State Commission Decisions and Filings	
3	Ohio 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 dba AT&T Ohio,* Arbitration Award (March 4, 2009)
4	Illinois Docket No. 08-0545, *In the Matter of the Petition of Intrado Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended, to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a AT&T Illinois,* Intrado Inc. Reply Brief on Exceptions (filed March 2, 2009)
5	Verizon Direct Testimony in West Virginia Case No. 08-0298-T-PC at lines 172-74 (filed Sept. 9, 2008)

CERTIFICATE OF SERVICE

The undersigned hereby acknowledges that a copy of INTRADO COMMUNICATIONS, INC.'S REPLY BRIEF was filed with the Secretary of the Massachusetts Department of Cable and Telecommunications via electronic filing and Federal Express and that a copy was served on the following individuals via electronic mail Federal Express on this 12th day of March, 2009:

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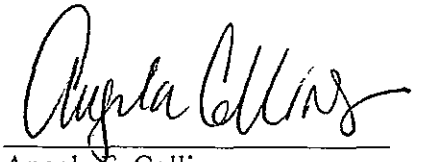

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Attachment 1

LEXSEE 219 F3D 744

Iowa Utilities Board, et al., Petitioners, v. Federal Communications Commission and United States of America, Respondents.

No. 96-3321 (and consolidated cases)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

219 F.3d 744*; *2000 U.S. App. LEXIS 17234*; *21 Comm. Reg. (P & F) 180

September 17, 1999, Submitted
July 18, 2000, Filed

SUBSEQUENT HISTORY: **[**1]** Certiorari Granted January 22, 2001, Reported at: *2001 U.S. LEXIS 951*. Certiorari Granted January 22, 2001, Reported at: *2001 U.S. LEXIS 950*. Certiorari Granted January 22, 2001, Reported at: *2001 U.S. LEXIS 949*. Certiorari Granted January 22, 2001, Reported at: *2001 U.S. LEXIS 948*. Certiorari Granted January 22, 2001, Reported at: *2001 U.S. LEXIS 947*.
Writ of certiorari granted, in part *Verizon Communs., Inc. v. FCC, 531 U.S. 1124, 121 S. Ct. 877, 148 L. Ed. 2d 788, 2001 U.S. LEXIS 947 (2001)*
Writ of certiorari granted, in part *WorldCom, Inc. v. Verizon Communs., Inc., 531 U.S. 1124, 121 S. Ct. 877, 148 L. Ed. 2d 788, 2001 U.S. LEXIS 948 (2001)*
Writ of certiorari granted, in part *FCC v. Iowa Utils. Bd., 531 U.S. 1124, 121 S. Ct. 878, 148 L. Ed. 2d 788, 2001 U.S. LEXIS 949 (2001)*
Writ of certiorari granted, in part *AT&T Corp. v. Iowa Utils. Bd., 531 U.S. 1124, 121 S. Ct. 878, 148 L. Ed. 2d 788, 2001 U.S. LEXIS 950 (2001)*
Writ of certiorari granted, in part *General Communs., Inc. v. Iowa Utils. Bd., 531 U.S. 1124, 121 S. Ct. 879, 148 L. Ed. 2d 788, 2001 U.S. LEXIS 951 (2001)*
Affirmed in part and reversed in part by, Remanded by *Verizon Communs., Inc. v. FCC, 535 U.S. 467, 122 S. Ct. 1646, 152 L. Ed. 2d 701, 2002 U.S. LEXIS 3559 (2002)*
Vacated by, in part, Petition denied by *Iowa Utils. Bd. v. FCC, 301 F.3d 957, 2002 U.S. App. LEXIS 22146 (8th Cir., 2002)*
Motion granted by *AT&T Corp. v. Iowa Utils. Bd., 537 U.S. 807, 123 S. Ct. 56, 154 L. Ed. 2d 9, 2002 U.S. LEXIS 5437 (2002)*
Motion granted by *Gen. Communs., Inc. v. Iowa Utils. Bd., 537 U.S. 807, 123 S. Ct. 56, 154 L. Ed. 2d 9, 2002 U.S. LEXIS 5438 (2002)*
Motion granted by *FCC v. Iowa Utils. Bd., 537 U.S. 807, 123 S. Ct. 56, 154 L. Ed. 2d 9, 2002 U.S. LEXIS 5436 (2002)*

PRIOR HISTORY: On Petitions for Review of an Order of the Federal Communications Commission. 96-98. 95-185. 93-252. 95-185;96-98/325/333. 95-185; 96-98;96-325. 96-394. 96-185. 96-333. 92-237.

In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 1996 FCC LEXIS 4312.
AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 834, 1999 U.S. LEXIS 903 (1999)

DISPOSITION: Granted pending petitions for review in part. Vacated in total, *47 C.F.R. §§ 51.505(b)(1), 51.609, 51.513, 51.611, 51.707, 51.317, 51.405(a), (c),* and *(d),* and *51.303*. Remained firm in our previous decision to vacate *47 C.F.R. §§ 51.305(a)(4)* and *51.311(c)* (the superior quality rules) and *47 C.F.R. § 51.315(c)-(f)* (the additional combinations rule). Denied petitions for review in all other respects.

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JUDGES: Before WOLLMAN, Chief Judge, BOWMAN and HANSEN, Circuit Judges.

OPINION BY: HANSEN

OPINION

[*747] HANSEN, Circuit Judge.

These cases are before us on remand from the Supreme Court. *See AT & T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999)*. Local telephone service providers (known as "incumbent local exchange carriers" or "ILECs") and their industry associations petition for review of the First Report and Order [1] issued by the Federal Communications Commission (FCC) which contains the FCC's findings and rules [2] pertaining to the local competition provisions of the **[*748]** Telecommunications Act of 1996 [3] (the Act). The Act requires an ILEC to (1) permit requesting new **[**2]** entrants (competitors) in the ILEC's local market to interconnect with the ILEC's existing local network and, thereby, use that network to compete in providing local telephone service (interconnection); (2) provide its competitors with access to elements of the ILEC's own network on an unbundled basis (unbundled access); and (3) sell to its competitors, at wholesale rates, any telecommunications service that the ILEC provides to its customers at retail rates in order to allow the competing carriers to resell those services (resale). *See 47 U.S.C. § 251(c)(2)-(4) (1994 ed., Supp. III)*. [4] Through this Act, Congress sought "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat. 56, 56 (1996). Challenges to the First Report and Order were consolidated in this court.

1 *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996)* (First Report and Order).

[3]**

2 The FCC's rules are codified in scattered sections of Title 47, Code of Federal Regulations. All references in this opinion to the Code of Federal Regulations are to the 1997 version.

3 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of Title 47, United States Code).

4 All references in this opinion to sections and subsections of the Telecommunications Act of 1996 in the United States Code are to the 1997 supplement unless otherwise indicated.

I. Background

We present a brief summary of the background of this case based upon the belief that all parties are familiar with the opinion of the Supreme Court as well as our prior opinion. In our prior opinion, *Iowa Utils. Bd. v.*

F.C.C., 120 F.3d 753 (8th Cir. 1997), we concluded, in relevant part, that (1) the FCC exceeded its jurisdiction in promulgating various pricing rules; (2) the FCC exceeded its jurisdiction in promulgating *47 C.F.R. § 51.405*, regarding rural exemptions; (3) the FCC exceeded its jurisdiction in promulgating *47 C.F.R. § 51.303*, regarding **[**4]** preexisting agreements; and (4) various unbundling rules, including the superior quality rules and the combination of network elements rule, were contrary to the Act.

The Supreme Court affirmed in part, reversed in part, and remanded. *See AT & T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999)*. The Supreme Court reversed that part of our opinion pertaining to jurisdiction and held that the FCC had jurisdiction to (1) design a pricing methodology; (2) promulgate rules pertaining to rural exemptions; and (3) promulgate rules regarding preexisting agreements. The Supreme Court also reversed our decision to vacate *47 C.F.R. § 51.315(b)*. The Supreme Court did not address the part of our opinion vacating the superior quality rules, *47 C.F.R. §§ 51.305(a)(4)* and *51.311(c)*, and the additional combination of network elements rule, *47 C.F.R. § 51.315(c)-(f)*.

On remand we must now review on the merits the FCC's forward-looking pricing methodology, proxy prices, and wholesale pricing provisions. The petitioners also request that the court vacate *47 C.F.R. § 51.317*, regarding the identification of additional unbundled network elements, and **[**5]** that the court reaffirm its previous decision vacating the superior-quality rules and the additional combination of network elements rule. We also must review on the merits *47 C.F.R. § 51.405*, regarding rural exemptions, and *47 C.F.R. § 51.303*, pertaining to preexisting agreements.

II. Analysis

The United States Courts of Appeals have exclusive jurisdiction to review final orders of the FCC pursuant to *28 U.S.C. § 2342(1)* and *47 U.S.C. § 402(a) (1994)*. In reviewing an agency's interpretation of a statute, we must defer to the agency only if its interpretation is consistent with the plain meaning of the statute or is a reasonable construction of an ambiguous statute. *See Chevron U.S.A. Inc.* **[*749]** *v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)*. We will overturn an agency interpretation that conflicts with the plain meaning of the statute, *see id.*, is an unreasonable construction of an ambiguous statute, *see id. at 844-45*, or is arbitrary and capricious. *See 5 U.S.C. § 706 (1994)*; *Chevron, 467 U.S. at 844*. **[**6]** In making our decision regarding reasonableness, the issue "is not whether the Commission made the best choice, or even the choice that this Court would have made, but rather 'whether the FCC made a reasonable selection from among the available alternatives. '" *Southwestern Bell Tel. Co. v. F.C. C., 153 F.3d 523, 559-60 (8th Cir. 1998)* (quoting *MCI Telecomms. Corp. v. FCC, 218 U.S. App. D.C. 389, 675 F.2d 408, 413 (D. C. Cir. 1982)*.

A. Pricing Methodology

Congress established pricing standards for the rates that may be charged by ILECs to their new local service competitors for interconnection and for the furnishing of network elements on an unbundled basis. The statute, in relevant part, states:

> (d) Pricing standards
>
> (1) Interconnection and network element charges
>
> Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of *section 251* of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section--
>
> (A) shall be--
>
> (i) based on the cost (determined without reference to a rate-of-return **[**7]** or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and
>
> (ii) nondiscriminatory, and
>
> (B) may include a reasonable profit.

47 U.S.C. § 252(d)(1).

The FCC promulgated various pricing rules to implement the Act. The FCC's pricing provisions that pertain to the pricing of interconnection and network elements utilize a forward-looking economic cost

methodology that is based on the total element long-run incremental cost (TELRIC) of the element. These costs are to be based on an ILEC's existing wire center locations using the most efficient technology available in the industry regardless of the technology actually used by the ILEC and furnished to the competitor. *See* First Report and Order P685. State commissions are to employ TELRIC to determine the price an ILEC may charge its competitors for the right to interconnect with the ILEC and/or to use the ILEC's network elements to compete with the ILEC in providing telephone services.

The petitioners contend the TELRIC method violates the plain language and purpose of the Act and represents arbitrary and capricious decision-making. The petitioners **[**8]** challenge TELRIC on four grounds.

1. Hypothetical Network Standard

In its First Report and Order, the FCC explained that forward-looking methodologies, like TELRIC, consider the costs that a carrier would incur in the future for providing the interconnection or unbundled access to its network elements. *See* First Report and Order P683. These costs either can be based on the most efficient network configuration and technology currently available, or on the ILEC's existing network infrastructures. *See id*. The FCC chose an approach which it says combined the two possibilities. *See id*. P685. Pursuant to *§ 252(d)(1)*, the FCC promulgated *47 C.F.R. § 51.505* entitled "Forward-looking economic cost." It states in part that "the total element long-run incremental cost of an element should be measured based on the use of the most efficient **[*750]** telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers." *47 C.F.R. § 51.505(b)(1)*. The only nonhypothetical factor in the calculation is the use of the actual location of the ILEC's existing wire centers.

The petitioners assert that the hypothetical **[**9]** network standard upon which TELRIC's costs are based is contrary to the Act's plain language. *Section 252(d)(1)(A)(i)* requires the just and reasonable rates for network elements to be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing *the* interconnection or network element." *Id*. (emphasis added). The petitioners contend the language points inescapably to the actual costs the ILEC incurs for furnishing its existing network to the competitor either through interconnection or on an unbundled network element basis. However, the petitioners explain that the costs under the FCC's pricing methodology are those costs that would be incurred by a hypothetical carrier deploying a hypothetical network that is optimally efficient in technology and configuration. The petitioners argue that the FCC's hypothetical network standard does not reflect what they are statutorily required to furnish to their competitors and is, therefore, flatly contrary to the statute.

The respondents counter the petitioners' assertion that TELRIC costs are based on a hypothetical network. The respondents contend TELRIC does reflect the ILECs' costs **[**10]** but on a predictive forward-looking basis that assumes a reasonable level of efficiency. According to the respondents, setting rates based on the use of the most efficient technology available and on the lowest cost network configuration using existing wire center locations is consistent with the statute, promotes competition, and is a reasonable application of forward-looking costs.

The intervenors in support of the FCC (the intervenors) explain that costs should be based on what any firm, including the specific ILEC whose rates are to be set, would incur in providing the network elements today. They suggest these costs should be the replacement cost of the network using the technology available today and that no firm in a competitive market would charge rates based on the cost of reproducing obsolete technology. The intervenors contend that calculating the cost of old technology with current prices defeats the purpose of using a forward-looking methodology.

We agree with the petitioners that basing the allowable charges for the use of an ILEC's existing facilities and equipment (either through interconnection or the leasing of unbundled network elements) on what the costs would **[**11]** be if the ILEC provided the most efficient technology and in the most efficient configuration available today utilizing its existing wire center locations violates the plain meaning of the Act. It is clear from the language of the statute that Congress intended the rates to be "based on the cost ?of *providing the interconnection or network element*," *id*. (emphasis added), not on the cost some imaginary carrier would incur by providing the newest, most efficient, and least cost substitute for the actual item or element which will

be furnished by the existing ILEC pursuant to Congress's mandate for sharing. Congress was dealing with reality, not fantasizing about what might be. The reality is that Congress knew it was requiring the existing ILECs to share their existing facilities and equipment with new competitors as one of its chosen methods to bring competition to local telephone service, and it expressly said that the ILECs' costs of providing *those* facilities and *that* equipment were to be recoverable by just and reasonable rates. Congress did not expect a new competitor to pay rates for a "reconstructed local network," First Report and Order P685, but for the existing **[**12]** local network it would be using in an attempt to compete.

[*751] It is the cost to the ILEC of providing its existing facilities and equipment either through interconnection or by providing the specifically requested existing network elements that the competitor will in fact be obtaining for use that must be the basis for the charges. The new entrant competitor, in effect, piggybacks on the ILEC's existing facilities and equipment. It is the cost to the ILEC of providing that ride on those facilities that the statute permits the ILEC to recoup. This does not defeat the purpose of using a forward-looking methodology as the intervenors assert. Costs can be forward-looking in that they can be calculated to reflect what it will cost the ILEC in the future to furnish to the competitor those portions or capacities of the ILEC's facilities and equipment that the competitor will use including any system or component upgrading that the ILEC chooses to put in place for its own more efficient use. In our view it is the cost to the ILEC of carrying the extra burden of the competitor's traffic that Congress entitled the ILEC to recover, and to that extent, the FCC's use of an incremental cost approach **[**13]** does no violence to the statute. At bottom, however, Congress has made it clear that it is the cost of providing the actual facilities and equipment that will be used by the competitor (and not some state of the art presently available technology ideally configured but neither deployed by the ILEC nor to be used by the competitor) which must be ascertained and determined.

Consequently, we vacate and remand to the FCC rule 51.505(b)(1).

2. Use of a Forward-looking Methodology

The petitioners contend that the FCC's use of its forward-looking TELRIC methodology, which denies the ILECs recovery of their historical costs, is contrary to the express terms of the Act and is unreasonable. The petitioners state that the term "cost" plainly refers to historical cost and that the juxtaposition of "cost" in *§ 252(d)(1)(A)(i)* with "profit" in *§ 252(d)(1)(B)* confirms this. They refer to the discussion of profit in paragraph 699 of the First Report and Order as support for their proposition that if profit must be read in an accounting sense, then so too must cost. In addition, they assert the FCC failed to provide an adequate explanation for its rejection of historical costs and that an agency **[**14]** is not allowed to change ratemaking methodologies without cogently explaining why the change is being made.

The respondents argue the term "cost" is an elastic term that can be construed to mean either historical or forward-looking costs and that the FCC's interpretation of cost as forward-looking is reasonable. They clarify the discussion in the First Report and Order regarding profit. They explain that the FCC found that a normal profit, which TELRIC is designed to yield, represents a "reasonable profit" within the meaning of the statute and that the FCC has not construed profit to mean accounting profit. The respondents also argue the FCC explained in detail its decision to use forward-looking costs and that the decision was reasonable based on the new competitive objectives of the 1996 Act. The intervenors agree with the respondents that the term "cost" imposes no clear limits on the FCC's authority to establish a ratemaking methodology, and according to their argument, it is in these circumstances that an agency is entitled to deference.

We respectfully disagree with the petitioners' contention that cost, as it is used in the statute, means historical cost. The statute simply **[**15]** states that rates "shall be based on the cost ...of providing the interconnection or network element." *47 U.S.C. § 252(d)(1)(A)*. We conclude the term "cost," as it is used in the statute, is ambiguous, and Congress has not spoken directly on the meaning of the word in this context. We agree with the assessment that "the word 'cost' is a chameleon, capable of taking on different meanings, and shades of meaning, depending on the subject **[*752]** matter and the circumstances of each particular usage." *Strickland v. Commissioner, Maine Dept. of Human Servs., 48 F.3d 12, 19 (1st Cir. 1995), cert. denied, 516 U.S. 850, 133 L. Ed. 2d 91, 116 S. Ct. 145 (1995).*

The FCC has the authority to make rules to fill any

gap in the Act left by Congress, provided the agency's construction of the statute is reasonable. *See Chevron, 467 U.S. at 843*. Likewise, "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *AT & T Corp., 525 U.S. at 397* (citation to *Chevron* omitted). Forward-looking costs have been recognized as promoting a competitive environment **[**16]** which is one of the stated purposes of the Act. The Seventh Circuit, for example, explained, "[I] t is current and anticipated cost, rather than historical cost that is relevant to business decisions to enter markets ...historical costs associated with the plant already in place are essentially irrelevant to this decision since those costs are 'sunk' and unavoidable and are unaffected by the new production decision." *MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081, 1116-17 (7th Cir. 1983), cert. denied, 464 U.S. 891, 78 L. Ed. 2d 226, 104 S. Ct. 234 (1983)*. Here, the FCC's use of a forward-looking cost methodology was reasonable. The FCC sought comment on the use of forward-looking costs and concluded that forward-looking costs would best ensure efficient investment decisions and competitive entry. *See* First Report and Order P705. It is apparent that the FCC explained in detail its reason for selecting a forward-looking cost methodology to implement the new competitive goals of the Act, and any past rejection of forward-looking methodologies was made in a monopoly, rather than a competitive, environment. *See* First Report and **[**17]** Order PP 618-711.

Additionally, we are unpersuaded by the petitioners' discussion of the juxtaposition of the word "profit" with "cost" in the statute. The FCC did not interpret profit as accounting [5] profit as the petitioners contend. The First Report and Order discusses only two types of profit: economic [6] and normal [7]. *See* First Report and Order P699. The FCC interpreted the word "profit" in the statute to mean "normal profit." The FCC found that TELRIC provides for a "normal" profit and that level of profit is reasonable within the meaning of the statute. *Section 252(d)(1)(B)* states only that the rates paid for either interconnection or furnishing unbundled access "may include a reasonable profit." The use of the word "may" indicates that the inclusion of a reasonable profit is not mandatory but permitted. Additionally, nothing in the phrase "may include a reasonable profit" suggests "cost" must mean historical costs. A "profit" can be made whether a historical cost or forward-looking cost methodology is used. We reiterate that a forward-looking cost calculation methodology that is based on the incremental costs that an ILEC actually incurs or will incur in providing the **[**18]** interconnection to its network or the unbundled access to its specific **[*753]** network elements requested by a competitor will produce rates that comply with the statutory requirement of *§ 252(d)(1)* that an ILEC recover its "cost" of providing the shared items.

5 Accounting profit equals the difference between total revenue and explicit costs. Explicit costs are those costs incurred when a monetary payment is made. Accounting profit is typically higher than economic profit because accounting profit only subtracts explicit costs rather than the total opportunity costs. *See* ROGER A. ARNOLD, ECONOMICS 484-85 (2d ed. 1992).

6 Economic profit equals the difference between total revenue and total opportunity cost, including both explicit and implicit costs. Implicit costs represent the value of resources used for which no monetary payment is made. *See id*. Economic profit is also referred to as supranormal profit. *See* First Report and Order P699.

7 Normal profit is achieved when a company earns revenue that is equal to its total opportunity costs. This is the level of profit needed for a company to cover all of its opportunity costs. Normal profit is the same as zero economic profit. *See* ARNOLD, *supra* note 5, at 485.

[19]** 3. Effect of Universal Service Subsidies

The petitioners submit that the failure to include the costs imposed by the government mandated subsidies in network element prices would frustrate the Act's objectives by forcing the ILECs to bear a disproportionate share of the universal service burdens. They explain that when an incumbent carrier provides to a competitor the network elements needed to serve a business customer, the costs to the incumbent not only include the costs of operating the particular network elements furnished but also the loss of that customer's contribution to support lower rates for others. The loss of that contribution, the petitioners argue, must be included in the determination of the rates charged the competitor for unbundled access to the ILEC's network elements.

The respondents and intervenors assert that allowing the ILECs to include the costs of universal service subsidies in its rates would violate the Act. They argue *§*

252(d)(1) requires rates to reflect the costs of providing the network elements, not the costs of universal service subsidies. Including those costs, according to the respondents, would violate that section of the Act. The respondents **[**20]** cite two decisions in which we concluded that the costs of universal services subsidies should not be included in the costs of providing the network elements. *See Competitive Telecomms. Ass'n v. F.C. C., 117 F.3d 1068, 1074-75 (8th Cir. 1997)*; *Southwestern Bell Tel. Co., 153 F.3d at 540*.

In accordance with our previous opinions, we maintain our view that the costs of universal service subsidies should not be included in the costs of providing the network elements. *Section 252(d)(1)(A)(1)* requires rates to be cost-based. Universal service charges are not based on the actual costs of providing interconnection or the requested network element. *See Competitive Telecomms., 117 F.3d at 1073*. "Payment of cost-based rates represents full compensation to the incumbent LEC for use of the network elements that carriers purchase." *Southwestern Bell, 153 F.3d at 540* (quoting *In re Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges, 12 FCC Rcd 15982 (1997)* P337). Including the costs of universal service subsidies **[**21]** would allow for double recovery. *See id*.

4. Takings Argument

The petitioners contend the use of the TELRIC method to set rates raises a serious *Fifth Amendment* takings issue that the statute should be construed to avoid. The petitioners challenge the pricing rules as mandating invalid confiscatory rates. The petitioners insist the statute must be read so that an ILEC receives just and reasonable compensation in the constitutional sense for the services it provides to its competitors.

The respondents argue that the claim that the use of TELRIC will constitute a taking is not ripe for judicial consideration because, at this point, it is unknown whether the rates established under TELRIC will constitute just and reasonable compensation. In addition, the intervenors point out that TELRIC compensates the ILECs for the present market value of the property taken which is all that is constitutionally required for just and reasonable compensation.

Because we have vacated *47 C.F.R. § 51.505(b)(1)*, we have some doubt that we need to address the argument that TELRIC also violates the Constitution. Our remand to the FCC of the TELRIC rule should result in a new rule for determining the **[**22]** compensation that the ILECs will receive for the new competitor's use of the ILEC's property--a rule that should **[*754]** accurately determine the actual costs to the ILEC of furnishing its network (either by interconnection or on an unbundled element basis) to its competitors together with a permitted reasonable profit. Whether the new rule will result in rates that do not provide just and reasonable compensation cannot be foretold. However, in the event our view of TELRIC's statutory invalidity turns out to be incorrect, and to avoid as best we can another remand, we proceed further with the petitioners' constitutional assertions.

In our earlier opinion we determined that the ILECs' claims that the FCC's unbundling rules constituted an unconstitutional taking were not ripe for adjudication. *See Iowa Utils. Bd., 120 F.3d at 818*. We did so principally on the basis that the rates for the unbundled access were to be set by the state commissions, that the actual rates were largely yet unknown, and that the Act provided for a mechanism (arbitration before the state commissions and review in federal district court) to determine what the just and reasonable rates would be in individual **[**23]** cases. That ripeness conclusion was not attacked in the Supreme Court. While we recognize that the argument made here (that TELRIC itself, because it is based on a hypothetical network using the most efficient technology available which bears little or no resemblance to the ILEC's property which will be actually made available to competitors, must result in rates that are neither just nor reasonable, and confiscatory in the constitutional sense) is not the same one we addressed in our earlier opinion, we conclude for many of the same reasons we expressed before, *see id.*, that the present takings claim is not ripe for review. [8]

8 We note, with no small amount of interest, that the Supreme Court has granted certiorari to review the Fifth Circuit's decision in *Texas Office of Pub. Util. Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999)*, where the Fifth Circuit noted that the use of a forward-looking cost model to determine universal service subsidies did not result in an unconstitutional taking. *GTE Service Corp. v. FCC, 120 S. Ct. 2214, 147 L. Ed. 2d 247 (U.S. 2000)*.

[24]**

The Constitution protects public utilities from rates which are "so unjust as to be confiscatory." *Duquesne Light Co. v. Barasch, 488 U.S. 299, 307, 102 L. Ed. 2d 646, 109 S. Ct. 609 (1989)*. However, a takings claim cannot be based on the ratemaking methodology, but rather it must be based on the rate itself. "It is not theory but the impact of the rate order which counts." *Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602, 88 L. Ed. 333, 64 S. Ct. 281 (1944)*. Until the actual rates are established, we cannot conclude whether the impact of TELRIC driven rates will constitute a taking. "It is not enough that a party merely speculates that a government action will cause harm." *Alenco Communications, Inc. v. F.C. C., 201 F.3d 608, 624 (5th Cir. 2000)*. We do not need to disregard *Chevron* deference and interpret the statute in accordance with the petitioners' views in order to avoid an unconstitutional taking in this instance. The possibility that a regulatory program may result in a taking does not justify the use of a narrowing construction. *See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 128-29, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985)*. **[**25]** In such circumstances, the adoption of a narrowing construction might frustrate a potentially permissible application of a statute. *See id. at 128*. Because the consequences of the FCC's choice to use TELRIC methodology cannot be known until the resulting rates have been determined and applied, the constitutional claim is not ripe. *See Duquesne, 488 U.S. at 317* (Scalia, White, and O'Connor, JJ., concurring) (noting that the Constitution looks to the consequences produced rather than the technique employed).

B. Wholesale Rates

Section 252(d)(3) of the Act provides that state commissions "shall determine **[*755]** wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." Pursuant to this section, the FCC promulgated *47 C.F.R. § 51.607* which excludes "avoided retail costs" from wholesale rates. "Avoided retail costs" are defined by the FCC as "those costs that reasonably can be avoided when an incumbent LEC provides a telecommunications service for resale **[**26]** at wholesale rates to a requesting carrier." *47 C.F.R. § 51.609(b)*.

The petitioners challenge the FCC's interpretation of the term "avoided retail costs." The petitioners contend *§ 252(d)(3)* plainly requires wholesale rates to reflect the ILECs' retail rates less those costs that an ILEC actually avoids when it loses its retail customers to a reselling competitor. However, under the FCC's definition of "avoided retail costs," the petitioners argue the FCC requires them to exclude all retailing costs rather than only those costs that an ILEC actually avoids. The petitioners state that many costs associated with retailing are fixed and will not begin to decline initially nor will the costs decline proportionately to the number of customers lost to the reseller. The petitioners explain the phrase "will be avoided" in *§ 252(d)(3)* means "actually avoided" because otherwise the wholesale discount given the reseller would be inflated.

The respondents counter that the phrase "will be avoided" is ambiguous and that the FCC reasonably interpreted the language of the statute. The intervenors explain that the ILECs avoid incurring any retailing costs when engaging in wholesale transactions, **[**27]** and even if certain retailing costs are fixed, the ILECs would still incur only those costs that arose in connection with the ILECs' retailing activities. The respondents state that making competitors pay for a portion of the ILECs' retailing costs, even though the new entrant is not the cause of those retail costs, would result in the new entrants subsidizing the ILECs' retail offerings while still having to pay the new entrants' own retailing costs.

We agree with the petitioners that the phrase "will be avoided" refers to those costs that the ILEC will actually avoid incurring in the future, because of its wholesale efforts, not costs that "can be avoided." The verb "will" is defined, in part, as "a word of certainty." BLACK'S LAW DICTIONARY 1598 (6th ed. 1990). Whereas, the verb "can" is "often used interchangeably with 'may, '" *id. at 206*, and may is a word "of speculation and uncertainty." *Id*. at 1598. The language of the statute is clear. Wholesale rates shall exclude "costs that will be avoided by the local exchange carrier." *47 U.S.C. § 252(d)(3)*. The plain meaning of the statute is that costs that are actually avoided, not those that could be **[**28]** or might be avoided, should be excluded from the wholesale rates.

If the Congress had meant the standard to be one of reasonable avoidability, it could have easily said so. We note that Congress's starting point in *§ 252(d)(3)* is the

retail rates the ILEC charges its subscribers for the same service the new competitor (who wants to enter the market by reselling) has requested be furnished to it. From those retail rates, the ILEC's costs that "will be avoided" by furnishing those services to the competitor are to be excluded. The statute recognizes that the ILEC will itself remain a retailer of telephone service with its own continuing costs of providing that retail telephone service. The FCC's rule treats the ILEC as if it were strictly a wholesaler whose sole business is to supply local telephone service in bulk to new purveyors of retail telephone service. Under the statute as it is written, it is only those continuing costs of providing retail telephone service which will be avoided by selling to the competitor the services it requests which are to be excluded. **[*756]** The FCC's rule is contrary to the statute.

Consequently, we vacate and remand rule 51.609.

C. Proxy Prices

The FCC **[**29]** established proxy prices to be used for interconnection and network element charges, wholesale rates, and the rates for termination and transport. The state commissions are to use these proxy prices if they do not use the provided ratemaking method to establish rates. The proxy prices consist of upper limits higher than which the rates set by the state commissions shall not go.

The petitioners argue the proxy prices should be vacated for three reasons. First, the petitioners state that the respondents expressly disavowed the proxy prices before the Supreme Court in order to support the FCC's position that it was not trying to set specific prices, but rather it was merely designing a pricing methodology. Therefore, the FCC, according to the petitioners, is judicially estopped from trying to revive the proxy prices now. Second, the petitioners contend the proxy prices should be vacated because they are based on the unlawful TELRIC method and employ the impermissible definition of "avoided retail costs." Third, the petitioners argue the proxy prices were developed using unreliable cost models and, as a result, are arbitrary and capricious.

The respondents counter that the petitioners' **[**30]** challenge to the proxy prices is not subject to review because the proxy prices are not binding on the states. The respondents contend that states may elect to use the proxy prices, but the states are not required to use them. The respondents insist that this court has jurisdiction to review only final orders of the FCC, and the proxy prices are not final orders because they do not impose an obligation on the states. The intervenors add that substantial deference should be accorded to the FCC because the issue concerns interim relief, citing *Competitive Telecommunications Association v. F.C. C., 117 F.3d 1068, 1073-75 (8th Cir. 1997).*

We agree with the petitioners that the respondents are estopped from trying to now revive the proxy prices. "The doctrine of judicial estoppel prohibits a party from taking inconsistent positions in the same or related litigation." *Hossaini v. Western Missouri Med. Ctr., 140 F.3d 1140, 1142 (8th Cir. 1998)*. Judicial estoppel is invoked "to protect the integrity of the judicial process." *Id. at 1143*. The FCC represented to the Supreme Court that it was not establishing rates and depriving the state **[**31]** commissions of their role in implementing the Act. *See* Reply Br. for Federal Pet'rs at 7, *AT & T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999) 1998 WL 396961*. The FCC emphasized that it was merely providing a methodology for state commissions to use in completing the "critical and complex task of determining the economic costs of an efficient telephone network." *Id*. The FCC dismissed the proxy prices as "designed for a past period in which no cost studies could have been made available to the state commissions. They have no relevance to this case." *Id*. at 7 n.5.

We are not persuaded by the FCC's explanation to this court of its position before the Supreme Court. The respondents explain that the proxy prices were not relevant to the ILECs' claim before the Supreme Court that the pricing rules intruded on the states' role in establishing rates because the proxy prices were optional. The First Report and Order very clearly commands the use of the proxy prices by directing that "a state commission *shall* use [default proxies] ...in the period **[**32]** before it applies the pricing methodology." First Report and Order P619 (emphasis added). Additionally, rule 51.503(b) states that the ILECs' rates for its elements *"shall* be established" using either TELRIC or the proxy prices. *See* **[*757]** *47 C.F.R. § 51.503(b)* (emphasis added). The word "shall" is language of a mandatory nature. *Clark v. Brewer, 776 F.2d 226, 230 (8th Cir. 1985)*. It is clear from the language of the First Report and Order, as well as the rules, that the state commissions are to use the proxy prices until the state commissions have established their own rates using the TELRIC

method. The use of the proxy prices until such time is not optional.

The Supreme Court held that the FCC "has jurisdiction to design a pricing methodology." *AT & T Corp., 525 U.S. at 385*. However, the FCC does not have jurisdiction to set the actual prices for the state commissions to use. Setting specific prices goes beyond the FCC's authority to design a pricing methodology and intrudes on the states' right to set the actual rates pursuant to *§ 252(c)(2)*. Following the Supreme Court's opinion, we now agree with the FCC that its role is to resolve "general **[**33]** methodological issues," and it is the state commission's role to exercise its discretion in establishing rates. Br. for Federal Pet'rs at 26-27, *AT & T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999), 1998 WL 396945*.

The proxy prices are also infirm because they rely on the hypothetical most efficient carrier rationale which we have found to be violative of the Act, *ante* at 5-8, and because they rely on the erroneous definition of "avoided retail costs."

We conclude the proxy prices cannot stand and, for the foregoing reasons, vacate rules 51.513, 51.611, and 51.707.

D. Unbundling Rules

The FCC issued numerous rules to implement the ILECs' duties to provide unbundled access to their network elements under subsection 251(c)(3). Many of these rules were previously challenged. In light of the Supreme Court's opinion, we revisit three of the unbundling rules.

1. Identification of Additional Unbundled Network Elements

The Supreme Court vacated *47 C.F.R. § 51.319* which required the ILECs to provide requesting carriers with unbundled access to a minimum of seven network elements so long as access was "necessary" and **[**34]** failure to provide the access would "impair" the competitors' ability to provide services. The Supreme Court vacated *47 C.F.R. § 51.319* because the FCC's interpretation of the "necessary" and "impair" standard was too broad and unreasonable. *See AT & T Corp., 525 U.S. at 388-92*.

The ILECs request that we now vacate rule 51.317 because it utilizes the same "necessary" and "impair" standard of rule 51.319. The Supreme Court did not specifically address the validity of rule 51.317. This court previously upheld the "necessary" and "impair" standard, but we vacated the portion of rule 51.317 that created the presumption that a network element must be unbundled if it is technically feasible to do so.

The respondents concede that rule 51.317 must be remanded to the FCC as a result of the Supreme Court's opinion. *See* Resp'ts' Br. at 87 n. 42. Therefore, we vacate rule 51.317 without any further discussion.

2. Superior Quality Rules

In our previous opinion, we vacated *47 C.F.R. §§ 51.305(a)(4)* and *51.311(c)*, collectively known as the superior quality rules. These rules require an ILEC to provide, upon request, interconnection and unbundled network elements that are **[**35]** superior in quality to that which the ILEC provides to itself. The Supreme Court did not address these rules.

The petitioners ask us to reaffirm our previous decision vacating the superior quality rules. They contend the Supreme Court's decision did not affect our conclusion that the superior quality rules violated **[*758]** the Act because the FCC did not seek a review of our prior decision vacating these rules.

The respondents argue that the Supreme Court affirmed the FCC's general authority to adopt rules implementing the Act and that under this general authority the superior quality rules are valid. The intervenors agree and explain that because nothing in the Act forecloses the superior quality rules, the rules should be reinstated.

We again conclude the superior quality rules violate the plain language of the Act. We further conclude that nothing in *47 U.S.C. §§ 154(i), 201(b)*, or *303(r)* gives the FCC the power to issue regulations contrary to the plain language of the Act. As we were correctly reminded at oral argument that this court is not a "super FCC," neither is the FCC an alter ego Congress free to change the words of a statute from "at least equal in quality" **[**36]** to "superior in quality" when it exercises its rule-making power. Subsection 251(c)(2)(C) requires the ILECs to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to

itself ...." Nothing in the statute requires the ILECs to provide superior quality interconnection to its competitors. The phrase "at least equal in quality" establishes a minimum level for the quality of interconnection; it does not require anything more. We maintain our view that the superior quality rules cannot stand in light of the plain language of the Act for all the reasons we previously expressed. *See Iowa Utils. Bd., 120 F.3d at 812-13*. We also note that it is self-evident that the Act prevents an ILEC from discriminating between itself and a requesting competitor with respect to the quality of the interconnection provided.

3. Additional Combinations Rule

In our previous opinion, we also vacated *47 C.F.R. § 51.315(c)-(f)*, the additional combinations rule. This rule requires an ILEC to perform the functions necessary to combine unbundled network elements in any technically feasible manner. Although the Supreme Court reversed our decision **[**37]** to vacate *47 C.F.R. § 51.315(b)*, prohibiting the ILECs from separating requested network elements that are already combined, the Supreme Court did not address subsections (c)-(f).

The petitioners request that we reaffirm our prior decision vacating the additional combinations rule. The petitioners state that the Supreme Court's decision to reinstate 51.315(b) does not call into question this court's decision to vacate 51.315(c)-(f). The petitioners explain 51.315(b) is different because it prohibited ILECs from separating previously combined network elements over the objection of the requesting carrier. The additional combinations rule contained in subsections (c)-(f), on the other hand, requires the ILECs to combine their own network elements in new ways or with elements provided by the requesting carriers. They argue the additional combinations rule violates the Act.

In addition to the respondents' argument regarding the general rulemaking authority of the FCC, they assert this court's decision to vacate rules 51.315(c)-(f) was predicated on language rejected by the Supreme Court when it reinstated rule 51.315(b). In reinstating subsection (b), the Supreme Court emphasized the **[**38]** ambiguous nature of *§ 251(c)(3)* regarding the separation of leased network elements. *See AT & T Corp.*, 525 U.S. at 395. Because of this ambiguity, the Supreme Court concluded, subsection (b) is rationally based on the nondiscrimination language in *§ 251(c)(3)*. *See id*. The respondents rely on the same nondiscrimination language to support subsections (c)-(f) because without these subsections, they argue, new entrants would incur higher costs for unbundled network elements than the ILECs incur. The intervenors agree that the policy concerns of ensuring against an anticompetitive practice not only support *47 C.F.R. § 51.315(b)* but also subsections (c)-(f).

[*759] We are not persuaded by the respondents' contention that the Supreme Court's reinstatement of rule 51.315(b) affects our decision to vacate subsections (c)-(f). Nor do we agree with the Ninth Circuit that the Supreme Court's opinion undermined our rationale for invalidating the additional combinations rule. *See U.S. West Communications v. MFS Intelenet, Inc., 193 F.3d 1112, 1121 (9th Cir. 1999), cert. denied, 147 L. Ed. 2d 1005, 2000 U.S. LEXIS 4680, 120 S. Ct. 2741 (U.S. 2000)*. **[**39]** The Ninth Circuit misinterpreted our decision to vacate subsections (c)-(f). We did not, as the Ninth Circuit suggests, employ the same rationale for invalidating subsections (c)-(f) as we did in invalidating subsection (b). *See MCI Telecomms. v. U.S. West, 204 F.3d 1262, 1268 (9th Cir. 2000)* (" The Eighth Circuit invalidated Rules 315(c)-(f) using the same rationale it employed to invalidate Rule 315(b). That is, the Eighth Circuit concluded that requiring combination was inconsistent with the meaning of the Act because the Act calls for 'unbundled' access.") Rather, the issue we addressed in subsections (c)-(f) was *who* shall be required to do the combining, not whether the Act prohibited the combination of network elements. *See Iowa Utils. Bd., 120 F.3d at 813*.

Rule 51.315(b) prohibits the ILECs from separating previously combined network elements before leasing the elements to competitors. The Supreme Court held that 51.315(b) is rational because "*[section] 251(c)(3)* of the Act is ambiguous on whether leased network elements may or must be separated." *AT & T Corp., 525 U.S. at 395*. Therefore, under the second prong of **[**40]** *Chevron*, the Supreme Court concluded 51.315(b) was a reasonable interpretation of an ambiguous statute.

Unlike 51.315(b), subsections (c)-(f) pertain to the combination of network elements. *Section 251(c)(3)* specifically addresses the combination of network elements. It states, in part, "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunication

service." Here, Congress has directly spoken on the issue of who shall combine previously uncombined network elements. It is the requesting carriers who shall "combine such elements." It is not the duty of the ILECs to "perform the functions necessary to combine unbundled network elements in any manner" as required by the FCC's rule. *See 47 C.F.R. § 51.315(c)*. We reiterate what we said in our prior opinion: "The Act does not require the incumbent LECs to do *all* the work." *Iowa Utils. Bd., 120 F.3d at 813*. Under the first prong of *Chevron*, subsections (c)-(f) violate the plain language of the statute. We are convinced that rules 51.315(c)-(f) must remain vacated.

E. Rural Exemptions

[41]** Congress enacted *§ 251(f)* to relieve the small and rural ILECs from some of the obligations imposed by other subsections of *§ 251*. The FCC promulgated *47 C.F.R. § 51.405* to establish standards that the state commissions must follow in determining whether the small and rural ILECs are entitled to the exemption, suspensions, or modifications set forth in *§ 251(f)*.

The petitioners contend rule 51.405 cannot be reconciled with the language of the statute. They challenge the rule on three grounds. First, they argue the rule eliminates two of the three prerequisites that must be satisfied before a state commission may terminate an exemption. Second, they disagree with the limitation the rule places on the statutory phrase "unduly economically burdensome." Third, they suggest that the rule impermissibly shifts the burden of proof in exemption proceedings.

1. Prerequisites for Terminating an Exemption

Section 251(f)(1)(A) explains that a state commission may terminate an exemption **[*760]** for a rural telephone company if a request for interconnection, services, or network elements "is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title **[**42]** (other than subsections (b)(7) and (c)(1)(D) thereof)." The FCC promulgated *47 C.F.R. § 51.405* pursuant to *§ 251(f)*. The rule requires the ILECs to offer evidence that the application of the requirements under *§ 251(c)* "would be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry" in order to justify exemption. *47 C.F.R. § 51.405(c)*.

The petitioners contend the rule is invalid because it alters the statutorily-mandated criteria that must be met in order for a state commission to terminate a rural ILEC's exemption. The petitioners point out that rule 51.405 refers only to the "unduly economically burdensome" prerequisite for termination rather than the above-mentioned three criteria.

The respondents argue that the rule does not eliminate any statutory criteria regarding rural exemptions. The respondents explain it was not the FCC's intent, nor was it within the FCC's power, to eliminate any statutory requirements. The respondents suggest that state commissions will look to the statute itself, in addition to the FCC's rule, when implementing *§ 251(f)*. They further claim that the FCC has stated in a later **[**43]** order that rule 51.405(c) "does not in any way affect a state's responsibility to consider all three of the factors set forth in *section 251(f)(1)(A)*," citing to an order entered when the Rural Telephone Coalition sought a stay of rule 51.405(c). *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 20166 (1996)* P15.

We agree with the petitioners that the rule impermissibly disregards two of the three statutory requirements that must be met before a state commission can terminate an exemption. A state commission looking at rule 51.405(c) would conclude that if a rural ILEC had failed to show an undue economic burden, the exemption must be terminated, regardless of the existence of the ILEC's companion defenses of technical infeasibility and/or inconsistency with § 254 of the Act. A rule that permits such a result represents an arbitrary and unreasonable interpretation of the governing statute.

2. Undue Economic Burden

Rule 51.405 also refers to the statutory requirement that a request for interconnection, unbundled elements, or retail services for resale must not cause an undue economic burden in order **[**44]** to justify termination of an exemption under *§ 251(f)(1)* or to justify the denial of a petition for suspension or modification under *§ 251(f)(2)*. The rule interprets the statutory phrase "unduly economically burdensome" as "undue economic burden beyond the economic burden that is typically associated with efficient competitive entry." *47 C.F.R. § 51.405(c),(d)*.

The petitioners argue that the rule's interpretation of

the statutory language is unreasonable because it does not allow state commissions to consider the total actual economic burden that competitive entry could impose on a small or rural ILEC. The petitioners explain that the phrase "unduly economically burdensome" indicates Congress intended state commissions to consider any type of economic burden that might be imposed by such a request, including those burdens associated with efficient entry.

The respondents assert that the FCC interpreted "unduly economically burdensome" to refer to something more than the economic burden that commonly or ordinarily occurs upon efficient competitive entry because otherwise exemption, suspension, or modification would be virtually automatic. The respondents submit that Congress did **[**45]** not intend to preclude competitive entry into small or rural markets; **[*761]** rather Congress intended to protect the small or rural ILECs from only those *§ 251(b)* or *§ 251(c)* requirements that might be unfair or inappropriate.

We agree with the petitioners that the FCC has unreasonably interpreted the phrase "unduly economically burdensome." We owe no deference to an agency's interpretation that would "frustrate the congressional policy underlying a statute." *Bureau of ATF v. Fed. Labor Relations Auth., 464 U.S. 89, 97, 78 L. Ed. 2d 195, 104 S. Ct. 439 (1983)* (quoting *NLRB v. Brown, 380 U.S. 278, 291-92, 13 L. Ed. 2d 839, 85 S. Ct. 980 (1965))*. In the Act, Congress sought both to promote competition and to protect rural telephone companies as evidenced by the congressional debates. *See* 142 CONG. REC. S687-01 (Feb. 1, 1996) (statements by Sen. Hollings and Sen. Burns); 142 CONG. REC. H1145-06 (Feb. 1, 1996) (statement by Rep. Orton). It is clear that Congress intended that all Americans, including those in sparsely settled areas served by small telephone companies, should share the benefit of the lower cost of competitive telephone service and the **[**46]** benefits of new telephone technologies, which the Act was designed to provide. It is also clear that Congress exempted the rural ILECs from the interconnection, unbundled access to network elements, and resale obligations imposed by *§ 251(c)*, unless and until a state commission found that a request by a new entrant that the ILEC furnish it any of *§ 251(c)* 's methods to compete in the rural ILEC's market is (1) not unduly economically burdensome, (2) technically feasible, and (3) consistent with § 254. *See 47 U.S.C. § 251(f)(1)*. Likewise, Congress provided for the granting of a petition for suspension or modification of the application of the requirements of *§ 251(b)* or *(c)* if a state commission determined that such suspension or modification is necessary to avoid (1) a significant adverse economic impact, (2) imposing a requirement that is unduly economically burdensome, and (3) imposing a requirement that is technically infeasible; and is consistent with the public interest, convenience, and necessity. *See 47 U.S.C. § 251(f)(2)*.

There can be no doubt that it is an economic burden on an ILEC to provide what Congress has directed **[**47]** it to provide to new competitors in *§ 251(b)* or *§ 251(c)*. Because the small and rural ILECs, while they may be entrenched in their markets, have less of a financial capacity than larger and more urban ILECs to meet such a request, the Congress declared that their statutorily-granted exemption from doing so should continue unless the state commission found all three prerequisites for terminating the exemption, or determined that all prerequisites for suspension or modification were met in order to grant an ILEC affirmative relief. It is the full economic burden on the ILEC of meeting the request that must be assessed by the state commission. The FCC's elimination from that assessment of the "economic burden that is typically associated with efficient competitive entry" substantially alters the requirement Congress established. By limiting the phrase "unduly economically burdensome" to exclude economic burdens ordinarily associated with competitive entry, the FCC has impermissibly weakened the broad protection Congress granted to small and rural telephone companies. We have found no indication that Congress intended such a cramped reading of the phrase. If Congress had wanted the state **[**48]** commissions to consider only that economic burden which is in excess of the burden ordinarily imposed on a small or rural ILEC by a competitor's requested efficient entry, it could easily have said so. Instead, its chosen language looks to the whole of the economic burden the request imposes, not just a discrete part.

Nor do we think the consideration of the whole economic burden occasioned by the request will result in state commissions "automatically" continuing the exemption, or "automatically" granting a petition for suspension or modification. In making their determination of "unduly economically **[*762]** burdensome," the state commissions will undoubtedly take into their judgment the fact that the ILEC will be

paid for the cost of meeting the request and may also receive a reasonable profit pursuant to *§ 252(d)*. Subsections (c) and (d) of rule 51.405 are an unreasonable interpretation of the statute's requirement that a *§ 251(b)* or *§ 251(c)* request made by a competitor must not be "unduly economically burdensome" to the small or rural ILEC.

3. Burden of Proof

Rule 51.405 also requires the rural ILEC to offer evidence to the state commission to prove that it is entitled to a continuing **[**49]** exemption. The rule states, "Upon receipt of a bona fide request for interconnection, services, or access to unbundled network elements, a rural telephone company must prove to the state commission that the rural telephone company should be entitled, pursuant to *section 251(f)(1)* of the Act, to continued exemption from the requirements of *section 251(c)* of the Act." *47 C.F.R. § 51.405(a)*.

The petitioners contend the FCC has improperly placed the burden of justifying a continued exemption on the ILECs. The petitioners discuss the language in *47 U.S.C. § 251(f)(1)(A)*, which states "subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements ...." This language, they explain, indicates that the ILECs are automatically exempt from subsection (c) until a request has been made, and once a request is made, the burden is on the party making the request to prove that the request is not unduly economically burdensome, is technically feasible, and is consistent with § 254. They also assert the burden of proof lies with the proponent of the order **[**50]** according to the Administrative Procedure Act. *See 5 U.S.C. § 556(d) (1994)*.

The respondents argue it was reasonable to place the burden on the rural ILECs because the default rule is for the state commission to deny the exemption unless the state commission affirmatively finds a reason to continue the exemption. The respondents rely on the Senate conference report on the Act which explains that a state commission must rule on the continuation of an exemption within 120 days, "and, if no exemption is granted," then the state commission must establish a schedule for compliance. S. CONF. REP. NO. 104-230, at 122 (1996). The respondents emphasize the word "granted" implies that a state commission will only grant an exemption if there is a specific reason to do so.

We agree with the petitioners that the rule impermissibly places the burden of proof on the ILECs. The statute states that the requirements of *§ 251(c)* "shall not apply to a rural telephone company *until*" a request has been made. *47 U.S.C. § 251(f)(1)(A)* (emphasis added). The use of the word "until" suggests that the rural telephone companies have a continuing exemption **[**51]** that is only terminated once a bona fide request is made, provided the request is not unduly economically burdensome, is technically feasible, and is consistent with § 254. Although the conference report refers to state commissions granting an exemption, the language of a conference report does not trump the language of a statute. *See Sierra Club v. Clark, 755 F.2d 608, 615 (8th Cir. 1985)*. The language of the statute uses the word "terminate" not "grant." *See 47 U.S.C. § 251(f)(1)(B)*. The plain meaning of the statute requires the party making the request to prove that the request meets the three prerequisites to justify the termination of the otherwise continuing rural exemption.

For the foregoing reasons, we vacate rule 51.405(a), (c), and (d).

F. Preexisting Agreements

Congress enacted *§ 252* of the Act to establish procedures for state commissions **[*763]** to approve agreements between ILECs and competing telecommunication carriers arrived at through negotiation or arbitration. *Section 252(a)* requires agreements entered into pursuant to *§ 251(c)(1)* 's duty to negotiate to be submitted to the state commissions for approval. *Section 252(a)(1)* **[**52]** states:

> Upon receiving a request for interconnection, services, or network elements pursuant to *section 251* of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of *section 251* of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated

> before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

The FCC promulgated *47 C.F.R. § 51.303* which requires all interconnection [9] agreements, even those that predate the 1996 Act, to be submitted to the state commissions for approval. The rule states, "All interconnection agreements between an incumbent LEC and a telecommunications carrier, including those negotiated before February 8, 1996, shall be submitted by the parties to the appropriate state commission for approval ...." *47 C.F.R. § 51.303(a)*.

> 9 We note that the term "interconnection" has been defined by the FCC as "the physical linking of two networks for the mutual exchange of traffic." First Report and Order P26.

[53]** The petitioners argue that the rule violates the explicit language of the Act because, while the Act references agreements entered into pursuant to *§ 251*, the rule applies to *all* agreements, even those entered into years before the Act was passed. The petitioners explain that agreements negotiated and entered into pre-1996 could not have been entered into "pursuant to *section 251*" because *§ 251* did not exist at that time, and therefore, only agreements that were either negotiated before the Act and formally entered into after the Act, or agreements that were both negotiated and formally entered into after the Act, must be submitted for approval.

The respondents contend that the agreement referred to in the third sentence of *§ 252(a)(1)* is not limited to the agreement mentioned in the first and second sentences. The first and second sentences, they argue, refer to agreements reached pursuant to *§ 251*, while the agreement mentioned in the third sentence refers to all, including pre-Act, agreements. The respondents explain that the term "negotiated" in the phrase set off by commas in the third sentence means a completed negotiation or, in other words, a negotiation that has **[**54]** resulted in a completed interconnection agreement.

We agree with the petitioners that the rule is contrary to the language of the Act. The respondents attempt to isolate the third sentence of *§ 252(a)(1)* from the prior two sentences. The FCC concluded "that the final sentence of *section 252(a)(1)*, which requires that *any* interconnection agreement must be submitted to the state commissions, can and should be read to be independent of the prior sentences in *section 252(a)(1)*." First Report and Order P166. This is not a proper construction because "we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States Nat'1 Bank of Oregon v. Independent Ins. Agents, 508 U.S. 439, 455, 124 L. Ed. 2d 402, 113 S. Ct. 2173 (1993)*.

The subsection in question begins by making reference to a competitor's "request ...pursuant to *section 251*." Upon **[*764]** receiving such a request, the competitor and the ILEC "may negotiate and enter into a binding agreement" without regard for the interconnection and unbundled network element access standards of *§ 251(b)* and *(c)*. The second sentence requires **[**55]** that the agreement so negotiated and entered into contain a detailed schedule of itemized charges for the items covered by the "agreement." The third sentence begins with the words, "[t] he agreement" (which can only mean the same agreement authorized by the first sentence and referred to in the second sentence) and requires that it be submitted to the state commission for approval pursuant to subsection (e).

The phrase in the third sentence set off by commas, which reads, "including any interconnection agreement negotiated before February 8, 1996," serves as the co-subject of the verb form "shall be submitted" and explains and defines what else besides the "agreement" mentioned in the first two sentences of the section must be submitted to the state commission. The "what else" that must be submitted to the state commission for approval is any interconnection agreement "negotiated" before February 8, 1996.

Congress was aware that many states were already exploring and experimenting with ways to open up local telephone markets to competition, and that telephone carriers were involved with each other in negotiations for those purposes prior to and at the time of the Act's passage. **[**56]** *See, e. g.*, S. REP. NO. 104-23, at 5 (1995). By using the phrase "including any interconnection agreement negotiated before February 8, 1996," Congress brought within the sphere of required state commission approval all interconnection agreements entered into after February 8, 1996, including specifically those whose terms were arrived at by negotiation prior to

that date but which had not yet been formally entered into by the parties. Because that unique group of interconnection agreements (those that were negotiated before but not yet entered into by February 8, 1996) could not have been agreements prompted or originated by either a request made under the Act or by the duty to negotiate contained in the Act (as the Act was not yet in existence at the time they were being negotiated), they could not be an "agreement" covered by the first two sentences and the first two words of the third sentence of *§ 252(a)(1)*. Nevertheless, because their subject matter, interconnection, was one which the Act was intended to compel, and because they would be entered into after the effective date of the Act, it was logical for Congress to want them subject to the Act's provisions. The use **[**57]** of the statutory language "including any interconnection agreement negotiated before February 8, 1996" also eliminated any argument that the agreeing carriers could have made in order to avoid state commission approval that their agreement had been negotiated before the Act's date and, therefore, was not subject to it.

We also think it of some significance that Congress intentionally used both the terms "negotiate" and "enter into" in the first sentence of *§ 252(a)(1)* but only used the verb "negotiated" in the third sentence. Had Congress wanted to include all interconnection agreements that had been both negotiated and entered into before the Act's effective date within the scope of the third sentence, all it had to do was use the same words it had used in the first sentence. *See Kifer v. Liberty Mut. Ins. Co., 777 F.2d 1325, 1333 n. 9 (8th Cir. 1985)* (" 'When the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place. '") (quoting *United States v. Nunez, 573 F.2d 769, 771* (2d Cir.), *cert. denied, 436 U.S. 930, 56 L. Ed. 2d 774, 98 S. Ct. 2828 (1978))*. **[**58]** It did not, and its choice not to do so reinforces our conclusion that Congress did not intend to do so. *See, e. g., Johnson v. United States, 529 U.S. 694, 146 L. Ed. 2d 727,* **[*765]** *120 S. Ct. 1795, 1803 (2000)* (When Congress means the same consequences, it is "natural for Congress to write in like terms.").

Across the country there were thousands of interconnection agreements existing between and among ILECs before the Act was passed. In Wisconsin alone the state commission estimated that there were over 3,000 pre-Act agreements which, under the FCC's construction of *§ 252*, would now have to be submitted for approval. *See* Addendum to Br. of Pet'rs United States Telephone Ass'n et al. at 9. Many of those agreements were between neighboring noncompeting ILECs for the exchange of features and functions. There is no indication that Congress intended the state commissions to go back through years of agreements and approve or disapprove them. We conclude that Congress knew it was already giving the state commissions a huge amount of new work to do in arbitrating and approving the new agreements that would quickly be coming into being by virtue of the substantive provisions of **[**59]** the Act, and that it did not intend to add an even heavier burden by forcing the state commissions to replow old ground. The FCC's construction of the statute is unreasonable.

We further find it difficult to square the FCC's interpretation with the recognized presumption against retroactive legislation. By construing the word "negotiated" in the third sentence to mean "negotiated and entered into," the FCC's rule reaches back and requires something that the parties to the preexisting agreement had no reason to expect--required state commission approval under new and different standards which affect the rights the parties had at the time they entered into their agreement. *See Landgraf v. USI Film Prods., 511 U.S. 244, 280, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994)*. Here again Congress's choice not to use the words "entered into" in the third sentence tells us that Congress did not intend the retroactive effect the FCC has given to the Act. Absent clear Congressional intent for retroactive effect, there should be none. *See id*. By making the Act applicable to interconnection agreements that were only negotiated before the Act's effective date (but not yet entered **[**60]** into), Congress gave the parties the option of either proceeding to enter into the negotiated agreement with the knowledge it would have to be submitted to the state commission for approval, or not. In so doing, an unwanted retroactive effect can be avoided, the parties can proceed knowing what the law will be, and the effect of the Act is entirely prospective.

We hold that *§ 252(a)(1)* applies to any agreement which was either (1) both negotiated and entered into pursuant to *§ 251* after the Act went into effect or (2) is an interconnection agreement that was negotiated before, but not yet entered into when, the Act went into effect.

Consequently, we vacate rule 51.303.

III. Conclusion

We grant the pending petitions for review in part. For the reasons stated, we vacate, in total, *47 C.F.R. §§ 51.505(b)(1)*, *51.609*, *51.513*, *51.611*, *51.707*, *51.317*, *51.405(a),(c)*, and *(d)*, and *51.303*. We remain firm in our previous decision to vacate *47 C.F.R. §§ 51.305(a)(4)* and *51.311(c)* (the superior quality rules) and *47 C.F.R. § 51.315(c)-(f)* (the additional combinations rule). In all other respects, we deny the petitions **[**61]** for review.

Attachment 2

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 96-45
Federal-State Joint Board on Universal Service	)	(Report to Congress)

REPORT TO CONGRESS

Adopted: April 10, 1998 **Released: April 10, 1998**

By the Commission: Chairman Kennard and Commissioners Ness, Powell and Tristani issuing separate statements; Commissioner Furchtgott-Roth dissenting and issuing a statement.

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51. Senators Stevens and Burns raise a substantial point. The conference committee's decision not to adopt language explicitly classifying services employing protocol processing as information services supports the inference that the conferees did not intend that classification. We note, however, that the House language, adopted by the conference committee, was derived from the MFJ, and that services employing protocol processing were treated as information services under the MFJ.[107] Furthermore, as noted above, services offering net protocol conversion appear to fall within the statutory language, because they offer a capability for "transforming [and] processing" information. In light of these considerations, we recognize that the issue of the regulatory treatment of protocol processing is a difficult one.

52. We find, however, little to no discussion of this issue in the record. Accordingly, we do not believe that we have an adequate basis for resolving this matter in this Report. Moreover, we believe that we need not resolve the issue in order to address the important issues raised by the Appropriations Act. The regulatory classification of protocol processing is significant to the provision of universal service only to the extent that it affects the appropriate classification of Internet access service and IP telephony. We find, however, for the reasons explained below, that Internet access services are appropriately classed as information services without regard to our treatment of protocol processing.[108] Similarly, our discussion of the regulatory status of phone-to-phone IP telephony is not affected by our resolution of the protocol processing issue.[109] The protocol processing that takes place incident to phone-to-phone IP telephony does not affect the service's classification, under the Commission's current approach, because it results in no net protocol conversion to the end user.[110] Finally, when a facilities owner provides leased lines to an Internet access or backbone provider, it does not provide protocol processing.

3. "Telephone Exchange Service" and "Local Exchange Carrier" Definitions

53. The 1996 Act redefined "telephone exchange service" to include not only "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers interconnecting service of the character ordinarily furnished by a single exchange," but also "comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications

[107] *See United States v. Western Electric Co.*, 673 F. Supp. 525 (D.D.C. 1987) (amending the MFJ to allow RBOCs to provide such services notwithstanding their classification as information services), 714 F. Supp. 1 (D.D.C. 1988) (same), *rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990).

[108] *See infra* Section IV.D.2.

[109] *See infra* Section IV.D.3.

[110] *See supra* note 102.

service."[111] It defined "local exchange carrier" to include "any person that is engaged in the provision of telephone exchange service or exchange access." The definition excludes persons "engaged in the provision of a commercial mobile service . . . except to the extent the Commission finds that such service should be included in the definition of such term."[112]

54. Our review indicates that the legislative history does not provide guidance on the meaning of these provisions. It appears from the legislative text that Congress' redefinition of "telephone exchange service" was intended to include in that term not only the provision of traditional local exchange service (via facilities ownership or resale), but also the provision of alternative local loops for telecommunications services, separate from the public switched telephone network, in a manner "comparable" to the provision of local loops by a traditional local telephone exchange carrier. The record contains very little discussion of these definitions. We do not believe, however, that the 1996 Act's modification of the "telephone exchange service" definition, or its addition of the "local exchange carrier" definition, undercuts the analysis we present in this Report.

IV. APPLICATION OF DEFINITIONS

A. Overview

55. We have been directed by Congress to describe in detail the application of the definitions considered in the previous section to "mixed or hybrid services."[113] Congress has also directed that we explain "the impact of such application on universal service definitions and support, and the consistency of the Commission's application."[114] Under the statute, all "telecommunications carriers" that provide interstate telecommunications services must contribute to federal universal service mechanisms, and any company that otherwise provides interstate telecommunications may be required to contribute. Companies that use other providers' telecommunications networks to provide the communications path underlying their own information services do not contribute directly, but they support universal service indirectly through the telecommunications services they purchase. We conclude that entities providing pure transmission capacity to Internet access or backbone providers provide interstate "telecommunications." Internet service providers themselves generally do not provide telecommunications. In those cases where an Internet service provider owns transmission facilities, and engages in data transport over those facilities in order to provide an information service, we do not currently require it to contribute to universal service mechanisms. We believe it may be appropriate to reconsider that result, as it would appear in such a case that the Internet service provider is furnishing raw transmission capacity to itself. Finally, we consider the regulatory status of various forms of "phone-to-phone IP telephony" service mentioned generally in the record. The record currently before us suggests that

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[111] 47 U.S.C. § 3(47).

[112] *Id.* § 3(26).

[113] Appropriations Act, § 623(b)(2).

[114] *Id.*

Attachment 3

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Petition of Intrado Communications Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934 as amended, to Establish an Interconnection Agreement with the Ohio Bell Telephone Company dba AT&T Ohio.	)	Case No. 07-1280-TP-ARB

ARBITRATION AWARD

The Commission, considering the petition, the evidence of record, post hearing briefs, and otherwise being fully advised, hereby issues its arbitration award.

APPEARANCES:

Cahill, Gordon & Reindel, L.L.P. by Ms. Chérie R. Kiser, Suite 750, 1990 K Street, NW, Washington, DC 20006 and Ms. Rebecca Ballesteros, Intrado Communications, Inc., 1601 Dry Creek Drive, Longmont, Colorado 80503, on behalf of Intrado Communications, Inc.

Mayer Brown LLP by Mr. J. Tyson Covey, 71 South Wacker Drive, Chicago, Illinois 60606 and Ms. Mary K. Ryan Fenlon, AT&T Ohio, 150 East Gay Street, Room 4-A, Columbus, Ohio 43215, on behalf of Ohio Bell Telephone Company dba AT&T Ohio.

I. BACKGROUND

Under Section 252(b)(1) of the Telecommunications Act of 1996 (the Act),[1] if parties are unable to reach an agreement on the terms and conditions for interconnection, a requesting carrier may petition a state commission to arbitrate any issues which remain unresolved despite voluntary negotiation under Section 252(a) of the Act.

On August 22, 2007, the Commission issued its carrier-to-carrier rules in *In the Matter of the Establishment of Carrier-to-Carrier Rules*, Case No. 06-1344-TP-ORD. The rules came into effect on November 30, 2007. Rules 4901:1-7-08 and 4901:1-7-09, Ohio Administrative Code (O.A.C.), govern the negotiation and arbitration of interconnection agreements under 47 U.S.C. 252.[2] Under the rules, an internal arbitration panel is assigned

1 The Act is codified at 47 U.S.C. 151 et seq.

2 The rules supersede comparable provisions set forth in the Commission's Guidelines for Mediation and Arbitration issued in *In the Matter of the Implementation of the Mediation and Arbitration Provisions of the Federal Telecommunications Act of 1996*, Case No. 96-463-TP-UNC (Entry issued July 18, 1996).

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to recommend a resolution of the issues in dispute if the parties cannot reach a voluntary agreement.

II. HISTORY OF THE PROCEEDING

On February 5, 2008, the Commission issued certificate number 90-8000 to Intrado Communications, Inc. (Intrado), granting it authority as an emergency services telecommunications carrier.[3]

In the Commission's carrier-to-carrier rules, Rule 4901:1-7-09, O.A.C., specifies that "[a]ny party to the negotiation of an interconnection agreement may, during the period from the 135th to the 160th day (inclusive) after the date on which a local exchange carrier (LEC) receives a request for negotiation, petition the commission to arbitrate any open issues." By mutual agreement, the parties established December 29, 2007, as the 160th day (Arbitration Petition p. 7, footnote 12).

On December 21, 2007, Intrado filed a petition for arbitration of certain rates, terms, and conditions for interconnection and related arrangements with AT&T Ohio (AT&T) pursuant to Section 252(b) of the Act. In its petition, Intrado presented its issues in the form of categories.

On December 21, 2007, with its petition for arbitration, Intrado filed a motion pro hac vice to allow Chérie Kiser, Angela R. Collins, and Rebecca Ballesteros to practice before the Commission. The attorney examiner granted the motion by entry issued January 17, 2008.

On January 14, 2008, AT&T filed a motion to dismiss or, in the alternative, a motion to hold Intrado's petition in abeyance. In its motion, AT&T requested that the Commission dismiss the petition or, in the alternative, hold the petition in abeyance to allow for negotiation. AT&T also recommended that the Commission hold the petition in abeyance until it ruled on Intrado's application to provide services as a competitive local exchange carrier (CLEC). AT&T pointed out that the parties had not discussed the terms of an interconnection agreement. In its motion, AT&T states that it provided Intrado with the AT&T 13-state template interconnection agreement on August 2, 2007. More than four months later, on December 18, 2007, Intrado submitted to AT&T its proposed changes to the 13-state agreement. Intrado filed its petition for arbitration on December 21, 2007. Because of Intrado's delayed response, AT&T claims that it was virtually denied meaningful time to negotiate.

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3 *In the Matter of the Application of Intrado Communications, Inc. to Provide Competitive Local Exchange Services in the State of Ohio*, Case No. 07-1199-TP- ACE (Case No. 07-1199-TP-ACE or Certification Order).

In its January 14, 2008, motion, AT&T recommended that the Commission hold the petition in abeyance to await the Commission's decision in Case No. 07-1199-TP-ACE. AT&T explains that if the Commission were to deny Intrado's application, Intrado would not be entitled to an interconnection agreement. The arbitration petition, therefore, would be rendered moot. To avoid wasted effort, AT&T recommended that the petition be held in abeyance.

On January 22, 2008, AT&T moved to withdraw its motion to dismiss and request to hold the petition in abeyance. AT&T explained that pursuant to a conference mediated by the Commission's staff, the parties agreed to negotiate for a period of 30 days. In partial satisfaction of its request, AT&T agreed to withdraw its motion. By letter filed January 22, 2008, the parties acknowledged a mutual agreement to extend the negotiating period to February 17, 2008.

AT&T filed a response to Intrado's petition on January 15, 2008. Attached to its response, AT&T included an issues matrix that identifies 38 unresolved issues. AT&T added two additional issues to those presented by Intrado.

On March 5, 2008, after consultation with counsel, the attorney examiner issued an entry summarizing the schedule for the arbitration proceeding. The parties agreed to the following schedule:

Discovery Deadline	March 11, 2008
Arbitration Package	March 25, 2008
Hearing	April 8-11, 2008
Initial Briefs	April 23, 2008
Reply Briefs	May 2, 2008
Arbitration Award	May 28, 2008

By letter filed March 19, 2008, AT&T advised the Commission that the parties had agreed to stay the arbitration schedule for 30 days. Moreover, the parties agreed to cancel the hearing scheduled for April 8, 2008, and cancel the procedural schedule issued March 5, 2008.

In an entry issued August 1, 2008, the attorney examiner issued a revised procedural schedule as follows:

Discovery Completion	September 16, 2008
Issues Matrix	September 23, 2008
Arbitration Package	October 7, 2008
Hearing	October 14-16, 2008
Initial Briefs	October 30, 2008
Reply Briefs	November 13, 2008
Arbitration Award	December 17, 2008

On September 23, 2008, the parties filed an issues matrix identifying 36 unresolved issues, not counting sub-issues, for arbitration. AT&T amended the matrix on September 29, 2008. On January 30, 2009, and February 2, 2009, AT&T filed revised issues matrices advising the Commission of the issues that the parties had resolved.

In accordance with the procedural schedule, the parties filed arbitration packages on October 7, 2008, containing exhibits and the written testimony of their witnesses. Intrado provided the testimony of Carey F. Spence-Lenss and Thomas W. Hicks. AT&T offered the testimony of Patricia Pellerin and Mark Neinast. An arbitration panel conducted a hearing on October 14 and 15, 2008.

The parties filed initial briefs on October 30, 2008. Reply briefs were filed on November 13, 2008. On November 21, 2008, December 5, 2008, and December 16, 2008, AT&T filed memoranda of supplemental authority containing the decisions of other states relating to Intrado entering into interconnection agreements with ILECs.

III. ISSUES FOR ARBITRATION

Issue 1(a) **What service(s) does Intrado currently provide or intend to provide in Ohio?**

Issue 1(b) **Of the services identified in 1(a), for which, if any, is AT&T required to offer interconnection under Section 251(c) of the Telecommunications Act of 1996.**

Issue 1(c) **Of the services identified in 1(a), for which, if any should rates appear in the ICA?**

At the hearing, Carey F. Spence-Lenss appeared and testified on behalf of Intrado. Ms. Spence-Lenss is vice president of regulatory and government affairs for Intrado. She sponsored Intrado Exhibit 2. Intrado Exhibit 2 is her testimony, which addresses several issues, including issue 1(a) (Intrado Ex. 2 at 1, 3).

Providing Intrado's background information, Ms. Spence-Lenss states that Intrado was established in 1999 as a wholly-owned subsidiary of Intrado Inc. Intrado Inc., in turn, was founded in 1979. Intrado provides regulated telecommunications services, such as 911 selective routing, switching, and transport. In addition, Intrado provides automatic location identification (ALI) services that are integral to Intrado's Intelligent Emergency Network (IEN). By making new applications and services available to Public Safety Answering Points (PSAPs) and other public safety entities, Intrado intends to increase efficiency and effectiveness in responding to emergency calls. In so doing, Intrado claims that it can enable the public safety community to transcend the current constraints of the existing 911 infrastructure (Intrado Ex. 2 at 5).

Intrado will provide its service to public safety entities and give them access to various forms of communication, such as voice, data, and streaming media. Intrado's IEN also intends to expand the 911 infrastructure to embrace different technologies, including wireline, wireless, Internet telephony, and other technologies (Intrado Ex. 2 at 6).

Relying on the Commission's decision in Case No. 07-1199-TP-ACE, Ms. Spence-Lenss explained that the Commission granted Intrado authority to be a competitive emergency services telecommunications carrier (CESTC) in Ohio. She contends that, as a CESTC, the Commission found that under federal law Intrado is a "telecommunications carrier" that offers "telecommunications service." Likewise, under federal law, she claims that the Commission found Intrado to be engaged in the provision of "telephone exchange service." As a CESTC, it is Intrado's position, based on the Commission's decision, that it is entitled to all the rights and obligations of a telecommunications carrier pursuant to Sections 251 and 252 of the Act. Such rights include the authority to negotiate and interconnect with incumbent local exchange carriers (ILECs) like AT&T (Intrado Ex. 2 at 3-4).

Intrado proclaims that it has authority to provide competitive local telecommunications services in 40 states, including Ohio. Intrado points out that in the states of Illinois and California it has entered into two other Section 251 interconnection agreements with AT&T affiliates. Intrado has also entered into agreements with Qwest (Intrado Ex. 2 at 4).

As to what services it provides, Intrado responds that it is authorized to provide competitive 911/E911 telephone exchange services to counties and PSAPs in Ohio. Intrado notes, however, that the Commission, when it granted Intrado CESTC status, recognized that Intrado may seek to expand its authority to include other telephone exchange services (Intrado Ex. 2 at 9).

Intrado points out that its competitive 911/E911 service offering is similar to "telephone exchange communication service" or "Business Exchange" service, as currently offered by AT&T to PSAPs (Intrado Ex. 2 at 9).

Addressing Issue 1(a) in its brief, Intrado relies upon the definition of "telephone exchange service" in the Act to support its contention that it provides telephone exchange service. Specifically, Intrado relies upon 47 U.S.C. §153(47), which defines telephone exchange service as follows:

> (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

To respond to Intrado's contentions, AT&T offered the testimony of Patricia H. Pellerin. Ms. Pellerin is an employee of The Southern New England Telephone Company (AT&T Connecticut). She serves as an associate director-wholesale regulatory support. Ms. Pellerin sponsored AT&T Exhibit 1.

AT&T identifies issue 1(a) as the threshold issue. The answer is critical because a requesting carrier can arbitrate and interconnect with an ILEC under Section 251(c)(2)(A) only if it provides "telephone exchange service" or "exchange access" to others. AT&T claims that Intrado's witness admitted that IEN does not qualify as "exchange access." Hence, to AT&T, the remaining issue is whether IEN can qualify as telephone exchange service (AT&T Br. 5, AT&T Reply Br. 4).

Relying on the definition of exchange access service as "the offering of access to telephone exchange service or facilities for the purpose of the origination or termination of telephone toll services," AT&T rejects the notion that 911 services are "telephone toll services" (AT&T Ex. 1 at 17-18). In its review of the record, AT&T concludes that Intrado has not established that it provides telephone exchange service (AT&T Reply Br. 4).

AT&T rejects Intrado's claim that the Commission found it to be a provider of "telephone exchange service." In Case No. 07-1199-TP-ACE, AT&T states that the Commission found that Intrado's telephone exchange activities are restricted in scope and do not extend to the level of a CLEC. In the entry on rehearing, AT&T states that the Commission clarified that Intrado provides a component of basic local exchange service and is not a traditional provider of basic local exchange service. Instead, Intrado's

activities are limited to competitive emergency telecommunications services (AT&T Br. 11-12).

In its reading of Case No. 07-1199-TP-ACE, AT&T concludes that the Commission has not decided whether Intrado's 911 service is "telephone exchange service." The Commission has not conducted an analysis of the elements of telephone exchange service, i.e., whether Intrado's service provides "intercommunication," whether it operates "within a telephone exchange," whether the service is "of the character ordinarily furnished by a single exchange," or whether the service allows subscribers to "originate and terminate a telecommunications service." AT&T, therefore, concludes that the issue is open as to whether 911 service is a telephone exchange service (AT&T Reply Br. 8-9). In its own analysis, AT&T concludes that Intrado does not provide telephone exchange service, is not entitled to interconnect with AT&T under Section 251(c)(2), and that AT&T is not required to arbitrate terms for interconnection (AT&T Br. 12-13).

Intrado declares that its 911/E911 service meets the criteria for telephone exchange service. Intrado contends that its service allows its subscribers to intercommunicate, fulfilling part (A) and allows subscribers to originate and terminate calls as required by part (B). In both instances, Intrado claims to fulfill the requirements of part A and B because its service allows subscribers to intercommunicate with and originate and terminate calls to local emergency personnel (Intrado Br. 12).

Intrado claims to satisfy the intercommunication requirement because its 911 service allows PSAP customers to communicate with Intrado's other PSAP customers and AT&T's PSAP customers. Moreover, Intrado points out that its service allows consumers to make calls to PSAPs and communicate with local emergency personnel. Intrado describes an interconnected community consisting of 911 callers, PSAPs, and first responders in the relevant geographic area (Intrado Reply Br. 8).

Looking at 47 U.S.C. §153(47), AT&T rejects the notion that Intrado's 911/E911 service falls within the definition of telephone exchange service. Part A requires "intercommunicating." Because Intrado's IEN does not allow a PSAP customer to originate calls or receive non-911 calls, AT&T concludes that there is no intercommunication (AT&T Br. 6-8). Citing the Federal Communications Commission (FCC), AT&T states that intercommunication means the ability of all end users in an exchange to communicate with each other.[4] PSAP customers can only receive calls from 911 callers and cannot originate calls to anyone. AT&T rejects the idea that intercommunication exists because consumers can call PSAPs (AT&T Reply Br. 6-7). Even looking at intercommunication from the perspective of the 911 caller, AT&T still fails to find "intercommunication." A 911 caller can only connect to a specific, predetermined

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4 *In the Matter of Deployment of Wireline Services Offering*, 15 FCC Rcd. 385 ¶23 (December 23, 1999).

point (i.e., the PSAP). AT&T likens such an arrangement to private line service, where communications are restricted to two or more designated points for exclusive use by a particular customer or authorized users. AT&T declares that the FCC has stated that private line services do not constitute telephone exchange service (AT&T Reply Br. 7-8).

Pointing to non-traditional communication services that the FCC has deemed to be telephone exchange services, Intrado argues that it similarly offers telephone exchange service. As examples of other telephone exchange services, Intrado cites data transmissions, certain advanced DSL-based services, and electronic directory information services that provide call-completion services. In further reliance on the FCC, Intrado emphasizes that telephone exchange service is not limited to voice telephony (Intrado Br. 13-14).

AT&T dismisses Intrado's comparisons as flawed. Aside from failing to meet the definition of telephone exchange service, AT&T finds nothing in common with Intrado's 911/E911 service and xDSL service and directory assistance call completion. AT&T agrees that the FCC found that certain xDSL and directory assistance call completion services meet the definition of telephone exchange service because they allow subscribers to connect with all other end-users in the exchange and because the service met the other requirements in the definition of telephone exchange service (AT&T Reply Br. 10). To AT&T, there is a distinction that other services allow intercommunicating, the ability to connect with all other end users in an exchange. Because Intrado's IEN does not allow a PSAP customer to originate calls or receive non-911 calls, AT&T concludes that there is no intercommunication (AT&T Br. 6-8). Because PSAPs cannot connect with anyone in the exchange, AT&T sees an absence of intercommunicating and, therefore, distinguishes Intrado's service from the xDSL and directory assistance with call completion (AT&T Reply Br. 9-10). Moreover, AT&T regards Intrado's service as more akin to services that the FCC has found not to be telephone exchange service, like private line service or directory assistance without call completion, services where there is a predetermined point of connection (AT&T Reply Br. 10).

In the case of a call transfer, Intrado asserts that AT&T misconstrues the FCC's findings. Intrado explains that a directory assistance provider does not provide telephone exchange service if it hands off a call to another carrier and that carrier charges the calling party for completion of the call. Intrado points out that a calling party using 911/E911 services is never charged for a 911 call. If Intrado's PSAP customer transfers a call, Intrado charges the customer for the service. This clarifying distinction, Intrado believes, undercuts AT&T's argument (Intrado Reply Br. 9).

AT&T asserts other reasons why Intrado's service fails to meet the definition of "telephone exchange service." Analyzing the "telephone exchange" element of 47 U.S.C. §153(47), AT&T concludes that Intrado's IEN, the only service it intends to provide, does

not qualify as telephone exchange service because Intrado's service does not operate within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area. Instead, its service is based upon municipal boundaries. Telephone exchange service, asserts AT&T, is based upon exchange boundaries (AT&T Ex. 1 at 20). Noting that Intrado has conceded that its service does not operate within the same exchange or within exchange area boundaries, AT&T rejects the claim that Intrado provides a telephone exchange service (AT&T Br. 9).

Intrado disputes AT&T's argument that it does not provide telephone exchange service because it does not operate within telephone exchange boundaries. According to Intrado, the concept of an exchange is based upon geography and regulation, not exchange boundaries. Citing the FCC, Intrado states that the telephone exchange service definition does not require a specific geographic boundary. Drawing upon wireless carriers as an example, Intrado points out that they provide telephone exchange service even though their geographic service areas are not coterminous with their wireline counterparts (Intrado Reply Br. 9).

Intrado goes further to define telephone exchange service as including any means of communicating information within a local area that involves a central switching complex which interconnects all subscribers within a geographic area. Relying on this definition, Intrado describes its system as using selective routers to interconnect PSAPs and 911 callers located in the same geographic area. Intrado does not equate geographic areas with ILEC exchange boundaries. Extended area service (EAS), which Intrado compares to a community of 911 callers and PSAPs, is based on a community of interest where subscribers can reach each other without incurring a toll charge (Intrado Reply Br. 10).

Intrado adds that ILEC exchange boundaries are inapplicable to 911/E911 services. Intrado notes that the federal district court that oversaw the Modified Final Judgment recognized that 911/E911 transmissions cross local access and transport area (LATA) boundaries. To allow for emergency service across LATA boundaries, Intrado alleges that the court waived the within-LATA restrictions. From this, Intrado concludes that there is no requirement that Intrado's service offering be limited to AT&T's exchange boundaries to qualify as a telephone exchange service under the Act (Intrado Reply Br. 10-11).

Referring to another provision in the definition of "telephone exchange service," AT&T declares that Intrado's service is not "of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge." The FCC, according to AT&T, included this element as a means to determine whether the service is local in nature and not a toll service. Applying this condition to Intrado's service, AT&T finds that a customer can make a 911 call without incurring a toll charge, but the call is not

local in nature when it is delivered to a PSAP located in a different exchange and where such calls are not covered by the exchange service charge (AT&T Br. 9-10).

Intrado takes issue with AT&T's claim that 911 calls do not involve an "exchange service charge." Intrado explains that the provision of telephone exchange services to 911 callers is not at issue in this proceeding. Instead, Ohio public safety agencies and PSAPs will be billed as recipients of telephone exchange service from Intrado. Intrado's understanding from the FCC is that any charge assessed for service would be considered an "exchange service charge." Consequently, Intrado contends that it meets the "exchange service charge" element of the definition because Intrado's PSAP customers will have the ability to communicate within the equivalent of an exchange area pursuant to a service and payment agreement with Intrado (Intrado Reply Br. 12).

Intrado adds further that the "exchange service charge" portion of the definition only aids to define whether a service is local. To Intrado, there is no jurisdictional issue concerning 911/E911 service. Tariffs routinely include 911/E911 services to PSAPs. According to Intrado, the parties have agreed that no form of intercarrier compensation shall apply to the exchange of 911/E911 calls. For these reasons, Intrado urges the Commission to reject AT&T's reliance on the "exchange service charge" element of the definition of telephone exchange service (Intrado Reply Br. 12).

To meet Part B of the definition of "telephone exchange service," a subscriber must be able to originate and terminate a telecommunications service. According to AT&T, Intrado has admitted that IEN does not allow a subscriber to originate and terminate a telecommunications service (AT&T Ex. 1 at 20). Although a PSAP could transfer a call to another PSAP or conference in another PSAP, AT&T claims that Intrado admits that such transferring and conferencing are not the same as actually originating a call (AT&T Br. 10). A PSAP is not allowed to originate a call. To originate calls, the PSAP would use its local service provider (AT&T Ex. 1 at 20-21). Even though IEN allows a PSAP to transfer a call to another emergency responder, AT&T does not accept the argument that IEN provides PSAPs with the capability to originate calls. To highlight the point, AT&T noted that a PSAP would not be able to call back a disconnected caller using IEN (*Id.* at 25, 26).

AT&T adds that in some instances Intrado does not terminate a call. Intrado's tariff, according to AT&T, provides that its selective router may be used to hand-off the call to a separate 911 service provider for call completion. Citing the FCC, AT&T proclaims that handing off traffic to another carrier for completion does not meet the definition of telephone exchange service (AT&T Br. 10-11).

Intrado maintains that it allows its PSAP customers to originate and terminate communications. Because its service allows Intrado PSAP customers to reach AT&T PSAP customers or to conduct two-way communication between a 911 caller and a PSAP,

Intrado claims that its service has the capacity to originate and terminate calls (Intrado Reply Br. 8). Intrado denies any admission that call transfers and conferencing are not the same as originating a call (*Id.*)

In further support of its contention that its 911/E911 service is a telephone exchange service, Intrado points out that in its tariff AT&T describes its own 911 service as a "telephone exchange communication service." From this, Intrado argues that AT&T cannot deny that Intrado's 911/E911 service is a telephone exchange service.

AT&T rejects Intrado's argument as incorrect. AT&T clarifies that its tariff does not identify its 911 service as "telephone exchange service." Instead, the tariff refers to the service as "telephone exchange communication service," emphasizing that it is a communication service offered in an exchange. AT&T denies that there is anything in its tariff that asserts that its 911 service meets the definition of telephone exchange service. AT&T further contends that the label placed on a service is of no consequence. Ultimately, the characteristics of a service determine whether it is telephone exchange service (AT&T Reply Br. 11-12).

Intrado rejects AT&T's argument that Intrado's tariff is evidence that Intrado does not provide local exchange service. For its argument, AT&T points to language in Intrado's tariff that states that "The Company [Intrado] is not responsible for the provision of local exchange service to its Customers" (AT&T Ex. 1 at 19). AT&T also points to a tariff provision that states that "Intelligent Emergency Network Service is not intended to replace the local telephone service of the various public safety agencies which may participate in the use of this service" (*Id.*). A PSAP customer must purchase local exchange service from another carrier. From this, AT&T concludes that Intrado does not offer telephone exchange service (AT&T Br. 5-6, AT&T Reply Br. 5-6). Intrado responds that its 911/E911 services are not intended to replace all local exchange services to which public safety agencies may subscribe. For non-emergency purposes, PSAPs may subscribe to additional local exchange services. According to Intrado, its tariff simply acknowledges that PSAPs may subscribe to other local exchange services for administrative purposes, to make outgoing calls, or to receive other emergency or non-emergency calls. Intrado acknowledges in its tariff that PSAPs have the choice of other providers for these services (Intrado Br. 14-15).

In further support for its argument that it provides telephone exchange service, Intrado states that its interconnection arrangement with AT&T is for the mutual exchange of traffic. According to Intrado, two-way communications, not two-way traffic is key in determining whether there is a mutual exchange of traffic. Even though 911 trunks are generally one-way, Intrado argues that 911 trunks, nonetheless, provide two-way communications and traffic. As an example, Intrado points out that a call may be delivered by a one-way trunk to a PSAP. The PSAP, in turn, can "hookflash" for dial tone

to originate a bridged call to a third-party. From this, Intrado concludes that one-way trunks can support two-way voice communications (Intrado Br. 15-16).

AT&T disagrees with Intrado's claim that a hookflash is tantamount to originating a call. AT&T points to where Intrado has admitted that hookflash is merely a conferencing capability. AT&T also points to where Intrado has testified that its IEN service does not allow call origination. Consulting Intrado's tariff, AT&T finds where the tariff states that PSAP customers only receive calls, further undermining Intrado's claim of call origination capability. On this point, AT&T cites the Florida commission, which dismissed Intrado's petition upon finding that Intrado does not provide telephone exchange service (AT&T Reply Br. 5-6).

Intrado accuses AT&T of describing Intrado's 911/E911 service as an information service, rather than a telecommunications service. Citing the FCC, Intrado claims that the presence of Internet protocol within its network has no bearing on whether its service is an information service (Intrado Br. 17).

To further distinguish its service from an information service, Intrado highlights the component nature of its service. Intrado points to three components of its 911/E911 service: the selective router, the database system that retains the ALI, and the transport of the 911 call to the PSAP. Intrado acknowledges that the ALI might be regarded as an information service, but Intrado combines each component to create an integrated product (Intrado Br. 18-19).

In further rejecting AT&T's claim that Intrado's 911/E911 service is an information service, it is Intrado's contention that the nature of a service determines its classification. It is customer perception that defines a product. In this instance, Intrado states that public safety agencies understand that they are purchasing a complete, integrated 911/E911 service offering, not component parts (Intrado Br. 19).

Noting in the arbitration petition that Intrado compared its 911 services to fax services, AT&T disagrees. AT&T explains that fax services use basic two-way telephone exchange lines that have assigned telephone numbers. Moreover, the lines can originate and receive telephone calls over the public switched telephone network (PSTN). In comparison, AT&T enumerates that Intrado's 911 service does not have assigned telephone numbers, does not have dial tone, and cannot originate calls to subscribers served on the PSTN (AT&T Ex. 1 at 25-26).

AT&T notes that Intrado states in its petition that it intends to offer local exchange service. AT&T highlights, however, that Intrado is not certified to offer local exchange service. Based on its tariff, Intrado only intends to offer emergency services (AT&T Ex. 1 at 17-18).

Taking into account the State of Ohio's definition of basic local exchange service, AT&T concludes that Intrado's IEN does not qualify as basic local exchange service. As in the federal statute, Rule 4927.01(A)(1), O.A.C., defines basic local exchange service in terms of whether a customer can originate voice communications within a local service area. AT&T states that Intrado has admitted that its service does not allow subscribers to originate calls (AT&T Ex. 1 at 22-23). Referring to Rule 4927.01(A)(1)(a), O.A.C., AT&T points out that Intrado's IEN does not provide dial tone service. IEN also does not provide operator services and directory assistance. Intrado emphasizes that Rule 4927.01(A)(1)(d), O.A.C., specifies that operator services and directory assistance are only provided to exchange lines that provide dial tone. Furthermore, pursuant to Rule 4927.01(A)(1)(h), O.A.C., AT&T states that Intrado's IEN does not provide access to toll presubscription, interexchange or toll providers or both, and networks of other telephone companies. Intrado explains that interexchange carrier (IXC) presubscription services are only available to exchange lines that provide dial tone (AT&T Ex. 1 at 23-24).

Intrado rejects AT&T's contention that its tariff provides evidence that its 911/E911 service is not telephone exchange service. To the contrary, Intrado claims that there is no provision in the tariff that indicates that Intrado's 911/E911 service is anything other than telephone exchange service. Upon comparing, Intrado finds that its tariff provisions are nearly identical to those contained in AT&T's tariff. Moreover, those provisions highlighted by AT&T to support its contention are basic local exchange services, not telephone exchange services (Intrado Reply Br. 12-13).

AT&T makes the argument that the Commission has no authority to arbitrate issues that are not raised by the parties. Specifically, AT&T refers to the Commission's arbitration of issues under Section 251(a). Citing Section 252(b), AT&T states that the Commission must limit itself to deciding those issues raised by the parties. Because Intrado's application is filed under Section 251(c), AT&T contends that the Commission has no authority to arbitrate issues under Section 251(a). Even further, AT&T remarks that even if Intrado had sought to arbitrate under Section 251(a) the Commission would be barred from doing so under Section 252(b) (AT&T Br. 13-17).

In its reply brief, Intrado finds additional support for its position from commission decisions in Texas, Illinois, and California. The commissions found that Intrado offered telephone exchange service and, therefore, was entitled to interconnection under Section 251(c) (Intrado Reply Br. 4-5). In support of its argument that it provides telephone exchange service, Intrado highlights the reason why interconnection may only be provided to carriers that offer telephone exchange service or exchange access service. According to Intrado, the purpose of the limitation was to prevent long distance carriers from avoiding access charges by taking advantage of interconnection via Section 251(c). Intrado adds that it was Congress' intent, with the inclusion of part B of the telephone

exchange definition, to broaden the inclusion of services that would fall within the telephone exchange limitation in Section 251(c). Telephone exchange service is not limited to voice service (Intrado Reply Br. 5-6).

Intrado voices support over the Commission's authority to arbitrate and oversee the interconnection arrangements between the parties. Because Intrado is a competitor and AT&T is an ILEC, Intrado argues that Section 251(c) is applicable and grants the Commission oversight authority. Moreover, Intrado claims that its status as a competitor grants it access to the PSTN. Intrado rejects AT&T's recommendation that the parties enter into a commercial, non-Section 251 agreement. There would be no statutory requirement for Commission review and oversight. The agreement would not be publicly available for other carriers to review. Ultimately, Intrado argues, such an arrangement would undermine the Commission's jurisdiction over Intrado and 911/E911 services generally. Intrado points out that in Case No. 07-1216-TP-ARB, the Commission found that uninterrupted 911 service is affected with a public interest that calls for the Commission's oversight and resolution of disputes through arbitration (Intrado Reply Br. 13-14).

Pointing out differences between a commercial agreement and a Section 251(c) interconnection, Intrado highlights that a commercial agreement has nothing to do with interconnection to the PSTN. Commercial agreements are for retail services. Intrado wishes to be a competitor, not a retail customer. Intrado believes that the Section 251/252 framework is the appropriate mechanism (Intrado Reply Br. 15).

Intrado does not accept AT&T's assertion that many of the issues raised by Intrado fall outside the scope of sections 251(b) and 251(c) and thus are not subject to arbitration. By its intent to establish a mutual exchange of traffic and interoperability between the parties' networks, Intrado finds the key components of Section 251(c) interconnection. Intrado, relying on judicial precedent, also recognizes that in some circumstances, attendant issues that are themselves outside the scope of Sections 251(b) and (c) may be subject to arbitration (Intrado Reply Br. 16).

Intrado adds that some state commissions have recognized that the Section 252 arbitration process applies to all Section 251 agreements with ILECs. Intrado distinguishes the case law cited by AT&T, noting that those cases dealt with the duty to negotiate rather than arbitrate issues that fall outside of Section 251(b) and (c). Intrado believes that the true issue involves the authority of a state commission to review by means of an arbitration proceeding issues that are beyond Section 251(b) and (c) (Intrado Reply Br. 16-17).

ISSUE 1(a) ARBITRATION AWARD

In addressing what services Intrado provides or intends to provide, AT&T seeks to undermine Intrado's authority by taking the position that Intrado does not provide "telephone exchange service" or "exchange access." Claiming that Intrado has admitted that it does not provide "exchange access," AT&T focuses on whether Intrado provides telephone exchange service. To AT&T, the answer is crucial to whether Intrado can interconnect with AT&T under Section 251(c)(2)(A) of the Act.

In Case No. 07-1216-TP-ARB we stated that we had already generically addressed the issue of whether Intrado is engaged in the provision of telephone exchange services or exchange access service in Case No. 07-1199-TP-ACE. We determined that Embarq had merely repeated the position it asserted in Case No. 07-1199-TP-ACE. We, therefore, rejected Embarq's attempt to resurrect its arguments.

AT&T seeks to carve out an exception to reopen the issue by changing its approach. AT&T claims that in Case No. 07-1199-TP-ACE the Commission did not examine the elements of 47 U.S.C. §153(47) to determine whether Intrado provides telephone exchange service. Taking that approach, AT&T walks through the elements of 47 U.S.C. §153(47) and other criteria to show where Intrado's service lacks essential components of telephone exchange service.

Notwithstanding that we decided in prior cases that Intrado provides telephone exchange service, we will conduct an analysis of 47 U.S.C. §153(47). In our review of the record, we find sufficient evidence that Intrado's 911 service is telephone exchange service. First, we find that 911 service involves intercommunication. Intrado has identified the ability of its PSAP customers to communicate with other Intrado PSAP customers and AT&T's PSAP customers. The service also allows the public to communicate with PSAPs and local emergency personnel. Though somewhat limited in its ability, we find that there are more attributes than not that Intrado's service provides intercommunication. AT&T would deny the existence of intercommunication based on the limited calling choices inherent in the service. The statute, however, does not quantify intercommunication. It only requires the existence of intercommunication. Though minimal, we do find that intercommunication exists.

We also find that Intrado's 911 service operates within a connected system of telephone exchanges. We are persuaded by Intrado's argument that exchange boundaries should be read more broadly to include areas that are not coterminous with the ILEC exchange boundaries. PSAPs must have a service that takes into account the location of fire, police, and other emergency service providers within the county that it serves. Although the reach of a particular 911 service may not coincide with the boundaries of ILEC exchanges, the service does have geographical limitations that are generally

consistent with a community of interest. In this respect, we find that the service area is akin to a single exchange with EAS to neighboring exchanges. Furthermore, the Commission also agrees with Intrado that wireless carriers provide telephone exchange service and enter into Section 251 interconnection agreements even though they provide service in areas that are not coterminous with ILEC exchange boundaries.

To meet the requirement of an exchange service charge, Intrado states that it will charge PSAP customers and public safety agencies for telecommunication service. Based on its understanding of the FCC's position, Intrado believes that any service charge would be regarded as an exchange service charge. Although AT&T highlights that 911 callers are not charged and, therefore, do not incur an exchange service charge, we find sufficient evidence of an exchange service charge in the fee paid by PSAPs and public safety agencies to Intrado for the provision of telecommunications service.

Whether Intrado's PSAP customers can originate and terminate calls falls on whether calls initiated to other PSAPs and establishing two-way communications with 911 callers qualifies as originating and terminating calls. Intrado would also regard in some circumstances that call transfers and conferencing involve call originating. Again, as with "intercommunicating," the statute does not quantify "originate." We thus find that the capability of a PSAP to call to another PSAP and engage in two-way communications with 911 callers satisfies the call origination and termination requirement.

In its brief, Intrado emphasized that 47 U.S.C. §153(47) consists of two independent parts, A and B. If Intrado's 911 service satisfies the criteria of either A or B it will establish that it provides a telephone exchange service (Intrado Br. 12). Whether evaluated under part A or part B, we find that Intrado provides telephone exchange service.

AT&T argues that the Commission has no authority to arbitrate issues that fall within the ambit of Section 251(a). In *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 Cincinnati Bell Telephone Company*, Case No. 08-537-TP-ARB (Case No. 08-537-TP-ARB), we pointed out that while neither party raised the application of Section 251(a) as an issue for arbitration, it does not bar us from applying applicable law. Furthermore, we found that Section 252 endows us with arbitration and enforcement authority over all Section 251 agreements. Even though neither party has raised an issue relating to interconnection under 251(a), we are not prohibited from applying Section 251(a).

ISSUE 1(b) ARBITRATION AWARD

Intrado sought to identify the services that AT&T is required to offer interconnection under Section 251(c). Intrado takes the position that the Commission has

determined that Intrado is entitled to all rights under Section 251(c) because of its provision of competitive emergency telephone exchange services. AT&T, on the other hand, claims that it is not obligated to offer Section 251(c) interconnection to Intrado because Intrado does not provide telephone exchange service or exchange access.

In Case No. 07-1199-TP-ACE, and as recently as the Commission's January 14, 2009, entry on rehearing in Case No. 08-537-TP-ARB, the Commission determined that CESTCs are entitled to all the rights and obligations of a telecommunications carrier pursuant to Sections 251 and 252 of the Act. AT&T has not presented in this proceeding any facts or arguments that would cause the Commission to re-examine its previous determination. Moreover, our above analysis of 47 U.S.C. §153(47) leads us, alternatively, to the conclusion that Intrado provides telephone exchange service. Because Intrado is a provider of telephone exchange service, AT&T must provide interconnection to Intrado for all services offered by Intrado under its certification and subject to the further requirements of this arbitration award.

ISSUE 1(c) ARBITRATION AWARD

As a telecommunications carrier that offers telephone exchange services, Intrado is entitled to interconnection facilities and UNEs, where appropriate, at cost-based rates. Rates should be established pursuant to Sections 251 and 252 of the Act. Intrado's interconnection agreement with AT&T should include the pricing appendix typically approved by the Commission for AT&T interconnection agreements that set forth the prices to be charged by AT&T for services, functions, and facilities to be purchased in connection with the interconnection arrangements in Ohio.

For occasions when Intrado is the designated 911/E911 provider, the interconnection agreement should contain rates, such as port charges, for AT&T's interconnection to Intrado's network.

The availability and pricing of services provided by both parties is more fully discussed, below, in the Commission's award for Issue 1(d).

Issue 1(d) For those services identified in Issue 1(c), what are the appropriate rates?

The parties have presented a number of questions under the umbrella of this issue. AT&T once again argues that Intrado is not offering telephone exchange service and is, therefore, not entitled to Section 251(c) interconnection (Joint Issues Matrix filed September 23, 2008, AT&T Br. 17). Intrado argues for two points: the interconnection agreement should include rates for services provided by Intrado to AT&T, and rates for every service Intrado may purchase should be included in the interconnection agreement.

With regard to the inclusion in the interconnection agreement of rates to be charged by Intrado to AT&T, Intrado indicates that it charges port termination charges to all carriers who interconnect to their IEN and has, therefore, included these charges in the interconnection agreement. Intrado further points out its understanding that AT&T also charges port termination on carriers seeking to terminate 911 traffic on AT&T's network (Intrado Ex. 2 at 17). Intrado does not advance a specific position with regard to this issue on brief.

AT&T indicates on brief that the real issue is that Intrado wishes to include in a Section 251(c) agreement the rates that it would charge AT&T for the services Intrado seeks to provide (AT&T Br. 17). AT&T first maintains that it is improper for the interconnection agreement to include such charges, as the purpose of a Section 251(c) agreement is to allow a CLEC to obtain services from an ILEC (*Id.* at 17-18). Its second argument is that the rates are for services that AT&T is not required to purchase at all (*Id.* at 18). AT&T, in its third argument, maintains that the rates have not been reviewed by the Commission and should be reciprocal (*Id.*).

In addition, AT&T states that Intrado has provided no basis for its port termination charges, aside from indicating that they are similar to AT&T's charges imposed on competitors. AT&T further points out that the proposed rate table is titled "INTELLIGENT EMERGENCY NETWORK SERVICE E9-1-1 STANDALONE AGREEMENT," and notes that AT&T will not be purchasing Intrado's tariffed IEN service. AT&T also states that Intrado cannot compel AT&T to interconnect with it under Section 251(c), or insist on including terms for such connection in a Section 251/252 interconnection agreement. AT&T finally states its willingness to negotiate a commercial agreement for the parties' 911 interconnection (AT&T Ex. 1 at 29).+

AT&T observes that while Intrado states that its rates are similar to AT&T's, Intrado has stated that its rates are market-based and thus do not mirror AT&T's rates, as would be appropriate under Section 251(c). AT&T also observes that Intrado has a single rate across the country, while AT&T's rates vary by state (*Id.* at 30). AT&T concludes that the parties should be charging each other the same rates (*Id.* at 31). AT&T also explains that facilities and trunks are separate and distinct elements. AT&T goes on to state that when AT&T establishes trunks to Intrado, a trunk port charge may be appropriate, but notes that AT&T is not required to establish a separate point of interconnection (POI), has no duty to lease facilities from Intrado, and concludes that Intrado would have nothing to charge (*Id.* at 30).

With regard to the AT&T rates that appear in the interconnection agreement, AT&T initially argues that since Intrado is not entitled to interconnect under Section 251(c), there are no issues to arbitrate (*Id.* at 17-18, citing 47 U.S.C. §251(c)(2)(A), 47 C.F.R. §51.305(b),

and *First Report and Order* ¶191). In its reply brief, AT&T further states that paragraph 191 of the FCC's First Report and Order indicates that "Section 251(c) interconnection is only available to CLECs if they provide "telephone exchange service" or "exchange access" (*Id.* at 17).

AT&T subsequently argues that if Intrado is entitled to Section 251(c) interconnection, then the specific AT&T rates to be included in the agreement should be only those rates covered under 251(c). AT&T further states that if Intrado seeks to purchase non-Section 251(c) services those rates should not be included in the agreement. AT&T indicates that it has included language that refers to the appropriate tariffs for those non-Section 251(c) services (*Id.*).

With regard to the rates to be charged by AT&T, Intrado specifically argues that it is entitled to interconnection facilities and UNEs at cost-based rates and that all rates to be charged by AT&T should be specifically set forth in the interconnection agreement (Intrado Ex. 2 at 15). Intrado further argues that tariffs are not an appropriate mechanism for determining charges from AT&T to Intrado. Intrado further states that if AT&T can identify with specificity co-carrier interconnection pricing that has been established under Section 252(d)(1) and set forth in tariffs, Intrado could accept a reference to relevant tariffs, but AT&T has not yet done so (*Id.* at 15-16).

Intrado further expresses concern that, absent rates for services explicitly spelled out in the interconnection agreement, Intrado will be at a competitive disadvantage because Intrado will not know its operating costs. Intrado also indicates that AT&T could use the tariffed rates in an anti-competitive manner by placing resources in a given area and changing its tariffed prices for service (*Id.* at 16).

AT&T points out that there are services that Intrado may desire to purchase under certain scenarios where the terms, conditions, and prices appear in AT&T's Access Tariff, and gives the example of facilities on Intrado's side of a POI (*Id.* at 33). AT&T notes that Intrado may choose to obtain these services from another provider or by self-provision (*Id.*).[5] AT&T concludes that the interconnection agreement is not the appropriate place to price these services.

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5 Citing *In the Matter of the Establishment of Terms and Conditions of an Interconnection Agreement Amendment Pursuant to the Federal Communications Commission's Triennial Review Order and its Order on Remand,* Case No. 05-887-TP-UNC arbitration award issued November 9, 2005, (Issue 5), and Entry on Rehearing issued January 4, 2006 (¶¶ 18-20).

ISSUE 1(d) ARBITRATION AWARD

Whether Intrado is offering "telephone exchange service," and whether it is entitled to interconnection under Section 251(c) of the Act, is discussed in Issue 1(a). However, AT&T has put forward arguments in the context of Issue 1(d) that should be addressed.

First, in citing ¶191 of the *First Report and Order*, AT&T creates a conclusion that does not appear in the text. In fact, the referenced paragraph does not address the current question at all. The decision in ¶191 was whether an interexchange carrier had access to Section 251(c) interconnection. The FCC concluded that it did not because the IXC was not seeking interconnection for the purpose of providing telephone exchange service. The FCC went on to state that traditional IXCs that offer access services in competition with an incumbent LEC (i.e., IXCs that offer access services to other carriers as well as to themselves) are eligible to obtain interconnection pursuant to Section 251(c)(2).

However in this case, Intrado is engaged in the provision of telephone exchange service, even if it does not itself provide a complete telephone exchange service under its current certification. As a result, Intrado does seek interconnection for the purpose of the provision of telephone exchange service as affirmed by the Commission in Case No. 07-1199-TP-ACE.

Even if that were not sufficient reason to grant Intrado Section 251(c)(2) interconnection to AT&T's network, similar to an IXC that provides access service to other carriers in competition with the ILEC (which can obtain interconnection under 251(c)(2)), Intrado seeks to provide 911 termination services to other carriers. Intrado should, therefore, be similarly granted access to Section 251(c)(2) interconnection.

Second, AT&T cites ¶39 in the Commission's arbitration award in Case No. 07-1216-TP-ARB to support its contention that the purpose of a Section 251(c) agreement is exclusively for a CLEC to purchase services from an ILEC. Here again, AT&T's conclusion is not supported by the text. The discussion in that text is with regard to whether a process by which an ILEC can order services from a CLEC is included in an interconnection agreement, whether that inclusion is under Section 251(a) or 251(c). It does not support at all the concept that a Section 251 interconnection agreement is exclusively to allow a CLEC to purchase services from an ILEC.

As the subject of that paragraph is the determination of whether an aspect of an interconnection agreement is under Section 251(a) or 251(c), and AT&T maintains that this is a determination this Commission is prohibited from making, it seems that AT&T wishes to have it both ways. It cannot claim that the Commission was in error in the Embarq award with regard to assigning parts of the interconnection agreement to Section 251(a) and other parts to Section 251(c) and, on the other hand, cite to the very discussion it

claims was erroneous as support for its current position to deny Intrado access to a Section 251 interconnection agreement.

With regard to the inclusion of Intrado's port charges in the interconnection agreement, the Commission notes that, while there is no requirement under Section 251(c) that AT&T interconnect with Intrado on Intrado's network, pursuant to Issue 4 and 4(a), the Commission requires one POI on Intrado's network under certain circumstances. The Commission notes that under those circumstances, Intrado is required to provide for the possibility of that interconnection under Section 251(a) of the Act. As a result, Intrado is required to have rates and charges for the applicable interconnection services stated somewhere. Absent a carrier-to-carrier tariff, the most reasonable place for these rates to be listed is in an attachment to the interconnection agreement. As to the rates themselves, as proposed by Intrado, the trunk port would be the point of interconnection on Intrado's network. As such, Intrado's trunk port is defined as an interconnection facility. Consequently, the requirement that Intrado's rates mirror AT&T's port rates is not applicable here since that requirement applies only to reciprocal compensation for the transport and termination of traffic under 251(b)(5).

With regard to the explicit inclusion of all rates Intrado may pay AT&T as a result of this interconnection agreement, the Commission concludes that Intrado is mistaken on a few critical aspects of this question. Even though Intrado's purchasing of services from AT&T is subject to Section 251(c), that does not mean that all services that Intrado may wish to purchase are UNEs, or that all services it may wish to purchase are available at total element long-run incremental cost (TELRIC) or other cost-based pricing. For example, the FCC has set out explicit lists of the network elements that incumbent carriers are required to provide on an unbundled basis, and priced at TELRIC. Services or features not on those lists are available to Intrado from AT&T's Access Tariff or via a separate contract, just as it would be for any CLEC.

The Commission notes that numerous approved interconnection agreements refer to the incumbent carrier's Access Tariff for pricing, terms, and conditions of services not identified as UNEs. With regard to Intrado's concerns about the "volatility" of tariffed rates, the Commission notes that changes to AT&T's Access Tariff would be under Rule 4901:1-7-14, O.A.C., which requires a 30-day application and approval process. Given AT&T's "accessible letter" process regarding access tariff changes, Intrado would have ample notice of a pending change in rates, terms, or conditions, and would have an opportunity to be heard with regard to any change.

With regard to Intrado's suggestion that any tariff references be made specific, by identifying the tariff and/or tariffed service, this seems to create for AT&T an impossible task of predicting what Intrado would desire to purchase. Even if it were to make such a

prediction, such specificity may work against Intrado, as it could be understood to limit what Intrado might purchase from AT&T under this agreement.

Based on these considerations, the Commission concludes that AT&T's proposed language for sections CES 3.3.2 and CES 10.1, and Intrado's proposed language for section Pricing 1.1, are appropriate.

Issue 2(a) Does Intrado's certification as a CESTC entitle it to all rights and services under Section 251, including wholesale resale services and unbundled network elements?

For its position, Intrado relies on the Commission's decision in Case No. 07-1199-TP-ACE wherein the Commission determined that Intrado is entitled to all rights and obligations of a telecommunications carrier pursuant to Sections 251 and 252 of the Act. Furthermore, Intrado states that in its arbitration with Embarq[6] the Commission confirmed that Intrado is entitled to UNEs pursuant to Section 251(c). From this, Intrado concludes that it has rights under Section 251 to wholesale resale services and UNEs. Going a step further, Intrado contends that provisions concerning such services should be included in the parties' interconnection agreement (Intrado Ex. 2 at 17-18, Intrado Br. 53). More specifically, Intrado believes that it is entitled to reciprocal compensation, access to rights-of-way, and collocation (Intrado Br. 53). Intrado states that it does not dispute that there may be eligibility requirements to obtain certain UNEs. For those UNEs, Intrado states that it is committed to complying with any applicable rules (Intrado Br. 54).

AT&T argues that the Commission by its creation of a new carrier classification intended a difference between a CESTC and CLEC. If Intrado, as a CESTC, can obtain the all the rights and services available to a CLEC, there would be no practical difference between a CESTC and a CLEC. To preserve the distinction, AT&T believes that only those provisions that relate solely to CESTCs should be included in the interconnection agreement. The dispute arises because Intrado wishes to include language that would apply only to a CLEC. A concern of AT&T is that CLECs could opt into the interconnection agreement. AT&T, therefore, recommends that Intrado amend the agreement if it decides to become a CLEC (AT&T Ex. 1 at 35-36). AT&T adds that Intrado's certification as a CESTC does not entitle it to anything under Section 251 or 252. Nor, continues AT&T, is Intrado entitled to unbundled loops, a UNE, because its customers are not end users. By definition, AT&T contends that a UNE loop must serve an end user (AT&T Br. 18).

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6 *In the Matter of Intrado Communications, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with United Telephone Company of Ohio dba Embarq and United Telephone Company of Indiana dba Embarq, Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. 07-1216-TP-ARB (Case No. 07-1216-TP-ARB).

Intrado reiterates that the Commission in its Certification Order decided that Intrado is entitled to all rights under Section 251, including UNEs. As for including provisions for services that it has no authority to provide, Intrado points to Case No. 07-1216-TP-ARB where the Commission recognized that interconnection agreements are often negotiated prior to a party being granted certification to offer the services that may be covered by the interconnection agreement. Intrado contends further that the Commission determined that it would be appropriate to include services and facilities even if Intrado's current certification would bar the use of such services and facilities. Finding no reason for the Commission to alter its decision, Intrado believes that all appendices sought by Intrado, along with accompanying definitions, should be included in the interconnection agreement (Intrado Reply Br. 25-26).

ISSUE 2(a) ARBITRATION AWARD

At issue is whether Intrado has rights to wholesale resale services and UNEs. In Case No. 07-1199-TP-ACE and Case No. 07-1216-TP-ARB, we determined that Intrado, as a CESTC, is entitled to all rights and obligations under Section 251 of the Act. Section 251 of the Act, in part, sets forth the general duties of telecommunications carriers. Section 251(c) imposes a duty upon ILECs to make available unbundled access to network elements. Section 251(c) also includes a duty to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications subscribers.

AT&T takes the position that Intrado's status as a CESTC does not entitle it to anything under Sections 251 or 252. AT&T's position is directly contrary to our prior decisions. As we have previously, we find here that Intrado as a provider of telephone exchange services is entitled to all rights and obligations under Section 251 of the Act. Accordingly, Intrado is entitled to wholesale resale services.

As for UNEs, AT&T declares that unbundled loops are the only UNEs sought by Intrado for the provision of its CESTC service. AT&T rejects Intrado's entitlement to UNEs because it claims that Intrado's customers are not end users. According to AT&T, a UNE loop must serve an end user. In Issue 31, we determine that Intrado's PSAP customers are end users. Following AT&T's logic from the premise that Intrado's customers are "end users," we conclude that Intrado is entitled to unbundled loops. In sum, AT&T has asserted no facts or argument that would give us a basis for varying from the awards issued in Case Nos. 07-1199-TP-ACE and 07-1216-TP-ARB. Consequently, Intrado shall be entitled to UNEs. The Commission reminds Intrado that it may only avail itself of UNEs to the extent that it has Commission authorization to provide that service and the UNE is utilized for the intended purpose pursuant to FCC and Commission rules.

Issue 2(b) Which appendices should be included in the interconnection agreement?

It is Intrado's position that the interconnection agreement should include all appendices normally offered to competitors. Intrado explains that the Commission determined in Case No. 07-1199-TP-ACE that Intrado is entitled to all rights of a telecommunications carrier pursuant to Section 251. Included among those rights, according to Intrado, are reciprocal compensation, wholesale resale services, access to rights-of-way, UNEs, and collocation. Intrado states that AT&T specifically disputes Intrado's entitlement to UNEs and wholesale resale services (Intrado Br. 53).

Relying on Case No. 07-1216-TP-ARB, Intrado claims that the Commission has already determined that Intrado is entitled to UNEs under Section 251(c). As a "telecommunications carrier" providing a "telecommunications service," Intrado contends that it is entitled to a UNE under Section 251(c)(3) upon requesting it for the provision of a telecommunications service. Intrado acknowledges that there may be eligibility requirements for some UNEs. In those cases, Intrado states that it is willing to comport with those requirements. Being eligible for UNEs, Intrado believes that the interconnection agreement should reflect its eligibility (Intrado Br. 53-54).

Because it may seek to expand its certification and local service offerings, Intrado requests that the interconnection agreement not be limited to Intrado's provision of 911/E911 service (Intrado Ex. 2 at 18-19). To offer those additional services, Intrado will need to strike an agreement with AT&T. In doing so, Intrado argues that it would not be unlike other carriers that do not use all available services, facilities, and functions under an existing agreement. To deny the inclusion of additional services, argues Intrado, would single it out for an overly restricted interconnection agreement (Intrado Br. 55).

Intrado recalls that in Case No. 07-1216-TP-ARB, the Commission recognized that negotiations for services to be included in an interconnection agreement may precede certification. Moreover, Intrado recalls that the Commission determined that it was appropriate for Intrado to include services in the interconnection agreement that go beyond its current certification. Intrado urges the Commission to remain consistent and allow it to include all appendices normally included in an interconnection agreement. Intrado states that the parties have already expended a significant amount of time and resources negotiating both 911/E911 services and non-911/E911 services. To exclude non-911/E911 provisions would cause Intrado to negotiate and arbitrate those provisions again. Intrado, therefore, requests that all appendices and accompanying definitions be included in the interconnection agreement at this time (Intrado Br. 54-56).

Starting from the position that Intrado is not authorized to provide local exchange service, AT&T proposes to exclude from the interconnection agreement those appendices

that relate to local exchange service. AT&T's witness lists the specific appendices that should be included (AT&T Ex. 1 at 36). In addition, AT&T wants to exclude resale services and UNEs from the list of products that AT&T would provide to Intrado under the interconnection agreement. AT&T explains that resale services and UNEs are associated with the provision of basic local exchange service. Because Intrado is not certified to provide local exchange service, local service provisions should be omitted from the interconnection agreement. AT&T identifies those specific appendices that it wishes to exclude (AT&T Ex. 1 at 37-39).

For similar reasons, AT&T seeks to exclude from the interconnection agreement the UNE appendix. Without local exchange service authority, AT&T states that Intrado would have no use for UNEs. AT&T indicates that its argument hinges on the definition of end users and the availability of UNEs for end users, as discussed in Issue 31. According to AT&T, Intrado argues that its PSAP customers are end users, supposedly to qualify for unbundled loops (AT&T Ex. 1 at 39).

AT&T rejects Intrado's claim to all rights and services under Section 251. AT&T does acknowledge that the Commission stated that Intrado is entitled to all rights and obligations of a telecommunications carrier pursuant to Sections 251 and 252. AT&T points out that the Commission added that its certification decision does not address the appropriateness and scope of any specific request for interconnection. Cases would be decided on case-specific facts of Intrado's proposal (AT&T Ex. 1 at 39-40). AT&T's witness further points out that if the Commission decides in favor of AT&T on Issue 2(b) other issues will be moot, specifically issues 6, 13(a), 13(b), 15, 29(a), and portions of issues 3, 4(c), and 7(a) (AT&T Ex. 1 at 40).

In its brief, AT&T denies that Intrado, as a CESTC, is entitled to anything under Section 251 or 252. Because Intrado does not intend to resell any of AT&T's local services, AT&T believes that the interconnection agreement should not contain any provisions for resale. In particular, AT&T claims that Intrado is not entitled to wholesale resale services or UNEs such as unbundled loops. AT&T reasons that unbundled loops would only be available to Intrado if its customers were end users. AT&T does not regard PSAPs as end users (AT&T Br. 18).

Intrado asserts that AT&T is wrong in saying that Intrado, as a CESTC, is not entitled to anything under Section 251 or 252. Intrado repeats that the Commission decided in its Certification Order that Intrado is entitled to all rights under Section 251. To Intrado, that should be sufficient to settle the issue. Insofar as including in the interconnection agreement services which Intrado is not eligible to provide, Intrado points out in Case No. 07-1216-TP-ARB that the Commission recognized that interconnection agreements are often negotiated prior to the grant of certification to offer services that may be covered by the interconnection agreement. Intrado adds that the Commission also

determined that it was appropriate to include services and facilities in the interconnection agreement even if Intrado's current certification would bar access to those services and facilities. Based on this notion, Intrado advocates for the inclusion of all appendices in the interconnection agreement (Intrado Reply Br. 25-26).

Contrary to Intrado's reading of Case No. 07-1216-TP-ARB, AT&T states that the Commission rejected Intrado's argument in support of including services and facilities for which Intrado has no to authority provide. AT&T quotes and highlights language from the Commission's award to emphasize the scope and limitations of Intrado's certification.

Although Intrado wishes to include all appendices in the interconnection agreement, AT&T believes that only those appendices related to the actual service provided should be included. Conversely, AT&T would exclude those appendices relating to local exchange service because Intrado is not authorized to provide local exchange service (AT&T Br. 18-19).

AT&T is concerned that the inclusion of such appendices would burden AT&T's field personnel concerning which services Intrado is authorized to order. AT&T would also have to monitor the appendices to ensure that they are amended to updated with changes in law. Including the appendices, argues AT&T, would imprudently add voluminous surplusage to the interconnection agreement. AT&T would prefer to amend the agreement in accordance with the services that Intrado obtains authority to provide (AT&T Br. 18-19, AT&T Reply Br. 17).

ISSUE 2(b) ARBITRATION AWARD

AT&T argues that Intrado is not authorized to provide local exchange service. For that reason, AT&T seeks to exclude from the interconnection agreement sections such as resale services, UNE product lists the UNE appendix, and appendices that relate to local exchange service. These sections, AT&T explains, relate to local exchange service and, therefore, should be excluded. Moreover, AT&T points out that Intrado does not intend to resell AT&T's local services. AT&T, therefore, urges exclusion of resale provisions.

The positions asserted by AT&T have been considered and decided in Case Nos. 07-1199-TP-ACE and 07-1216-TP-ARB. In Case No. 07-1216-TP-ARB, specifically, we decided to allow the parties to include in the interconnection agreement provisions that Intrado lacked present authority to provide. We did, however, agree with Embarq that clarifying language should be included that "Intrado should not be allowed to avail itself of services or facilities that exceed the scope of Intrado's certification." We determined that such a provision was in line with Rule 4901:1-6-10(E)(3), O.A.C., which provides for the negotiation of an interconnection agreement prior to granting certification. As in Case No.

07-1216-TP-ARB we shall permit the interconnection agreement to contain appendices relating to local exchange service.

This finding is even more appropriate in light of the fact that Intrado has a pending CLEC certification before the Commission in Case No. 08-1289-TP-ACE, *In the Matter of Intrado Communications Inc. to Provide Facilities-Based and Resold Local Exchange Company Services in the State of Ohio* (08-1289). Pursuant to the Commission's entry on February 25, 2009, this application should follow the automatic approval process. Thus, Intrado's CLEC certification case will be effective on March 9, 2009. Again, however, the Commission reminds Intrado that services, or elements it receives from AT&T for the provision of its services pursuant to its CLEC authority should only be used to provide its CLEC services and those services, or elements it obtains from AT&T for its CESTC offering should be utilized as such.

Issue 2(c) Should the interconnection agreement include definitions for terms not utilized in the interconnection agreement?

In Issue 2(c), AT&T seeks to exclude the definition of terms that are not used in the interconnection agreement. If the Commission excludes from the agreement the local service appendices noted by AT&T, AT&T would urge the Commission to exclude as well those definitions associated with the excluded appendices (AT&T Ex. 1 at 40-41, AT&T 19-20, AT&T Reply Br. 17).

As with all appendices, Intrado advocates for the inclusion of all definitions in the interconnection agreement. Noting the time and resources spent toward reaching a comprehensive agreement, Intrado wants to include all appendices and definitions to avoid renegotiating and likely arbitrating provisions that are currently on the table (Intrado Ex. 2 at 19, Intrado Br. 55-56, Intrado Reply Br. 26).

ISSUE 2(c) ARBITRATION AWARD

With our decision to include all appendices, this issue is moot. AT&T's desire to exclude definitions of terms that are not used in the interconnection agreement is contingent upon the removal of appendices containing certain terms. Because we have decided that it is appropriate to include all appendices, the corresponding terms are relevant and should be defined.

Issue 3: What trunking traffic routing arrangement should be used for the exchange of traffic generally?

There are two contract provisions that are in dispute regarding Issue 3. First, whether the terms of the Competitive Emergency Services (CES) Appendix arise from

Section 251 of the Act or from the Commission's requirements. And second, whether Intrado shall be required to establish trunks to each AT&T local tandem in a LATA where Intrado offers non-911 service or whether it is at Intrado's option.

First, AT&T contends that Intrado is only certified, currently, as a CESTC, and the limits related to that certification come from the PUCO rather than 251. AT&T avers that its language reflects the fact that Intrado is not entitled to Section 251(c)(2) interconnection, is not a CLEC, and is not seeking typical CLEC arrangements in a Section 251(c) interconnection agreement (AT&T Br. 20).

Intrado argues that the Commission has already determined that Intrado is entitled to interconnection pursuant Section 251 (Intrado Ex. 1 at 9). Intrado points out that in every other state except Ohio, the parties have agreed to use the language "Section 251 of the Act" in this provision. Intrado avers that there is no reason for Ohio to be treated differently than the other states in which the parties will interconnect their networks. (*Id.*) At a minimum, Intrado suggests that the Commission should adopt language indicating that Section 251 of the Act and the Commission govern the source of 911 interconnection arrangements between the parties (*Id.*).

Next, AT&T contends that once Intrado obtains CLEC certification, it should be required to establish a trunk group to each AT&T local tandem in a LATA where Intrado offers non-911 service because without such trunk groups there is a possibility that there could be misrouted traffic or blocked calls (AT&T Ex. 2 at 16). AT&T contends that its proposal follows standard industry practice and routing principles embraced by the industry using the Local Exchange Routing Guide (LERG) (AT&T Ex. 2 at 16-17). AT&T contends that it is unclear why Intrado objects to establishing these trunk groups, since AT&T will provide them to Intrado at no charge, eliminating any economic burden on Intrado to establish trunks in order to prevent misrouted calls (Joint Issues Matrix).

Intrado claims that AT&T's proposed language requiring Intrado to establish trunking to every tandem in a LATA or to every originating office connected to a tandem goes beyond Intrado's obligations when providing non-911 traffic. Intrado argues that it is entitled to establish, pursuant to Section 251, a single POI per LATA and is under no obligation to establish additional facilities beyond that POI. AT&T's language, Intrado avers, would require just that (Intrado Ex. 1 at 9- 10).

ISSUE 3 ARBITRATION AWARD

Regarding the first of the two contract provisions in dispute for Issue 3, the Commission in Case No. 07-1199-TP-ACE determined that the services Intrado sought to provide qualified it as a telecommunications carrier, inasmuch as it would be engaged in the transmission of a telephonic message. Accordingly, the Commission found that

Intrado was entitled to all rights and obligations of a telecommunications carrier pursuant to Sections 251 and 252 of the Act. The Commission in its certification order also determined that the competitive services that Intrado intended to provide were so unique that it should not be classified as a CLEC but under the new designation CESTC and placed restrictions on what a CESTC could provide. As a telecommunications carrier, a CESTC has certain rights and obligations under sections 251 and 252 of the Act. Sections 251 and 252 of the Act give the states the responsibility and authority to implement and enforce some of those rights and obligations. In Ohio, the responsibility and authority are vested in this Commission. The two components (rights/responsibility vs. authority to implement and enforce) are not reasonably severable in that either, absent the other, is of no effect. As the Commission has placed unique parameters on CESTCs and has also determined that CESTCs have rights and obligations under sections 251 and 251 of the Act, the Commission directs the parties to adopt language, in CES 9.1, indicating that 911 interconnection arrangements between the parties are governed by Section 251 of the Act and this Commission.

With respect to the language in dispute in the ITR Appendix, the second disputed contract issue, the Commission finds that, given the benefits, and the fact that Intrado will incur no costs, Intrado should be required to establish a trunk group to each AT&T local tandem in a LATA where Intrado offers non-911 service. While the Commission agrees with Intrado that it is not legally obligated to establish more than a single point of interconnection with AT&T, the Commission is basing its decision on the record in this proceeding where AT&T demonstrated that the lack of such trunk groups could result in misrouted traffic or blocked calls. Furthermore, the benefit to Intrado from the deployment of such trunk groups and the fact that AT&T will provide the trunk groups to Intrado at no charge does not harm Intrado and may even serve to benefit Intrado by reducing or eliminating blocked or misrouted traffic. Therefore, AT&T's language for ITR 4.2 should be adopted.

Issue 3(a) What trunking and traffic routing arrangements should be used for the exchange of traffic when Intrado Comm is the designated 911/E911 service provider?

The disputes contained in Issue 3(a) revolve primarily around the routing of 911 traffic in split wire centers (i.e., wire centers whose customers are served by more than one PSAP). In this regard, the issue between the parties arises where the PSAPs in question are themselves served by different carriers, one of them being a CESTC. The main dispute is whether, in such a split wire center, a local exchange carrier should be required to establish direct trunking to the selective router of the E911 provider to that PSAP, and specifically if AT&T should be required to do so. As a secondary question, if direct trunking is not required, which carrier's selective router should be designated the primary selective router for that wire center. As ancillary issues, the parties dispute whether it is

appropriate to limit the language in Section CES to the provision of Wireline 911 services, and the use of the term "database" as opposed to "DBMS" (an acronym for Database Management System).

Intrado is seeking to require AT&T to use dedicated trunking from its end offices to deliver its end users' 911 calls to Intrado's selective router, when Intrado is designated as a 911 service provider, in split wire centers. Intrado claims that establishing dedicated trunking from AT&T's end offices to Intrado's selective router is technically feasible and provides the most reliable 911 network (Intrado Ex. 1 at 16, 19). Intrado points out that existing interconnection arrangements established by AT&T require CLECs to establish dedicated and redundant trunking from the CLEC's POI on AT&T's network to each selective router serving the geographic area in which the CLEC is offering service (Intrado Ex. 1 at 12-13). Intrado contends that it is not requiring AT&T to implement line attribute routing and has simply offered line attribute routing as a possible method for AT&T to determine over which dedicated trunk to route its 911 calls to reach the appropriate Intrado PSAP customer (Intrado Br. 29).

As a threshold matter, AT&T argues that Intrado's direct trunking proposal seeks to dictate how AT&T routes 911 traffic on AT&T's side of the parties' POI. AT&T argues that this Commission has held in previous cases that carriers are responsible for routing and carrying traffic on their own side of a POI and that other carriers cannot dictate those arrangements. Therefore, as long as AT&T gets 911 traffic to the POI, Intrado should not be able to dictate how it does so (AT&T Ex. 2 at 23-24). AT&T contends that Intrado's proposal would require AT&T to implement and pay for an entirely new system called Class Marking or Line Attribute Routing (AT&T Ex. 2 at 21). AT&T contends that implementing class marking would create serious reliability concerns and would be extremely complex, expensive, and time consuming. AT&T also states that Intrado is not willing to pay any of the related costs, preferring instead to shift the entire burden to AT&T. AT&T claims that it would have no way to recover those expenses (AT&T Ex. 2 at 25). AT&T points out that the difference between Class Marking and Line attribute Routing is that Line Attribute Routing is an automated process (AT&T Ex. 2 at 21, footnote 6). Class Marking, AT&T explains, is used to perform individual line screening on each subscriber line. Thus, AT&T avers, instead of being sent to a selective router, every 911 call would be routed directly to a PSAP from each end office, or in the case of Intrado, to Intrado's selective router (*Id.*) AT&T claims that it is unaware of any ILEC or CLEC in the country that uses class marking for 911 calls today, and Intrado has not identified any (AT&T Ex. 2 at 22). AT&T also indicates that Intrado's proposal creates reliability concerns. "Once one begins moving the call-sorting responsibility out to the end offices, and away from a centralized process, it expands the area where we have to maintain the routing of 911 traffic to numerous end offices" (AT&T Ex. 2 at 32).

AT&T claims the only alleged justification for Intrado to require direct trunking, no matter what the costs or risks, would be to avoid having to pay AT&T for selective routing when AT&T is the primary selective router and sends 911 calls to Intrado as the secondary selective router (AT&T Ex. 2 at 30–31). AT&T contends that this makes no sense in Ohio as AT&T does not charge other carriers for selective routing in split wire centers when it is the primary selective router. Thus claims AT&T, Intrado's alleged fear of having to pay AT&T as the primary selective router is unfounded (AT&T Ex. 2 at 31).

AT&T contends that Intrado's alternative proposal that Intrado always be designated as the primary selective router regardless of how many end users are served is fundamentally unfair (AT&T Ex. 2 at 35). AT&T avers that since its inception, 911 calls in a split wire center have been routed to the designated primary selective router which then either routes the call directly to a PSAP served by that router or, if necessary, sends the call to the secondary selective router which then sends the call to the correct PSAP served by that router (AT&T Ex. 2 at 19). AT&T claims that the determination of which carrier's selective router is primary and which is secondary, is typically based on which router serves PSAPs that serve the clear majority of access lines in the wire center. AT&T avers that this is the fairest, most logical, and most efficient method and is how AT&T deals with wire centers that are split between its PSAP customers and PSAP customers of an adjacent ILEC (*Id.*). AT&T explains that the basic assumption behind making the carrier whose PSAP serves the most access lines be the primary selective router is that more 911 calls will be headed to that carrier's PSAP customer, so it makes sense to route all 911 calls to that selective router first. AT&T contends that under Intrado's proposal, if Intrado's PSAP serves ten percent of the lines and AT&T's PSAP serves 90 percent of the lines in a wire center then 90 percent of 911 calls would leave AT&T's network and go to Intrado's selective router only to return to AT&T's network (AT&T Ex. 2 at 35-36).

With regard to the limitation of Section CES to "wireline" 911 services, Intrado states that it is opposed to the limitation because Intrado may be the designated 911/E911 service provider for more than wireline traffic. Intrado notes that the Commission has recognized that there are different "types" of telecommunications services (i.e., wireline, wireless, voice over Internet protocol (VoIP)) and that one provider may carry multiple types of 911/E911 calls (Joint Issues Matrix at 16). Intrado states that, as one 911 services provider may carry multiple types of calls, AT&T's use of the limiting term "wireline" is not consistent with the Commission's order on Intrado's certification (Intrado Ex. 1 at 11).

AT&T states that it proposes that CES sections 5 and 6 reflect the parties' respective responsibilities when Intrado is the designated wireline 911 service provider. AT&T posits that these provisions are limited to wireline services because AT&T only serves wireline end users, and it is those wireline end users that will access Intrado's 911 customers. The fact that Intrado may be the 911 provider for other services (e.g., wireless, nomadic VoIP)

is irrelevant to the parties' interconnection agreement because AT&T will not route wireless or nomadic VoIP traffic to Intrado (*Id.*).

With regard to the use of the terms 'database" and "DBMS," Intrado maintains that the interconnection agreement should use the defined term "DBMS" rather than the undefined term "database" (Joint Issues Matrix at 16). Intrado states that it prefers to use defined rather than undefined terms in the interconnection agreement (Intrado Ex. 1 at 11-12).

ISSUE 3(a) ARBITRATION AWARD

With regard to the trunking arrangements used for the exchange of 911 traffic when Intrado is the designated 911 service provider, the Commission finds that, consistent with our previous arbitration awards in Case Nos. 08-537-TP-ARB and 07-1216-TP-ARB, AT&T is generally entitled to route its end users' 911 calls to the POI and engineer its network on its side of the POI. The Commission also determined in those cases that consistent with the FCC's findings in *In the Matter of the Revision of the Commissions Rules to Ensure Compatibility with Enhanced 911 Emergency Systems, Request of King County,* 17 FCC Rcd. 14789, ¶1 (2002), and with certain geographic limitations, the POI for 911 traffic should be at the selective router of the E911 service provider that serves the caller's designated PSAP. Each party should bear the cost of getting to the POI.-

Therefore, unless the parties come to a mutual agreement regarding the designation of primary and secondary selective routers in split wire centers, AT&T should deliver its end users' 911 calls destined for PSAP customers of Intrado to Intrado's selective router serving that PSAP. In addition, Intrado should deliver its end users' 911 calls destined for PSAP customers of AT&T to AT&T's selective router serving that PSAP. Consistent with our previous findings, AT&T is not required to establish direct trunking to Intrado's selective router(s) where Intrado is the 911 provider to a PSAP. AT&T will, therefore, be able to engineer its network on its side of the POI, including the use of its selective router(s), for delivery of its end users' 911 traffic to Intrado's selective router.

As to the inclusion of the identifier "Wireline" in CES sections 5 and 6, if, as AT&T indicates, these sections are of no effect unless Intrado is designated as the wireline provider, then the addition of the term wireline to the sections is, by definition, unnecessary.

As a final matter, regarding the use of the defined term "DBMS" as opposed to "database," the Commission notes that the definition of DBMS itself in CES Section 2.8 identifies it as a "Database Management System." In the common usage of the terminology, and as the full wording of the acronym indicates, a DBMS is a system to manage a database. In reviewing the language in question, the Commission finds that

AT&T's proposed usage of each term is clear in meaning and consistent with the general usage of the terminology, and thus should be adopted.

Issue 4 What terms and conditions should govern points of interconnection generally?

Issue 4(a) What terms and conditions should govern points of interconnection when Intrado is the designated 911/E911 service provider?

AT&T is seeking to require Intrado to interconnect its non-911 PSTN traffic at an AT&T tandem or end office. AT&T argues that if Intrado desires to connect at some other point on AT&T's network, it would need to be mutually agreed to by the parties (AT&T Ex. 2 at 46). AT&T contends that it may have existing spare facilities and may agree to other POIs. AT&T contends that its proposed language follows existing law and will minimize potential disputes when establishing interconnection arrangements between the parties (AT&T Ex. 2 at 46-47).

Intrado avers that for non-911 traffic it is entitled to designate any technically feasible location within AT&T's network for the POI and is not limited to AT&T's end office or tandem as AT&T's language requires (Intrado Ex. 1 at 23).

Where Intrado is the designated 911 service provider, Intrado is proposing language requiring AT&T to transport its end users' emergency calls destined to Intrado's PSAP customers to two geographically diverse POIs on Intrado's network, which would be Intrado's selective router/access ports (Intrado Ex. 1 at 23-24). Intrado claims that ILECs like AT&T also impose this type of arrangement on CLECs seeking to terminate 911 service traffic on the ILEC's network. Intrado claims that it simply seeks to mirror the type of interconnection arrangements that AT&T and other ILECs have determined to be the most efficient and effective for the termination of emergency calls (Intrado Ex. 1 at 25). Intrado points out that where AT&T serves as the 911 service provider it routinely designates the location of its selective routing access ports as the POI for telecommunications entities to gain access to the 911 services AT&T provides to PSAPs. This POI, Intrado emphasizes, is in addition to the POI designated by the CLEC on AT&T's network for the exchange of other Section 251(c) traffic. Intrado further asserts that AT&T's POI arrangements with other ILECs are further evidence that industry practice calls for 911 calls to be delivered to the selective router serving the PSAP (*Id.* at 25).

Intrado explains that its proposal to require two geographically diverse POIs on Intrado's network when Intrado is the 911 service provider makes sense as the critical nature of 911 communications demands diversity and redundancy (Intrado Ex. 1 at 27).

Intrado further asserts that geographically diverse routes for 911 traffic are consistent with industry guidelines and recommendations (*Id.* at 28).

AT&T agrees with Intrado that redundant diverse facilities should be established for the exchange of 911 traffic; however, AT&T recommends that Intrado establish multiple POIs on AT&T's network (AT&T Ex. 2 at 43). AT&T is proposing that the parties interconnect their networks at AT&T's selective router and exchange 911 traffic with each other there. AT&T avers this position makes the most sense from an engineering and service viewpoint, as the parties will each have facilities at that location. AT&T contends that it also makes sense from a regulatory perspective, which requires a carrier connecting to an ILEC under Section 251(c) to establish the facilities to connect to the ILEC network. AT&T further argues that the purpose of a POI is to allow the mutual exchange of traffic between the interconnected carriers, and it makes no sense to require separate POIs for the interconnection of Carrier A to Carrier B and for Carrier B to Carrier A, when instead there can be one POI to serve both (AT&T Ex. 2 at 40).

ISSUES 4 and 4(a) ARBITRATION AWARD

In our prior decisions, the Commission determined that, consistent with the FCC's findings, the point of interconnection to the wireline E911 network, with certain geographic limitations, is at the selective router of the E911 network provider and that each party bears the cost of getting to the POI. The Commission, therefore, finds, unless otherwise mutually agreed to, that the 911 traffic terms and conditions established by the parties reflect that each party is responsible for getting its end users' 911 calls to the selective router of the 911 service provider to which a 911 call is destined. In other words, AT&T would need to establish a POI on Intrado's selective router for the delivery of its end users' 911 calls to PSAP customers of Intrado, and Intrado must establish a POI on AT&T's selective router for the delivery of its end users' 911 calls to PSAP customers of AT&T.

With respect to the number of POIs that must be established on a selective router for the delivery of 911 traffic, the Commission has previously determined that for 911 traffic there were no existing requirements to establish multiple POIs on a selective router for the delivery of end users' 911 calls destined for a PSAP served by that selective router. The Commission, therefore, rejected requiring the establishment of multiple POIs on the 911 service provider's selective router. Finding no new evidence to overturn this decision, the Commission again finds that establishing multiple POIs on the 911 service provider's selective router is not required at this time. As with the previous ruling, this does not preclude the parties from otherwise mutually agreeing to additional points of interconnection at any technically feasible point.

To the extent Intrado does not want to interconnect at an AT&T tandem or end office to exchange non-911 PSTN traffic, Intrado would be within its rights to request interconnection at any technically feasible point on AT&T's network. If the parties cannot mutually agree to terms and conditions for the type of interconnection requested by Intrado, the dispute can be brought before the Commission for resolution at that time.

4(c) What terms and conditions should govern points of interconnection when a fiber mid-span meet is used?

Intrado contends that if the parties were to interconnect using a mid-span meet, the parties would negotiate a point at which one carrier's responsibility for service ends and the other carrier's begins, and each party would pay its portion of the costs to reach the mid-span meet point. Intrado avers that each carrier is required to build to the mid-span meet point even if the ILEC is required to build out facilities to reach that point. Intrado avers that its proposed language reflects theses concepts (Intrado Ex. 1 at 32-33).

AT&T contends that Intrado's proposed mid-span meet point does not comport with federal law and grants Intrado sole discretion as to when, where, and how to establish a POI (AT&T Ex. 2 at 47). AT&T contends that interconnection at a location other than AT&T's end office or tandem building would be an expensive form of interconnection, for which Intrado must bear the cost (Joint Issues Matrix filed February 2, 2009, at 27).

ISSUE 4(c) ARBITRATION AWARD

The Commission does not agree with AT&T's assessment that Intrado's proposed language allows Intrado to determine unilaterally the location of the meet point. The language proposed by Intrado would allow for a meet point at an AT&T tandem or end office as agreed to by AT&T, or at some other mutually agreeable point. Therefore, if AT&T does not agree to a meet point requested by Intrado, it is not mutually agreed to, and AT&T would not be required to establish facilities to that meet point. The Commission, therefore, adopts Intrado's proposed language that would allow the parties to establish POIs at mutually agreeable points other than AT&T's tandems and end offices.

Issue 5(a) **Should specific terms and conditions be included in the ICA for inter-selective router trunking? If so, what are the appropriate terms and conditions?**

Issue 5(b) **Should specific terms and conditions be included in the ICA to support PSAP-to-PSAP call transfer with automatic location information (ALI)? If so, what are the appropriate terms and conditions?**

Intrado is proposing terms and conditions to be included in the interconnection agreement for inter-selective router trunking. Intrado explains that inter-selective router trunking is trunking deployed between selective routers that allows 911 calls to be transferred between selective routers and, thus, between the PSAPs served by the selective routers. Intrado contends that AT&T must ensure its network is interoperable with another carrier's network for the provision of 911 services. Intrado avers that the establishment of inter-selective router trunking as requested by Intrado will ensure that PSAPs are able to communicate with each other and still receive access to essential ANI/ALI information (Intrado Ex. 1 at 33-34). Intrado argues that interoperability using the capabilities inherent in each 911 service provider's selective router and ALI database system enables call transfers to occur with the ANI and ALI associated with the emergency call to remain with the voice communication when a call is transferred from one 911 service provider to another (Intrado Ex. 1 at 34).

Other than the public safety benefits, Intrado avers that this Commission, in its order certifying Intrado as a CESTC, recognized that interconnection between 911 service providers is necessary to ensure transferability across county lines and call/data transferability between PSAPs (Intrado Ex. 1 at 35).

AT&T argues that Intrado's proposed language requiring AT&T to implement the capability for PSAP-to-PSAP call transfers with ALI everywhere does not belong in an interconnection agreement, and should not be done with fixed contract terms between AT&T and Intrado. Rather, AT&T contends, the PSAPs at issue must be involved in the negotiations and all three parties must work together to formulate a written agreement. AT&T avers that not all PSAPs desire this capability for PSAP-to-PSAP call transfers and when they do formally request such call transfer capability, they may not all want to set it up in the same way (AT&T Ex. 2 at 49-50). AT&T also points out that unlike facility and trunking arrangements in a Section 251/252 interconnection agreement, these facilities and trunks would be deployed not to effectuate interconnection between AT&T and Intrado, but rather solely to meet a specific request of the E911 customers, who will not be a party to this agreement (AT&T Ex. 2 at 52).

While Intrado agrees that counties and PSAPs should be involved and advised on the inter-tandem functionality that is desired and, therefore, should be deployed between

the parties, Intrado does not agree that formal written PSAP approval is necessary before the deployment of inter-selective router trunks. Each party, Intrado argues, is responsible for its PSAP or county customers and can provide them with any information it deems appropriate (Intrado Ex. 1 at 35).

AT&T contends that implementing this capability would require AT&T to incur costs for facilities, trunks, database storage, extensive translations, and testing. Moreover, AT&T regards this work as highly specialized and, consequently, there are few technicians that are trained and qualified to work on 911 translations. The work, AT&T explains, is not routine business (AT&T Ex. 2 at 50). AT&T claims that Intrado is not willing to bear any of these costs and instead wants to shift the costs to AT&T. AT&T explains that today, if AT&T were to incur the costs to implement selective router-to-selective router call transfers, the requesting PSAP would compensate AT&T for those costs. Under Intrado's proposal, AT&T avers, AT&T would be required to incur all the costs to implement this capability, regardless of whether any PSAP requested it, yet neither the PSAP nor Intrado would compensate AT&T for any of its costs (AT&T Ex. 2 at 50-51). AT&T argues that such costs should only be incurred at the PSAP's request, since there would otherwise be no need to incur the expense of providing facilities and trunks for a capability that the PSAP did not request or intend to use (AT&T Ex. 2 at 52).

Intrado, on the other hand, states that its position is consistent with prior Commission findings. Intrado avers that the Commission in Case No. 07-1216-TP-ARB determined that interconnection agreements should contain the framework for interconnection and interoperability of the parties' networks through inter-selective routing and rejected requiring that PSAPs provide input into the inter-selective router arrangements to be established between Intrado and Embarq (Intrado Ex. 1 at 35-36).

While AT&T acknowledges the Commission required a similar approach in Case No. 07-1216-TP-ARB, AT&T contends the Commission decision overlooks the key factor of compensation, since there is no mechanism for Embarq to recover any of its costs of implementing Intrado's proposal from either Intrado or any PSAP. AT&T points out that the Commission expressly recognized that PSAPs should have a say in how call transfer capability is implemented and necessarily required the affected PSAPs to be consulted before any such capability is implemented and be allowed to participate in the planning (AT&T Ex. 2 at 53). AT&T contends that this decision makes sense and is consistent with AT&T's proposal with the exception that the Embarq decision includes PSAP-to-PSAP call transfers as part of a Section 251/252 interconnection agreement and will prevent Embarq from recovering its costs from the involved PSAP (AT&T Ex. 2 at 54).

AT&T avers that it would not refuse to implement the facilities and trunks required for PSAP-to-PSAP call transfers if Intrado's language is not accepted. AT&T contends that its proposed language would require both Intrado and AT&T to work together and enter

into a separate agreement--with the assistance of the PSAPs and necessary government agencies--to effectuate such an arrangement. AT&T contends that accepting its proposed language would require AT&T to work with Intrado and allow PSAPs to remain in the picture to ensure that the specific functionalities that they request are provided in a manner acceptable to them (AT&T Ex. 2 at 52-53).

ISSUES 5(a) and 5(b) ARBITRATION AWARD

In the Commission's previous awards, as in this one, the Commission determined that Section 251(a) of the Act is the applicable statute relative to the scenario in which Intrado and an ILEC each serve as primary providers of 911 service to different PSAPs and transfer calls between each carrier's selective routers in order to route properly a 911 call (inter-selective routing). The Commission has also concluded previously, as it does here, that it is appropriate to include terms and conditions for Section 251(a) arrangements in the parties' arbitrated interconnection agreement. In Case No. 07-1199-TP-ACE, the Commission required that each designated CESTC shall interconnect with each adjacent countywide 911 system to ensure transferability across county lines (Case No. 07-1199-TP-ACE, Finding and Order issued February 5, 2008, at 9). Additionally, the Commission required that each CESTC be required to ensure call/data transferability between Internet protocol (IP) enabled PSAPs and non-IP PSAPs within the countywide 911 systems it serves, and to other adjacent countywide 911 systems, including those utilizing non-IP networks which are served by another 911 system service provider (*Id*). As this call transfer capability is effectuated via inter-selective router trunking, the Commission determined in Case No. 07-1216-TP-ARB, that it has effectively required the availability of inter-selective router trunking between adjacent countywide 911 systems and between Intrado and other 911 carriers. Thus, the Commission concurred with Intrado that the interconnection agreement should contain the framework for interconnection and interoperability of the parties' 911 networks through inter-selective routing. The Commission sees no reason to deviate from this determination in this instance. While both parties and the Commission agree that PSAP input is important, the Commission agrees with Intrado that the interconnection agreement should contain the framework for establishing the interconnection and interoperability of the parties' networks to ensure inter-selective router capabilities can be provisioned once requested by an Ohio county or PSAP.

The Commission notes that the decision to include terms and conditions for inter-selective routing in Case No. 07-1216-TP-ARB, did not exclude Embarq from receiving compensation for implementing PSAP-to-PSAP call transfers from either the PSAP or Intrado. Similarly, the Commission finds our decision here to include inter-selective routing terms and conditions does not preclude AT&T from receiving compensation for implementing PSAP-to-PSAP call transfers, where it provides that functionality.

Issue 6 Should reciprocal requirements for trunking forecasting, ordering and service grading be included in the agreement?

With regard to Issue 6(a), trunking forecasting, the Revised Joint Issues Matrix filed on February 2, 2009, indicates that this issue has been resolved.

With regard to Issue 6(b), the ordering process, Intrado, in its initial brief, points out that it has provided a detailed description of its ordering process, that it has stated that its processes are compliant with the ATIS-OBF Access Service Request process, much like AT&T uses today, and that its witness had already acknowledged that Intrado would accept language indicating that its ordering system would be consistent with industry standard terms. Intrado finally states that AT&T can change its ordering systems as easily as Intrado can, and notes that the rates that Intrado can charge are limited to those included in the interconnection agreement (Intrado Br. 59-60). In its reply brief, Intrado references the arbitration award in Case No. 07-1216-TP-ARB to support its contention that Intrado's proposed language be included in the agreement (Intrado Reply Br. 27).

AT&T notes in its initial brief that the process by which AT&T would order services from Intrado is "outside the scope of a Section 251(c) interconnection agreement" (AT&T Br. 38, citing Case No. 07-1216-TP-ARB at 39). AT&T states that the "only appropriate ordering process for use in the interconnection agreement is AT&T's ordering process." AT&T finally concludes that even if Intrado conformed its web-based ordering process to industry standards, AT&T "would be forced to incur additional costs to implement that system solely for Intrado's own benefit." In its reply brief, AT&T points out that while its ordering system was developed as a result of collaborative processes, and can be changed only through a formal process, Intrado's was developed unilaterally and can be changed at any time. AT&T further indicates that Intrado should use the ordering system that "every other carrier uses" (AT&T Reply Br. 42). Finally, AT&T quotes the arbitration award issued in Case No. 07-1216-TP-ARB to support its contention that Intrado's language should be rejected.

ISSUE 6(b) ARBITRATION AWARD

The Commission finds it interesting to note that on Issue 6(b), the ordering process, both parties quote the same paragraph from the arbitration award issued in Case No. 07-1216-TP-ARB, yet reach opposite conclusions. The paragraph in question reads:

The establishment of ordering processes via a website is consistent with industry standards. Therefore, Intrado's proposed language regarding the process by which Embarq will order services from Intrado is appropriate for inclusion in the interconnection agreement. Notwithstanding this determination, the Commission finds that Intrado's proposed language is overbroad inasmuch as it simply states "as posted on INTRADO

COMM's website." The Commission is well aware how readily the information posted on a website can be changed. Therefore, consistent with Embarq's concerns, including those regarding unilateral changes to the ordering process, and the need for industry standard forms and procedures, the parties are directed to negotiate supplemental interconnection agreement language relative to the ordering process in order to provide more clarity and efficiency as to the implementation of the ordering process. In doing so, the parties should be mindful that all ordering processes should be consistent with existing industry standards, where applicable, consistent with Rule 4901:1-7-22(C), O.A.C., and that any changes to the ordering process will be subject to prior mutual agreement.

Case No. 07-1216-TP-ARB, Arbitration Award issued September 24, 2008, at 39.

Intrado, in focusing on the first sentence, maintains that its language should be adopted (Intrado Reply Br. 27). AT&T, focusing on the remainder of the paragraph, *concludes that Intrado's language must be rejected.*

While AT&T opines that there would be additional costs involved in developing processes to handle a unique Intrado ordering process, it has not provided specific support for that opinion, or an estimate of the costs involved. Additionally, the Commission notes that the proposed interconnection agreement requires that Intrado incur costs to obtain "operating system software and hardware to access AT&T 22-STATE OSS functions." AT&T goes so far as to specify what the hardware and software should be and indicates that those requirements may change, requiring the expenditure of additional costs simply so Intrado can order services from AT&T. Additionally, AT&T requires carriers to use web-based interfaces for certain ordering and pre-ordering processes. Intrado has not objected to incurring those costs or using a web-based process as a part of doing business, nor have any other carriers to the Commission's knowledge. From this, it would appear that incurring certain costs or using another carrier's web-based interface, in order to purchase facilities or services from another carrier is not unusual.

AT&T is correct in noting that there is a disparity in terms in the ability to change ordering processes. The Commission is very familiar with the long-running collaborative process that resulted in the current system. However, the Commission notes that it is not strictly correct to state that "all other carriers" use the Telcordia EXACT ordering system. It is clearly accurate to say that all other carriers use that system to place orders with AT&T. However, that does not address the question of how AT&T will place orders with Intrado, should the need arise. While AT&T seems to oppose the inclusion of any language that implies that it may at some point have to order services or facilities from Intrado, as a practical matter it well may have to do so. In that event, it would seem prudent for AT&T to seek the protection offered by establishing criteria in this agreement for that capability.

Neither party seems to oppose the development of interconnection agreement language that would render a result similar to that required in Case No. 07-1216-TP-ARB. The parties are, therefore, instructed to develop supplemental interconnection agreement language relative to the ordering process in order to provide more clarity and efficiency as to the implementation of the ordering process. In doing so, the parties should be mindful that all ordering processes should be consistent with existing industry standards, where applicable, consistent with Rule 4901:1-7-22(C), O.A.C., and that any changes to the ordering process will be subject to prior mutual agreement. These requirements are consistent with other arbitrations awards where this issue has arisen. Consequently, Intrado may be well served to discuss its ordering system with all affected carriers so that a single system might be developed.

Issue 7(a): *Should the ICA include terms and conditions to address separate implementation activities for interconnection arrangements after the execution of the interconnection agreement? If so, what terms and conditions should be included?*

AT&T initially states that the issue is whether, and to what extent the parties should document their physical architecture plans in a signed agreement. AT&T argues that documenting architecture plans in a signed agreement protects both parties, by "ensuring everyone has the same understanding of rights and responsibilities and has committed to a jointly understood plan." AT&T notes that this is a process routinely followed by CLECs. AT&T characterizes Intrado's objection as a misconception that the documentation process would constitute an amendment to the interconnection agreement, and further notes that Intrado's witness Hicks acknowledged that the language proposed by AT&T would not lead to an amendment of the interconnection agreement. Moreover, AT&T contends that he conceded that documenting the parties' plans would prevent future disputes. AT&T states that Intrado objects to using the standard forms used by AT&T to provide needed network information (AT&T Br. 39-40).

Intrado acknowledges that it may be beneficial to document the parties' physical architectures, but states that there is no need to "provide notices, to complete additional forms, or to sign separate agreements beyond the interconnection agreement to establish interconnection with AT&T." In its reply brief, Intrado maintains that AT&T's initial brief provides "nothing new beyond its pre-filed testimony and its issue statements" (Intrado Reply Br. at 29).

ISSUE 7(a) ARBITRATION AWARD

AT&T's assertion that this issue arises from Intrado's perception that the proposed signed documentation regarding the parties' physical architecture plans requires an

amendment to the interconnection agreement is supported on the record. The testimony of Intrado's witness indicates that this is Intrado's understanding (Intrado Ex. 2 at 38).

Given the importance of 911 and E911 systems to public safety, the Commission deems it appropriate to ensure that at least the level of documentation and coordination occurring between AT&T and any CLEC should occur between AT&T and Intrado. To this end, AT&T's proposed language with regard to CESIM 2.1, CESIM 5.1, CESIM 5.3, NIM 2.1, NIM 4.1, NIM 4.2, and NIM 4.3 are to be included in the final agreement.

With regard to CESIM 2.4, while there is no evidence on the record arguing for either party's specific language, Intrado's proposed language (which would require some form of notice 30 days prior to a request to change the physical architecture plan) appears to imply that either party must request permission of the other in order to make changes to its own physical architecture. Intrado's proposed language, therefore, implies additional unspecified time for approval. AT&T's proposed language (which would require 30 days notice of any intent to change the physical architecture plan), appears to be more expeditious, and is consistent with the use of "intent" with regard to notice timeframes in similar language appearing in existing approved interconnection agreements. On those bases, AT&T's proposed language should be allowed to stand.

Issue 10 What are the proper definitions for the following terms: (a) Competitive Emergency Services Telecommunications Carrier; (b) CLEC; and (c) Interconnection?

Intrado disagrees with AT&T's proposed definitions of "CESTC," "CLEC," and "Interconnection." Being a newly created classification, AT&T states that there has been no prior definition of CESTC. The parties now want to include a definition in the interconnection agreement. Toward that end, the parties have fashioned competing language. In its definition, AT&T designates a CESTC as a "telecommunications service" provider (AT&T Ex. 1 at 43). Intrado, on the other hand, opts to define a CESTC as a "telephone exchange service" provider (Intrado Ex. 2 at 27). AT&T, over Intrado's objection, wants to include language to define the scope of Intrado's certification. AT&T proposes to accomplish this by including language from the Commission's Certification Order (AT&T Ex. 1 at 43). In particular, AT&T focuses on a portion of the Certification Order where it states that the Commission restricted the scope of Intrado's service to the transmission of telephonic messages in its capacity of maintaining the selective router and directing 911 traffic to the appropriate PSAP. AT&T contends that its proposed language mirrors the Commission's language. Intrado's proposed language, on the other hand, AT&T regards as too broad and inconsistent with the Commission's Certification Order (AT&T Br. 41-42, AT&T Reply Br. 47).

Intrado objects to AT&T's proposal because it believes that it goes beyond the Commission's statement in Case No. 07-1199-TP-ACE. According to Intrado, AT&T's definition indicates that a CESTC is only permitted to maintain a selective router and direct 911 traffic to the appropriate PSAP. Intrado emphasizes that the Certification Order does not contain such a limitation. Moreover, there are activities that a CESTC may undertake that are not accounted for by AT&T's definition. Examples include maintaining the ALI database, call transfer, or notification services. Because of these additional activities, Intrado believes it is more accurate to state that a CESTC provides telephone exchange services (Intrado Ex. 2 at 27, Intrado Br. 61-62).

The parties agree that there should be a definition of CLEC but disagree on how to define it. Intrado proposes that the definition of CLEC be based upon the definition of CLEC found in Rule 4901:1-7-01(D), O.A.C. (Intrado Ex. 2 at 28, Intrado Br. 62). AT&T prefers to define CLEC in terms of a carrier's certification as a CLEC. In contrast, AT&T criticizes Intrado's language because it provides that any non-incumbent LEC can be a CLEC whether it has a certificate or not. It is AT&T's opinion that a carrier must be granted a certificate as a CLEC in AT&T's territory in order to obtain end user-specific products and services. As an example, AT&T believes that a carrier certified in one ILEC's territory would not without proper certification be a CLEC in another ILEC's territory for purposes of an interconnection agreement (AT&T Ex. 1 at 45). By its language, AT&T wants to preserve the distinction between a CLEC that provides basic local exchange service to end users and a CESTC that serves PSAPs but has no relationship with end users (AT&T Br. 42, AT&T Reply Br. 47-48). AT&T adds that its language proposal is particularly necessary if the Commission finds in issue 2(b) that the interconnection agreement must include CLEC provisions. To take advantage of CLEC provisions in the interconnection agreement, AT&T states that a carrier must have a CLEC certificate (AT&T Ex. 1 at 44-45, AT&T Br. 42-43).

The parties disagree on the definition of "interconnection." Intrado would rely on the definition contained in AT&T's generic template agreement. The template agreement defines interconnection in accordance with the Act. To Intrado, interconnection is the physical linking of the parties' networks for the mutual exchange of traffic (Intrado Ex. 2 at 28, Intrado Br. 63). AT&T disagrees. AT&T contends that its language proposal captures Intrado's unique characteristics. AT&T claims that Intrado is unique because it only provides 911/E911 services. It is a CESTC, not a CLEC. Distinguished from other carriers, Intrado and AT&T will interconnect at selective routers, not at an end office or tandem office (AT&T Br. 43, AT&T Reply Br. 48). AT&T is concerned that Intrado's definition could lead to a required interconnection at an end office or tandem office. AT&T, therefore, prefers to narrow the definition (AT&T Ex. 1 at 46, AT&T Br. 43).

ISSUE 10 ARBITRATION AWARD

The parties do not come to a complete agreement on the definition of a CESTC. Each proposes language ostensibly affecting the scope of Intrado's activities. The parties propose the following competing language for the definition of a CESTC in GTC §1.1.50 of the interconnection agreement:

> "Competitive Emergency Services Telecommunications Carrier" means a telephone company certificated by the Commission **to** offer***ing*** competitive ***local*** emergency **Telecommunications** ***Telephone Exchange*** Services on a county-wide basis**, and which certification is restricted in scope to the transmission of a telephonic message in its capacity of maintaining the Selective Router and directing 911 traffic to the appropriate PSAP within AT&T-OHIO's franchised area.**[7]

Both parties contend that their proposed language best tracks the Commission's Certification Order.

In its Certification Order, the Commission specifically concluded that Intrado, as a CESTC, is a "telecommunications carrier" pursuant to 47 U.S.C. §153(44) and is a provider of "telecommunications service" pursuant to 47 U.S.C. §153(51). From this and other findings, the Commission concluded that Intrado is "engaged in the provision of telecommunications." Given our findings in this arbitration award, it would be more accurate and consistent with the Certification Order to say that "Competitive Emergency Services Telecommunications Carrier" means a telephone company certificated by the Commission engaged in the provision of competitive local emergency Telephone Exchange Services on a county-wide basis.

In its definition of a CESTC, AT&T proposes language restricting the scope of Intrado's certification. It was not our intent in the Certification Order to limit the scope of Intrado's certification in any manner related to the maintenance of a selective router. Instead, the Commission merely referred to Intrado's activity of maintaining a selective router and directing 911 traffic to the appropriate PSAP as a basis for finding that Intrado is, by law, a telephone company and a public utility. AT&T's suggested language limiting Intrado's certification should, therefore, be omitted.

The parties disagree on what the definition of CLEC should be. AT&T advocates that a carrier must receive certification from the Commission as a requisite for being a

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7 The parties agreed upon language is in normal font. Intrado's proposed language is in bold italics. AT&T's proposed language is bold underline font.

CLEC. Intrado, on the other hand, recommends that Rule 4901:1-7-01(D), O.A.C., should serve as the definition of CLEC. Rule 4901:1-7-01(D), O.A.C., reads as follows:

> "Competitive local exchange carrier" (CLEC) means, with respect to a service area, any facilities-based and nonfacilities-based, local exchange carrier that was not an incumbent local exchange carrier on the date of the enactment of the Telecommunications Act of 1996 (1996 Act), or is not an entity that, on or after such date of enactment, became a successor or assign of an incumbent local exchange carrier.

AT&T rejects Intrado's proposal because it does not take into account whether a carrier has a certificate of public convenience and necessity.

We find that Intrado's proposed language, being entirely consistent with our rules, is the more appropriate definition of CLEC. It is common place and accepted practice for CLECs to negotiate the terms of an agreement with an ILEC prior to the CLEC being authorized to provide service in the ILEC's territory.[8] For this reason, we find that AT&T's prerequisite of certification is contrary to practice. Nevertheless, with respect to services and facilities that a CLEC may seek from an ILEC during negotiations, the CLEC may not employ those services and facilities until the CLEC obtains certification from the Commission.

At issue is whether "interconnection" should be broadly defined or whether, in this interconnection agreement interconnection should be restricted to interconnection between selective routers. AT&T would have the Commission define interconnection to mean interconnectivity between the selective routers of the parties. The Code of Federal Regulations, however, defines interconnection broadly. It is the "linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic."[9] We find no persuasive reason for deviating from interconnection as it is defined by the Act and the rules and regulations of the FCC. It is one thing to restrict interconnection to selective routers, to the exclusion of end offices and tandem offices; it is another to redefine a commonly used term. AT&T's proposed language goes too far.

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8 Case No. 07-1216-TP-ARB, Arbitration Award issued September 24, 2008, at 13; Rule 4901:1-6-10(E)(3), O.A.C..

9 47 C.F.R. 51.5 (Terms and Definitions)

Issue 13(a): What subset of traffic, if any, should be eligible for intercarrier compensation when exchanged between the parties?

AT&T indicates that the issue here concerns the definitions of "Section 251(b)(5) traffic," "ISP-Bound Traffic," and "Switched Access Traffic" (AT&T Br. 43). AT&T states that it proposes to define these terms consistent with the originating and terminating points of the call, and maintains that this is how traffic is normally classified for purposes of reciprocal compensation (*Id.*). AT&T also states that its definitions with regard to these terms are consistent with the Commission's decision in a previous arbitration case, and that the law relevant to these definitions has not changed since that decision (*Id.* at 44, citing *In the Matter of TelCove Operations, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Ohio Bell Telephone Company d/b/a SBC Ohio*, Case No. 04-1822-TP-ARB, Arbitration Award issued January 25, 2006, at 8-10 (*TelCove*). AT&T opines that its language is more specific and is consistent with applicable law and should, therefore, be adopted (AT&T Br. 43).

Specifically, AT&T proposes to define "Section 251(b)(5) Traffic" and "ISP-Bound Traffic" in terms of their originating and terminating points and in the same manner as traffic in which the originating end user and terminating end user are either both located in the same ILEC local exchange area or both located in neighboring ILEC local exchange areas within the same common mandatory local calling area (*Id.* 44-45). Similarly, AT&T proposes to define "Switched Access Traffic" based on the originating and terminating points, indicating that "Switched Access Traffic" must be traffic in which the originating and terminating points are within different local exchanges (*Id.* 44-45).

AT&T notes that "Reciprocal compensation is the most fertile source of inter-carrier disputes, and the law regarding reciprocal compensation is likely the area most subject to ongoing changes" (AT&T Reply Br. 49). AT&T indicates that if the proposed language is affected by an FCC decision prior to contract execution, AT&T would be willing to revisit the affected definitions (*Id.*).

AT&T identifies a further issue with regard to language in sections IC 1.2 and IC 3.5. AT&T takes the position that "Intrado has requested a wireline interconnection agreement, and Intrado should not be delivering wireless traffic to AT&T over local interconnection trunks pursuant to this agreement" (AT&T Br. 46). AT&T further notes that it has a different interconnection agreement "that accommodates the differing and unique requirements of wireless services" (*Id.*).

Intrado notes that the parties' interconnection agreement should be consistent with the rulings of the FCC with respect to intercarrier compensation, and further states that AT&T's language presents numerous problems and is generally inconsistent with the

current rules applicable to intercarrier compensation (Intrado Br. 65). Intrado observes that there have been numerous FCC and court decisions affecting intercarrier compensation since the *TelCove* decision.

Specifically, Intrado notes that in the *ISP Remand Order*[10] the FCC concluded that, except for traffic under Section 251(g) of the Act, "all telecommunications traffic" is subject to reciprocal compensation, and argues that this makes AT&T's reliance on direct or indirect references to "local" traffic inappropriate.

Further, Intrado posits that AT&T's proposed definition of "Switched Access Traffic" appears to include interconnected VoIP services, and states that the FCC has not specifically identified whether VoIP traffic is an information service or a telecommunications service. Intrado argues that this language would "impose obligations on Intrado in the context of an agreement that it has admitted by itsown pleadings to the FCC are not required" (Intrado Br. 68).

Finally, Intrado argues that AT&T's proposed language would limit reciprocal compensation to traffic determined to be "wireline" or "dialtone," neither of which are defined in the interconnection agreement. Intrado states that Intrado may deliver wireless traffic to AT&T to the extent Intrado is providing telecommunications services to a wireless provider and that wireless provider's customers call an AT&T customer. Intrado notes that AT&T's proposed language at Appendix Intercarrier Compensation §3.5 indicates that third party traffic may be exchanged between the parties (*Id.* 69).

ISSUE 13(a) ARBITRATION AWARD

The treatment of ISP-bound traffic has been decided and re-decided a number of times in recent years. In 1999, the FCC found that ISP-bound traffic was jurisdictionally interstate, since users contact websites across state lines.[11] Because the FCC had previously determined that Section 251(b)(5) applied only to local traffic,[12] the FCC concluded that ISP-bound traffic was not subject to reciprocal compensation. In March of 2000, the D.C. Circuit Court remanded the matter without vacating the FCC's decision,

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10 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, ¶54 (2001).

11 *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689 (1999) (Declaratory Ruling).

12 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 16013, paras. 1033–34 (1996) (subsequent history omitted) (Local Competition First Report and Order).

requiring a better explanation of how the FCC's jurisdictional analysis related to the question of whether ISB-bound traffic was subject to Section 251(b)(5).[13]

In April of 2001, the FCC released an order on remand that abandoned the earlier conclusion that Section 251(b)(5) traffic was local traffic and concluded that ISP-bound traffic was excluded from Section 251(b)(5) by virtue of Section 251(g) of the Act.[14] In order on remand, the FCC maintained that Section 251(g) preserved the existing pre-1996 Act compensation structure for "exchange access, information access, and exchange services for such access." The FCC concluded that ISP-bound traffic was "information access" and, therefore, exclusively subject to the FCC's jurisdiction as interstate traffic under Section 201 of the Act. Noting that ISP-bound traffic tended to be one-way and, therefore, subject to regulatory arbitrage, the FCC imposed a unique compensation regime for ISP-bound traffic[15], pending the final resolution of the Intercarrier Compensation Notice of Proposed Rule Making (NPRM).[16]

In May of 2002, the D.C. Circuit Court again remanded to the FCC without vacating the decision. The Court indicated that the FCC's rationale was inadequate[17] but that there was a "non-trivial likelihood" that the FCC had the authority to establish the compensation system for ISP-bound traffic (*Id.* 434). Most recently, in November of 2008, the FCC concluded that "although ISP-bound traffic falls within the scope of Section 251(b)(5), this interstate, interexchange traffic is to be afforded different treatment from other Section 251(b)(5) traffic pursuant to our authority under sections 201 and 251(i) of the Act."[18]

AT&T's proposed definition of ISP-Bound traffic, as being between parties in the same "Local Exchange Area" or "mandatory local calling area," runs contrary to the trend in the FCC's decision making on the subject. It is certainly contrary to the November 2008 Remand Decision, in which the FCC explicitly identified ISP-bound traffic as "interstate, interexchange traffic." While, as AT&T has noted, reciprocal compensation is an area

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13 *Bell Atlantic*, 206 F.3d at 1 and 5.

14 *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, (2001) (ISP Remand Order),

15 *Id.*, paras. 74-77.

16 *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) (Intercarrier Compensation NPRM).

17 *WorldCom*, 288 F.3d at 429

18 *In the Matter of; High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Lifeline and Link Up ,Universal Service Contribution Methodology, Numbering Resource Optimization, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, IP-Enabled Services* Order on Remand and Report and Order and Further Notice of Proposed Rulemaking 2008 WL 4821547, F.C.C., Nov 05, 2008, (NO. WC05-337, CC96-45, WC03-109, WC06-122, CC99-200, CC96-98, CC01-92, CC99-68, WC04-36) (November, 2008 Remand Decision) at para. 6 [Emphasis added]

fraught with conflict, in this instance, the FCC has established a single form of intercarrier compensation for ISP-bound traffic, independent of whether that traffic is considered "local." AT&T's proposed definition at Section IC 5.1 is, therefore, not to be included in the final arbitration language. Intrado's proposed definition provides sufficient clarity, pending a final determination from the FCC on intercarrier compensation.

While AT&T's definition of "ISP-Bound traffic" appears in the interconnection agreement resulting from the *TelCove* arbitration, the definition was not presented as an issue in that arbitration. In fact, the only discussion in *TelCove* relating to ISP-bound traffic was in the context of an issue regarding the handling of Foreign Exchange (FX)/Virtual NXX traffic, which may include ISP-bound traffic. Therefore, AT&T's reliance on the *Telcove* arbitration for resolution of this issue, especially in light of the recent FCC ruling, is misplaced.

As a result of the foregoing, the Commission will require that the parties utilize Intrado's proposed language at sections IC 5.1 and GTC 1.1.86, with the requirement that the November 2008 Remand Decision also be referenced.

With regard to AT&T's proposed definition of Section 251(b)(5) traffic appearing at Section IC 4.1, Intrado argues that it is similarly impaired by the FCC's decision in the ISP Remand Order to "no longer construe Section 251(b)(5) using the dichotomy set forth in the Declaratory Ruling between "local" traffic and interstate traffic."[19] However, in this instance, for Section 251(b)(5) traffic other than ISP-Bound Traffic, the FCC's and the Commission's rulings have provided additional clarity regarding the term "reciprocal compensation" found in Section 251(b)(5). In particular, as noted by AT&T, the FCC rule, 47 C.F.R. §51.701(b)(1), states that Section 251(b)(5) reciprocal compensation does not apply to traffic that is interstate, or intrastate exchange access, or exchange services for such access. Furthermore, Rule 4901:1-7-12(C)(1), O.A.C., defines traffic subject to reciprocal compensation consistent with the FCC rules. AT&T's proposed definition in this case is the same one adopted by the Commission in the *Telcove* arbitration in regard to an issue arbitrated in that proceeding.[20] Thus, in order to provide the clarity previously provided by the FCC and this Commission, we direct the parties to incorporate AT&T's definition for Section 251 (b) (5) traffic at §IC 4.1 and exclude Intrado's proposed definition at §GTC 1.1.124. However, as the intercarrier compensation, including Section 251(b)(5) traffic, remains an open item,[21] the Commission expects the parties to avail themselves of the interconnection agreement's change in law provisions should the FCC or this Commission provide further guidance.

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19 ISP Remand Order at para 54

20 See, *Telcove* arbitration, Issue 37.

21 November, 2008 Remand Decision at ¶ 38 - 41

With regard to the disputed language in Section IC 1.2 and Section IC 3.5, while the parties are disputing Intrado's ability under this agreement to deliver wireless traffic to AT&T subject to reciprocal compensation, this appears to be a spurious issue.

Section 3.9 of the Intercarrier Compensation attachment (language not in dispute in this arbitration) clearly states that "This Attachment is not meant to address whether the Parties are obligated to exchange any specific type of traffic." Therefore, the question of whether Intrado may or may not deliver wireless traffic to AT&T cannot be addressed by language changes to this attachment.

Section IC 1.2 identifies that the appendix under discussion here applies to "...traffic originated over the originating carrier's facilities or over local circuit switching purchased by CLEC from AT&T...." Given that Intrado is not, and does not appear to intend to become registered as a CMRS carrier, and local circuit switching is inherently wireline, this would already seem to limit the Appendix IC to wireline traffic, with or without AT&T's proposed inclusions.

While Intrado argues that Section IC 3.5 may give it the right to transit wireless traffic to AT&T under this agreement, the language in question discusses the obligation to enter into intercarrier compensation arrangements with third party carriers, regardless of whether that third party carrier has purchased local switching on a wholesale (non-resale) basis. Here again, the inclusion or exclusion of the words "wireline" or "dialtone" do not appear either to impart or remove the ability of Intrado to deliver non-911 wireless traffic to AT&T, as that is not the subject at hand in the section.

Finally, Section 251(a) of the Act requires all carriers to handle transit traffic. However, transit traffic is not subject to reciprocal compensation. While generally the transit traffic carrier is an ILEC, the Act does not so limit the definition. Under Rule 4901:1-7-13 (D) O.A.C., transit traffic is under a different compensation regime than reciprocal compensation. Rule 4901:1-7-13, O.A.C., applies to Intrado's transiting of any traffic, regardless of source, to AT&T. Therefore, it appears that AT&T's proposed language does not and cannot have the limiting effect with which Intrado is concerned, because the limitations lie elsewhere in the interconnection agreement or in law. However, the exclusion of this language from Intrado's interconnection agreement, while it is generally present in CLEC agreements with AT&T, may possibly discriminate against another carrier not a party to the agreement. On this basis, therefore, AT&T's proposed language is to be included for sections C 1.2 and IC 3.5.

With regard to the language proposed by AT&T for sections IC 16.1 and ITR 12.1, there are two issues: the language discussing IP-enabled services and the differentiation between "local exchange service" and "local dialtone." As to the former issue, it is true that, as Intrado notes, the FCC has yet to make a conclusive statement as to whether IP-

enabled services are information or telecommunications services. However, until such a determination is made, the Commission notes that the language in question addressing the use of IP-protocol is, as was noted in the *TelCove* arbitration, technologically neutral, in that it treats calls using IP-based technologies in a consistent manner with those that do not. Thus, AT&T's proposed language for switched access traffic should be adopted, consistently with the Commission's decision in the *Telcove* arbitration. Should the FCC issue a decision at some point indicating that IP-enabled services are universally information services, or makes some other distinction, the parties can avail themselves of the change in law provisions of the agreement.

As a final matter encompassed by this issue, the parties are disputing the difference in language between the words "local dial tone" and "telephone exchange service" in sections IC 16.1, ITR 2.14, and ITR 12.1 which address traffic between AT&T and a potential Intrado CLEC. While neither party addresses this specific difference in language in the record, the Commission notes that this appears similar to the question regarding the language in sections IC 1.2 and IC 3.5. Similarly, the language proposed by AT&T appears commonly in its existing interconnection agreements. The Commission also notes that its resolution of the disputed language in Section IC 3.5 makes the phrase "local telephone exchange service" synonymous with "dialtone." Since the language proposed by AT&T, appearing in other interconnection agreements, is sufficiently clear to render the meaning of the language in the affected sections clear, the Commission will here require the language proposed by AT&T for these sections.

Issue 13(b) Should the parties cooperate to eliminate misrouted access traffic?

AT&T avers that the parties have agreed that, with some exceptions, Switched Access Traffic will be delivered over Feature Group Access trunks. To the extent Switched Access Traffic is improperly routed to local interconnection trunks, the parties have agreed to work cooperatively to identify such traffic with the goal of removing it from the local interconnection trunks. AT&T, however, contends that Intrado's purported agreement to assist AT&T in the endeavor rings hollow in light of Intrado's objection to language requiring it to join AT&T in seeking relief from a court or commission in order to prevent or stop misrouted traffic (AT&T Ex. 1 at 52-53). AT&T contends that adopting Intrado's position will enable traffic washing and related access avoidance schemes by third parties that are delivering such improper traffic to AT&T via Intrado. AT&T avers that its language provides the appropriate course of action for the parties to follow when Switched Access Traffic is improperly routed to local interconnection trunks and should be adopted (AT&T Ex. 1 at 53-54).

Intrado claims that AT&T's proposed language attempts to define broadly Switched Access Traffic and address how such traffic may be exchanged between the parties.

Intrado contends that AT&T's definition and related language regarding Switched Access Traffic would impose more onerous restrictions on that traffic than are currently found in the FCC's rules. Intrado avers that the FCC is currently reviewing Switched Access Traffic issues and, given the uncertainty in this area, Intrado would prefer to rely on applicable law rather than include terms and conditions that may be contrary to current requirements (Intrado Ex. 2 at 29).

Intrado contends that it is willing to work with AT&T to eliminate misrouted access traffic. However, Intrado believes AT&T's proposed language would require Intrado to engage in self-help mechanisms or block traffic, actions that are inconsistent with FCC requirements (Intrado Ex. 2 at 30). Intrado contends that the FCC disfavors self-help policies and has indicated that carriers may not block traffic, because it is not in the public interest (Intrado Br. 69-70). Intrado claims that if AT&T sees the need to take action against another carrier, AT&T is free to do so without the assistance of Intrado (Tr. Vol II at 43). Intrado contends that it should not be forced to join AT&T in court or state commission proceedings at AT&T's whim and Intrado's expense (Tr. Vol. I at 143). Intrado points out that AT&T's own witness admits that Intrado is under no obligation to assist AT&T in taking action against other carriers (Tr. Vol. II at 43-44)

AT&T contends that its language would merely require that, if all other efforts to stop misrouted traffic from being sent over the parties' networks fails, Intrado will join AT&T in going to the proper court or agency to seek authority to stop misrouted calls (Appendix IC §16.2). Intrado claims that AT&T's proposed language would require Intrado to agree to exercise self-help remedies or block misrouted access traffic (Intrado Br. 69). AT&T contends that the disputed language in Appendix IC §16.2 requires nothing of the kind (AT&T Reply Br. 51).

ISSUE 13(b) ARBITRATION AWARD

Each party claims, with regard to the language in dispute in Issue 13(b), dire results clearly not contemplated in the language at hand. AT&T's proposed language does not specify what actions Intrado should take on its own to stop improperly routed traffic. Intrado's language refers to "applicable law," and thus does not contemplate the avoidance of access charges.

The Commission concurs with Intrado. By agreeing to proposed contract language requiring Intrado to work cooperatively with AT&T to identify and remove third-party switched access traffic that is inappropriately routed over local interconnection trunk groups, Intrado will be required, at a minimum, to follow all FCC and Commission directives regarding misrouted access traffic. The Commission further agrees with Intrado that it is not necessary to include language that would require Intrado and AT&T to file a joint complaint or "any other appropriate action with the applicable Commission."

AT&T's language also presumes that the joint request will seek the removal or blocking of such traffic, rather than appropriate routing and compensation.

The Commission reminds AT&T that it is free to take whatever action it deems necessary against Intrado or the third-party for the resolution of such issues. The Commission will determine how such issues will be resolved. It is not necessary for the contract language to predetermine a course of action.

Furthermore, Intrado is correct that the requirements for Switched Access Traffic, as a subset of all intercarrier compensation, are currently under review by the FCC. Therefore, the Commission approves Intrado's proposed language for IC §16.2 and ITR §12.2.

Issue 15: Should the interconnection agreement permit the retroactive application of charges that are not prohibited by an order or other change in law?

AT&T proposes in Appendix IC §4.2.1 that retroactive treatment would apply to traffic exchanged as "local calls." AT&T maintains that, because local calls are subject to reciprocal compensation, "local calls" is the appropriate classification of traffic to which a retroactive adjustment should apply (AT&T Br. 47). AT&T further maintains that Intrado's opposition to AT&T's proposal makes no sense because "local calls" are the calls subject to reciprocal compensation, and thus, "local calls" is the appropriate classification of traffic to which the retroactive adjustment would apply (AT&T Ex. 1 at 54-55, AT&T Br. 47, AT&T Reply Br. 53,).

Intrado agrees that the interconnection agreement should include terms and conditions to address changes in law. Intrado, however, disagrees with AT&T's proposed language discussing how such modifications will be implemented. Intrado notes that AT&T's language indicates that retroactive compensation adjustments will apply "uniformly" to all traffic exchanged as "local" calls under the agreement, and expresses concern that this language could allow AT&T to make retroactive compensation adjustments for traffic that is not affected by a change of law. Intrado states that it has, therefore, proposed language that would limit the application of retroactive compensation adjustments to those specifically ordered by intervening law (Intrado Ex. 2 at 30, Intrado Br. 70).

ISSUE 15 ARBITRATION AWARD

The parties wish to craft language that will govern the retroactive application of charges in the event that there is a change in law, specifically a modification or nullification of the FCC's ISP Compensation Order. Intrado rejects AT&T's proposed language because it believes the language is too broad and could allow AT&T to make

retroactive compensation adjustments for traffic that is not affected by a change in law. To prevent this possibility, Intrado proposes to limit adjustments to traffic affected by intervening law. AT&T rejects Intrado's proposed language as redundant and unnecessary.

By its proposed language, AT&T seeks to ensure that retroactive treatment is applied only to traffic exchange as "local calls." AT&T's reasoning is that only local calls are subject to reciprocal compensation and, therefore, are the only type calls that would be subject to a retroactive adjustment.

The parties proposed language appears in IC Section 4.2.1 and reads as follows:

> Should a regulatory agency, court or legislature change or nullify the **AT&T-OHIO**'s designated date to begin billing under the FCC's ISP terminating compensation plan, then the Parties also agree that any necessary billing true ups, reimbursements, or other accounting adjustments shall be made symmetrically and to the same date that the FCC terminating compensation plan was deemed applicable to all traffic in that state exchanged under Section 251(b)(5) of the Act. By way of interpretation, and without limiting the application of the foregoing, the Parties intend for retroactive compensation adjustments, to the extent they are ordered by Intervening Law, to apply uniformly to all traffic among **AT&T-OHIO**, CLEC and Commercial Mobile Radio Service (CMRS) carriers in the state where traffic is exchanged ***to which Intervening Law applies*** **as local calls within the meaning of this Appendix**.[22]

Noting the reference to "Intervening Law" appearing earlier in the provision, we find merit in AT&T's criticism of Intrado's proposed language as redundant and unnecessary. Accordingly, Intrado's proposed language should be excluded. The record does not show that Intrado objects to AT&T's assertion that only local calls would be subject to any change in the ISP Compensation Plan. Nor do we find otherwise. Moreover, we find no merit in Intrado's concern that AT&T could use this provision to make retroactive compensation adjustments for traffic that is not affected by a change in law. The language "within the meaning of this Appendix limits the scope appropriately to local calls affected by the FCC's ISP Compensation Plan. AT&T's language should, therefore, be incorporated into the interconnection agreement.

The parties agreed upon language is in normal font. Intrado's proposed language is in bold italics. AT&T's proposed language is bold underline font.

Issue 24: What limitation of liability and/or indemnification language should be included in the ICA

Intrado rejects AT&T's proposed limitation of liability language for being overly broad. According to Intrado, AT&T's language protects it from being liable to Intrado, Intrado's end users, or any other person for losses arising out of the provision of access to 911 services. Intrado claims that AT&T's language also protects it from errors, interruptions, defects, failures, or malfunctions of 911 and seeks protection from fraud, even if committed by AT&T. Intrado, by its language proposal, intends to make AT&T liable for errors, interruptions, defects, failures, or malfunctions that are attributable to AT&T (Intrado Ex. 2 at 30-31, Intrado Br. 71). Intrado believes AT&T's language goes too far. Intrado contends that, typically, carriers cannot limit their liability for errors caused by gross negligence or willful misconduct. Intrado clarifies that its proposed language employs the phrase "attributable to AT&T" to refer to situations that are not otherwise protected by existing law and tariffs (Intrado Br. 71).

AT&T, on the other hand, does not agree that it should be liable for personal injury, death, or destruction of property for any errors, interruptions, defects, failures, or 911 service malfunctions that arise from the normal course of business. AT&T wants to protect itself from matters beyond its control. Reviewing Intrado's tariff, AT&T finds that it includes extensive limitation of liability language that protects Intrado in similar circumstances (AT&T Ex. 1 at 56).

In support of its proposed limitation of liability language, AT&T states that limits on liability for 911 service are appropriate. Moreover, AT&T believes that limits on liability are critical to allow carriers to provide 911 service. Otherwise, the cost and risk of providing 911 service would be too great. AT&T also seeks to protect itself from end user fraud. AT&T sees no reason to be held liable for the fraudulent conduct of Intrado's end users. Instead, AT&T proposes that Intrado accept responsibility for its end users' fraud (AT&T Ex. 1 at 57-58).

Particularly troubling to AT&T is the phrase that assigns liability that is "attributable to AT&T." AT&T condemns that language as vague and ambiguous and appears to impose broader liability on AT&T than would apply under normal fraud law. To AT&T, the language is too indefinite and could be read to assign liability to AT&T for losses that are beyond its control. Moreover, AT&T declares that the language is unnecessary because Intrado cannot identify any scenario where a customer's fraudulent behavior could be attributed to AT&T. A better solution, suggested by AT&T, is for Intrado protect itself from liability by incorporating protective language in its own tariff (AT&T Br. 48-49).

Intrado rejects AT&T's claim that "attributable to AT&T" is vague and ambiguous. Intrado claims that it sufficiently defended its support for its proposed language in its brief. In further support of its proposed language, Intrado points out that the limitation of liability language is from AT&T's own template interconnection agreement. To grant AT&T unlimited protection from liability, alleges Intrado, is inconsistent with Ohio law and AT&T's tariff (Intrado Reply Br. 27-28).

AT&T reiterates that broad limitation of liability is essential in the provision of 911 service. Without limitation of liability, the risks and costs of providing the service would be prohibitive. AT&T reads Intrado's proposal to include the phrase "attributable to AT&T" as broadening, not limiting, AT&T's exposure to liability. Intrado's interpretation is that the language would limit AT&T's liability except where there is gross neglect or wanton and willful misconduct. AT&T disagrees. AT&T finds the language vague to the point of conceivably exposing AT&T to greater liability. AT&T believes that it could conceivably be held liable for the fraud of an Intrado customer. Conversely, AT&T claims that Intrado cannot identify any circumstances where its customer's fraud could be attributed to AT&T. For that reason, AT&T concludes that Intrado's language is unnecessary and should be excluded (AT&T Reply Br. 53-54).

ISSUE 24 ARBITRATION AWARD

By including the term "attributable to AT&T," Intrado seeks to hold AT&T liable for 911 service failures rooted in AT&T's acts or omissions. Intrado rejects AT&T's proposed language because it appears to protect AT&T even from errors caused by gross negligence or willful misconduct. AT&T, on the other hand, believes that Intrado's suggested language is vague and overbroad, to the point of increasing beyond typical standards AT&T's exposure to liability.

We agree with AT&T that, as a matter of public policy, 911 service providers should be afforded broad limitation of liability to allow the provision of 911 service. Without such protection, the potential risk and liability exposure inherent in 911 service would be prohibitive. However, Intrado believes that AT&T's language goes too far, protecting AT&T from even those errors caused by gross negligence or willful misconduct. Intrado's proposed language attempts to reign in what it regards as absolute freedom from liability resulting from AT&T's proposal. Contrarily, AT&T reads Intrado's language to do the opposite of its intent. Instead, of limiting AT&T's liability, AT&T contends that Intrado's language broadens AT&T's exposure to liability, even including acts beyond AT&T's control.

The parties agree that limitation of liability language should be included in the interconnection agreement. They differ on the language to effectuate limitation of liability. AT&T does not advocate for its protection from losses resulting from gross negligence or

willful misconduct. Nor would we endorse such a position. AT&T only argues that Intrado's proposed language fails to achieve the purpose of limiting liability to any errors except those caused by gross negligence or willful misconduct.

Limitation of liability in the provision of 911 service must be broad, yet it should not provide absolute immunity. To achieve the purpose of limiting of liability to within an acceptable degree, we recommend that the parties include the following language in GTC §15.7 of their interconnection agreement: AT&T shall not be liable to CESTC, its End User or any other Person for any Loss alleged to arise out of the provision of access to 911 service or any errors, interruptions, defects, failures or malfunctions of 911 service, unless such loss is attributable to gross negligence or willful misconduct.

This language determines AT&T's liability by its conduct, not by its status as a party. We agree with AT&T that an interpretation of Intrado's proposed language could expose AT&T to liability for any loss traceable to its actions, even where its acts or omissions are merely inadvertent. Our language limits AT&T's liability to within acceptable standards without granting it complete immunity.

Issue 29(b) Is AT&T permitted to impose unspecified non-recurring charges on Intrado Comm?

Intrado argues that any charges applied to Intrado via the interconnection agreement must be developed pursuant to the process established by Sections 251 and 252 and must be set forth in the interconnection agreement. Intrado argues that it cannot agree to pay for services or products when it does not know the rate to be charged. Intrado avers that it does not plan to order products or services that are not contained in the interconnection agreement, which should resolve AT&T's' concerns through the Section 252 process with approval by the Commission.

According to AT&T, this issue involves what pricing should apply when Intrado orders and AT&T inadvertently provisions products and services that are not contained in the interconnection agreement. AT&T explains that the parties have already agreed that AT&T's obligation to provide products and services to Intrado is limited to those for which rates, terms, and conditions are contained in the interconnection agreement. AT&T also avers that the parties have agreed that, to the extent Intrado orders a product or service not contained in the interconnection agreement, AT&T would reject that order (AT&T Ex. 1 at 63). AT&T is proposing language that would require Intrado to pay the standard generic rate that a CLEC would pay for that same product or service when there is no access tariff (AT&T Ex. 1 at 64). AT&T points out that these provisions are only relevant when Intrado orders something it is not entitled to pursuant to the interconnection agreement. Therefore, AT&T contends, it should not have to go through the process of proposing rates pursuant to Sections 251 and 252 of the Act, as proposed by

Intrado (AT&T Ex. 1 at 64). AT&T states that its proposed language is entirely appropriate considering that Intrado has ordered a product or service for which it had no contract terms, but that AT&T provisioned anyway (AT&T Ex. 1 at 64).

AT&T further contends that it should be allowed to reject new orders for the same product or services until rates, terms, and conditions are incorporated into the interconnection agreement. AT&T avers that it should not be required to continue providing service outside the interconnection agreement simply because it did so once (AT&T Ex. 1 at 64). If the order were for a UNE, AT&T claims that Intrado could submit a bona fide request (BFR) in accordance with Appendix UNE's BFR provisions. AT&T further avers that if the order were for a product or service still available in AT&T's access tariff, Intrado could seek to amend the interconnection agreement to incorporate relevant rates terms and conditions (AT&T Ex. 1 at 63).

ISSUE 29(b) ARBITRATION AWARD

The Commission agrees with AT&T that it should not have to go through the process of proposing rates when it provisions a product or service on Intrado's behalf that is not contained in the parties' interconnection agreement. The Commission believes that doing so would equate Intrado's ordering of a service not contained in the interconnection agreement to a BFR or a request to amend the interconnection agreement, which it is clearly not. However, as AT&T has agreed that it would reject orders for services not contained in the interconnection agreement, Intrado is not solely to blame if such a situation arises. Therefore, the Commission finds that the response to the situation must be balanced between the parties.

It is true that the interconnection agreement contains provisions for adding additional, products, services, terms, and conditions. However, in a situation where Intrado orders a product or service for which terms and conditions are not contained in the interconnection agreement, the Commission finds that AT&T does not have to propose rates pursuant to the process established by Sections 251 and 252 of the Act. This is particularly appropriate since the product or service may not be a UNE subject to the pricing requirements of Section 252(d).

The Commission, therefore, will allow AT&T to charge Intrado what it charges CLECs for the same product or service. However, if AT&T has provisioned Intrado's order, even though it agreed to reject such orders, the Commission finds that Intrado should only be required to pay the lowest price in effect at that time for Ohio CLECs and not necessarily the generic rate.

We have found that a request to provision a service not contained in the interconnection agreement does not equate to a BFR or a request to amend the

interconnection agreement. Moreover, taking into consideration the parties' agreement that AT&T can reject orders for products and services not contained in the interconnection agreement, the Commission finds that AT&T should be allowed to reject future orders for the product or service until such time as terms and conditions are incorporated into the interconnection agreement.

Consistent with these findings, the parties are instructed to include AT&T's proposed language for Pricing Sections 1.9.1 and 1.9.2 with the language of 1.9.1. The language should be revised to reflect pricing for orders that are not contained in the interconnection agreement. Pricing should be at the lowest rate in effect at that time for Ohio CLECs.

Issue 31: How should the term "End User" be defined and used in the interconnection agreement?

Intrado defines the issue in terms of whether Intrado's PSAP customers are "end users." It is Intrado's position that PSAPs and other public safety agencies that Intrado will serve are retail end users. Intrado points out that PSAPs or municipalities purchase services from ILECs at retail rates from retail tariffs. Moreover, Intrado asserts that ILECs grant such PSAPs and municipalities end user status. Intrado, therefore, asks for similar treatment. Intrado advocates that PSAPs should be regarded as end users whether served by Intrado or AT&T (Intrado Ex. 2 at 32-33). In support of its position, Intrado refers to the Commission's decision in Case No. 07-1216-TP-ARB, where Intrado states that the Commission found that PSAPs are properly considered end users (Intrado Br. 63-64).

AT&T proposes language that would restrict end users to AT&T's residence and business retail customers because those are the only customers that will be placing calls to 911. Intrado's customers, on the other hand, will include other carriers for which Intrado aggregates 911 traffic and Intrado's PSAP customers. AT&T rejects Intrado's position because none of Intrado's customers will be able to dial 911. AT&T notes from the arbitration award in Case No. 07-1216-TP-ARB that the Commission distinguished between dial tone end users and PSAP end users. It is AT&T's understanding that the Commission in the Intrado Certification Order defined end user to refer to customers of basic local exchange service that can dial 911. To support its position, AT&T notes that the National Emergency Number Association (NENA) defines end user as the 911 caller. AT&T mentions that the parties' interconnection agreement incorporates several NENA definitions. AT&T explains that its definition of end users is not the same as the NENA definition. AT&T explains that its generic definition for "end user" is intended for CLECs that offer basic local exchange service. AT&T believes a different definition is needed for Intrado's interconnection agreement where it is limited to the offering of 911/E911 services. AT&T would agree to withdraw its definition and substitute the NENA definition. In further support of its position, AT&T believes that the general term

"customer" is more appropriate because Intrado will not be providing service to end users. In addition, the word "customer," AT&T argues, provides a level of liability protection against all Intrado customers. Finally, AT&T warns that if non-911 appendices are included in the interconnection agreement under issue 2(b), Intrado may have customers that are not end users (AT&T Ex. 1 at 65-68, AT&T Br. 51-53).

In its reply brief, AT&T argues that consistency demands that end users be distinguished from Intrado's customers. As an example, AT&T points to provisions in the interconnection agreement where "end user" is used in the context of intercarrier compensation. AT&T adds that there are other provisions that are unrelated to the service that a PSAP receives (AT&T Reply Br. 56).

Noting Intrado's reliance of Case No. 07-1216-TP-ARB for the idea that PSAPs are properly considered end users, AT&T contends that Intrado's reliance is misplaced. AT&T cites language from the award in Case No. 07-1216-TP-ARB that states that Intrado's proposed definition of end user is too broad given the limitations of its current certification. Another distinction, AT&T points out, is that in Case No. 07-1216-TP-ARB Embarq, an ILEC, agreed to include PSAP customers in the definition of "end user." The Commission, for its part, adopted the parties' definition of end user that included PSAP customers. AT&T, therefore, does not regard Case No. 07-1216-TP-ARB as binding precedent (AT&T Reply Br. 56-57).

ISSUE 31 ARBITRATION AWARD

In Case No. 07-1216-TP-ARB, the Intrado and Embarq presented for arbitration the issue of "Whether the agreement should contain a definition of "end user" and what definition should be used?"[23] The arbitration award issued in Case No. 07-1216-TP-ARB set out the following definition of "end user" for the interconnection agreement between Embarq and Intrado:

> For the purposes of this agreement "End User" means the retail, end-use, dial tone customer of either party, or the PSAP served by either party receiving 911 calls for the purpose of initiating the emergency or public safety response. Where one or the other form of end-user is specifically required, "End User" shall refer to the retail, dial tone customer, while "PSAP End User" shall refer to the PSAP.

We find no facts or arguments that would cause us to vary from the award in Case No. 07-1216-TP-ARB. Moreover, the reasoning for our decision in Case No. 07-1216-TP-ARB is equally applicable in this proceeding.

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[23] Case No. 07-1216-TP-ARB, Arbitration Award issued September 24, 2008, Issue 4.

In Case No. 07-1216-TP-ARB, we considered the definition of "customer" as it appears in Rule 4901:1-7-01, O.A.C., and noted that the Commission's rules governing carrier-to-carrier (i.e., wholesale) operations compel that the term "customer" include wholesale customers. We also rejected Intrado's request to expand the definition of end user to include wholesale customers. Similarly, AT&T's proposal that "customer" be used to refer to Intrado's PSAP end users would be overly broad because of its inclusion of wholesale customers, as "customer" is defined by our carrier-to-carrier rules. We must, therefore, reject AT&T's use of the word "customer" to distinguish Intrado's PSAP customers from AT&T's end users.

To shed additional light, the Commission considered the definition of end user as it appears in Rule 4901:1-8-01, O.A.C., (911 Service Program Rules). Rule 4901:1-8-01(E), O.A.C., in addition to describing the E911 database, also identifies an "end user" as the customer who makes a 911 call (Case No. 07-1216-TP-ARB, Arbitration Award issued September 24, 2008, p. 19-20). As in Case No. 07-1216-TP-ARB, "end user," for the purpose of this interconnection agreement shall mean the retail, end-use, dial tone customer of either Intrado or AT&T or the PSAP served by either party. Where it is necessary to avoid ambiguity, the parties shall use "End User" to refer to the retail, dial tone customer, whereas "PSAP End User" may refer to the PSAP.

Issue 34(a) How should a non-standard collocation request be defined?

Issue 34(b) Should non-standard collocation request be priced on an individual case basis?

AT&T explains that the parties have agreed that non-standard collocation requests (NSCR) are requests from a Collocator that are beyond the terms, conditions, and rates set forth in the Physical Collocation Appendix. Therefore, AT&T argues, any collocation request that does not have rates, terms, and conditions set forth in the interconnection agreement are non-standard collocation requests (AT&T Ex. 1 at 69). AT&T argues that Intrado's proposed language, which states that NSCR charges would not apply if AT&T has existing similar arrangements with other communications service providers, is fraught with the potential for dispute. AT&T avers that while another carrier might have what Intrado would characterize as an arrangement "similar" to what Intrado requests, such an arrangement may actually be quite different and may impose on AT&T different provisioning costs. AT&T further contends that another carrier's collocation arrangement may have been engineered and provisioned several years prior to Intrado's request, making any associated pricing obsolete and inappropriate for application to Intrado. AT&T avers that if Intrado objects to AT&T's non-standard collocation charges because it believes them to be discriminatory, it may invoke dispute resolution pursuant to the interconnection agreement. AT&T contends that individual-case-basis pricing is

appropriate for any non-standard collocation arrangement; therefore, Intrado's proposed language should be rejected (AT&T Ex. 1 at 69-70).

Intrado contends that AT&T should not be permitted to impose non-standard charges on Intrado for arrangements that AT&T has provided to other service providers. Intrado avers that once AT&T provides one provider with a certain arrangement, it should no longer be considered non-standard and subject to varying costs based on AT&T's independent determination. Intrado avers that the FCC has found that if a particular method of interconnection is currently employed between networks or has been used successfully in the past, a rebuttable presumption is created that such a method is technically feasible for substantially similar network architectures. Intrado further avers that under such circumstances the FCC stated that ILECs bear the burden of demonstrating technical infeasibility (Intrado Br. 74-75, citing *In The Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499, Released August 8, 1996 at 204). Intrado, therefore, contends that AT&T should not be permitted to impose arbitrary costs on Intrado when AT&T has already provided a similar arrangement to another provider (Intrado Ex. 1 at 40-41).

ISSUES 34(a) AND (b) ARBITRATION AWARD

As the parties have agreed that a NSCR is a request for collocation that is beyond the terms, conditions, and rates established in the interconnection agreement, the Commission agrees with AT&T that any collocation request that does not have rates, terms, and conditions set forth in the interconnection agreement would logically be considered an NSCR. The Commission also finds the use of the term "similar arrangements" could lead to disparities between what the parties regard as similar arrangements.

The Commission also agrees with AT&T that the cost of provisioning similar arrangements several years ago may vary significantly from the cost of providing the same arrangement today. Intrado argues that the FCC's Local Competition Order established a rebuttable presumption of feasibility. While this point is addressed in the Local Competition Order, feasibility is not the same as the cost of provisioning. Since AT&T is not attempting to deny Intrado arrangements that are not part of the interconnection agreement that have been provided in the past, but only wishes to apply non-standard charges on an individual case basis, Intrado's argument about technical feasibility is moot.

In addition, the Commission finds that, similar to the FCC's argument for abandoning the "pick-and-choose rule,"[24] allowing a CESTC to select "similar

[24] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Second Report and Order, 19 F.C.C.R. 13494, CC Docket No. 01-338, Released July 13, 2004

arrangements" established for another telecommunications carrier, where the only benefit may be price, may well inhibit the development of more creative solutions that will better meet the CESTC's needs.[25]

Therefore, the Commission approves AT&T's proposed language allowing it to impose non-standard charges for collocation arrangements for which terms and conditions are not set forth in the interconnection agreement. The Commission concurs with AT&T that if Intrado objects to AT&T's non-standard collocation charges because it believes them to be discriminatory, it may invoke dispute resolution pursuant to the interconnection agreement. The Commission believes the dispute resolution process will be better able to determine whether similar arrangements exist and whether the prices previously charged for these similar arrangements are still relevant to the NSCR on an individual case basis.

Issue 36 Should the terms defined in the interconnection agreement be used consistently throughout the agreement?

Intrado states that the interconnection agreement defines certain terms. To the extent that the interconnection agreement defines a term, Intrado advocates that the term be capitalized throughout the interconnection agreement to denote a specifically defined term (Intrado Ex. 2 at 33, Intrado Br. 64-65). Intrado believes that consistent capitalization will reduce disputes concerning the meaning of certain terms. Of particular concern to Intrado is the capitalization of the term "end user." Intrado reveals that the parties have not come to an agreement on whether the term "end user" should be capitalized (Intrado Br. 65).

For its position, AT&T believes that words should be capitalized only when their use is consistent with the defined term. As an example, AT&T believes that the term "end user" should be defined relative to its customers, not end users of other carriers generally (AT&T Ex. 1 at 70). AT&T does not believe that capitalization is an appropriate issue for arbitration. Instead, AT&T believes the matter should be addressed when the parties create a conforming agreement for Commission approval (AT&T Br. 54, AT&T Reply Br. 58)).

ISSUE 36 ARBITRATION AWARD

Both parties agree that defined terms should be capitalized throughout the interconnection agreement. To that extent, we agree with the parties. Defined terms should be capitalized throughout the interconnection agreement. The point of contention between the parties is the capitalization of the term "end user." In Issue 31 we defined "end user" to mean the retail, end-use, dial tone customer of either party or the PSAP

[25] Id at ¶¶ 1 and 12.

served by either party receiving 911 calls for the purpose of initiating the emergency or public safety response. When used in this manner, "end user" should be capitalized. Where it is necessary to avoid ambiguity, the PSAP served by either party shall be capitalized and referred to as the "PSAP End User."

It is, therefore,

ORDERED, That Intrado and AT&T incorporate the directive set forth in this Arbitration Award within their final interconnection agreement. It is, further,

ORDERED, That, within 30 days of this Arbitration Award, Intrado and AT&T docket their entire interconnection agreement for review by the Commission, in accordance with Rule 4901:1-7-09(G)(5), O.A.C. If the parties are unable to agree upon an entire interconnection agreement within this time frame, each party shall file for Commission review its version of the language that should be used in a Commission - approved interconnection agreement. It is, further,

ORDERED, That nothing in this Arbitration Award shall be binding upon this Commission in any subsequent investigation or proceeding involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

ORDERED, That this Arbitration Award does not constitute state action for the purpose of antitrust laws. It is not our intent to insulate any party to a contract from the provisions of any state or federal law that prohibits restraint of trade. It is, further,

ORDERED, That this docket shall remain open until further order of the Commission. It is, further,

ORDERED, That a copy of this Arbitration Award be served upon Intrado, AT&T, their counsel, and all interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

LDJ/CK/LS/MT/vrm

Entered in the Journal

MAR 0 4 2009

Reneé J. Jenkins
Secretary

Attachment 4

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

In the Matter of the Petition of Intrado Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended, to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a AT&T Illinois	))))))	Docket No. 08-0545

Intrado Inc. Reply Brief on Exceptions

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Dated: March 2, 2009

Its Attorneys

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STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

In the Matter of the Petition of Intrado Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended, to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a AT&T Illinois	))))))	Docket No. 08-0545

Intrado Inc. Reply Brief on Exceptions

Intrado Inc. ("Intrado"), by its attorneys, hereby submits its Reply Brief on Exceptions in connection with Intrado's Petition for Arbitration ("Petition") to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a AT&T Illinois ("AT&T") pursuant to Section 252(b) of the Communications Act of 1934, as amended ("Act").[1] The Illinois Commerce Commission ("Commission") should adopt the two exceptions set forth in Intrado's Brief on Exceptions[2] and find that Intrado offers telephone exchange service and is therefore entitled to interconnection under Section 251(c) of the Act as recommended by Commission Staff in this proceeding. The Commission should reject the finding in the Proposed Arbitration Decision ("PAD")[3] that Intrado does not offer telephone exchange service because it is based on an erroneous interpretation of federal law, and should direct the Administrative Law Judges

[1] 47 U.S.C. § 252(b).

[2] Intrado recognizes that Rule 761.430 requires "a suggested replacement statement or finding" to be included in exceptions. Given that Intrado takes exception to the majority of the statements and findings in the Proposed Arbitration Decision, it would be impractical for Intrado to include specific suggested replacement statements or findings in its exceptions other than the inclusion of the suggested replacement finding that Intrado offers telephone exchange service and is entitled to Section 251(c) interconnection.

[3] Docket No. 08-0545, *Intrado Inc. Petition for Arbitration pursuant to Section 252(b) of the Communications Act of 1934, as amended, to Establish an Interconnection Agreement with Illinois Bell Telephone Company*, Proposed Arbitration Decision (Feb. 13, 2009) ("PAD").

("ALJs") to arbitrate the remaining unresolved issues pursuant to Section 251(c) and, as necessary, pursuant to Section 251(a) of the Act.

ARGUMENT

I. INTRADO PROVIDES TELEPHONE EXCHANGE SERVICE AND IS ENTITLED TO SECTION 251(C) RIGHTS AS STAFF HAS RECOGNIZED

As set forth in Intrado's Briefs and Intrado's Brief on Exceptions, Intrado's 911 service satisfies each prong of the telephone exchange service definition as interpreted by the Federal Communications Commission ("FCC") (Intrado Exception No. I).[4] The PAD correctly determines that Intrado's 911 service satisfies the "within a telephone exchange" and "exchange service charge" requirements of the telephone exchange service definition.[5] Intrado's service also allows Intrado's public safety answering point ("PSAP")[6] customers to receive 911 calls and intercommunicate with all 911 callers programmed to reach the particular PSAP. Intrado's service therefore satisfies the "intercommunication" requirement of the telephone exchange service definition.[7] This is consistent with Commission Staff's conclusions throughout this proceeding that Intrado offers telephone exchange service and is therefore entitled to interconnection pursuant to Section 251(c).[8]

Intrado also agrees with Staff's finding that the Commission should take an expansive view of the types of entities entitled to interconnection pursuant to Section 251(c).[9] The PAD itself acknowledges that the Commission is "receptive to statutory interpretation that advances

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[4] Intrado Initial Brief at 12-16, 18-20; Intrado Reply Brief at 6-10; Intrado BOE at 3-6.

[5] PAD at 15-16, 16-17.

[6] For ease of reference, Intrado uses the term "PSAP" to refer to any Illinois public safety agency, Emergency Telephone System Board, or other entity that may be responsible for purchasing 911/E911 services to ensure consumers living in the relevant geographic area can reach emergency responders.

[7] Intrado Initial Brief at 12-16, 18-20; Intrado Reply Brief at 6-10; Intrado BOE at 3-6.

[8] Staff Initial Brief at 9-10; Staff BOE at 2.

[9] Staff BOE at 2.

the law's intentions and enhances public safety,"[10] but the PAD's conclusions ignore this important public interest objective. The approach advocated by Staff in its Brief on Exceptions is consistent with the Commission's prior findings in Sprint's arbitration proceeding with various rural carriers.[11] In that case, the Commission determined that supporting Sprint's entry into the market was "significant" because it represented "one of the first, if not the first," competitive alternatives in the geographic areas Sprint sought to serve.[12] The same is true here. The Illinois public safety agencies Intrado seeks to serve are a class of customers with no competitive choice of service provider today.[13] Thus, a finding that Intrado is entitled to interconnect with AT&T, pursuant to Section 251(c), Section 251(a) or both, would "greatly serve[] the public interest" and would allow the Illinois public safety market "to benefit from the competitive telecommunications market"[14] as Congress, the Illinois legislature, and this Commission envisioned.[15]

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[10] PAD at 18.

[11] Staff BOE at 2 (citing Docket Nos. 05-0259, *et al.*, *Cambridge Telephone Company, et al. Petitions for Declaratory Ruling and/or Suspension or Modification Relating to Certain Duties under Sections 251(b) and (c) of the Federal Telecommunications Act, pursuant to Section 251(f)(2) of that Act; and for Any Other Necessary or Appropriate Relief*, Order at 13 (July 13, 2005) ("*Sprint-Rural Order*"); *rehearing and reconsideration denied*, Notice of Commission Action (Aug. 26, 2005); *aff'd Harrisonville Telephone Company, et al. v. Illinois Commerce Commission, et al.*, Civil No. 06-73-GPM, Memorandum Opinion and Order (S.D. Ill. Sept. 5, 2007)).

[12] *Sprint-Rural Order* at 11.

[13] Direct Testimony of Carey F. Spence-Lenss on behalf of Intrado Inc. at 24, lines 4-6 (Intrado Hearing Exhibit 4).

[14] *Sprint-Rural Order* at 18.

[15] Section 251 was intended to facilitate "[v]igorous competition," which Congress understood "would be impeded by technical disadvantages and other handicaps that prevent a new entrant from offering services that consumers perceive to be equal in quality to the offerings of [incumbent carriers]." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶ 16 (1996) ("*Local Competition Order*") (intervening history omitted), *aff'd by AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). The process established by Section 251 and the FCC's implementing rules eliminates these barriers to entry to give competitors like Intrado "a fair opportunity to compete" in the marketplace. *See id.* ¶ 18. The opening of the local exchange market to competition was "intended to pave the way for enhanced competition in all telecommunications markets, by allowing all providers to enter all markets." *Id.* ¶ 4. Illinois law also supports a competitive telecommunications market. *See, e.g.*, 220 ICLS 5/13-103 (directing the Commission to ensure the "development of and prudent investment in advanced telecommunications services and networks that foster economic development of the State

The Commission's conclusions in the Sprint proceedings are also consistent with its previous findings in the *SCC Order* that the "public interest is protected when [911/E911] services are regulated."[16] As Staff notes, the PAD does not adequately address "how the facts obtained in the instant matter differ from those in" the *SCC* proceeding.[17] Indeed, Staff correctly recognizes that Intrado's current 911/E911 product will offer significantly more than SCC's service offering.[18] Unlike SCC, Intrado will not merely be a middleman, but will provide a complete, integrated service to its Illinois public safety customers. Moreover, Intrado will provide services to telematics providers (such as OnStar) and private branch exchange ("PBX") owners who have subscribers that originate 911 calls.[19] Thus, there is no justification for reversing the Commission's prior findings in the *SCC Order* or for the Commission to accept the edits proposed by Staff to the PAD with respect to the *SCC Order* under Staff Exception No. 2.[20]

Finally, Intrado disagrees with Staff that the classification of AT&T's 911 service to Illinois public safety agencies has no bearing on this proceeding (Staff Exception No. 3).[21] As evidenced by the Emergency Telephone Service Act and the Commission's Part 725 rules, it has already been determined that 911/E911 services should be subject to a significant level of

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[is] encouraged through the implementation and enforcement of policies that promote effective and sustained competition in ***all*** telecommunications service markets") (emphasis added).

[16] 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 at 8 (Mar. 21, 2001) ("*SCC Order*"); *see also* Intrado BOE at 9-10 (discussing the Commission's previous public interest findings).

[17] Staff BOE at 3.

[18] Staff BOE at 3-4.

[19] Docket No. 08-0545, *Intrado Inc. Petition for Arbitration pursuant to Section 252(b) of the Communications Act of 1934, as amended, to Establish an Interconnection Agreement with Illinois Bell Telephone Company*, Intrado Communications Inc. Verified Petition for Arbitration at 6, n.10 (filed Sept. 22, 2008).

[20] Staff BOE at 5.

[21] Staff BOE at 7.

regulation.[22] The Commission has routinely regulated the 911/E911 services provided by AT&T and other incumbents,[23] has approved of the inclusion of such services in the incumbents' regulated local exchange tariffs,[24] and has rejected attempts by other unqualified 911/E911 service providers to enter the market.[25] The statements contained in AT&T's tariff regarding its 911/E911 service and the Commission's past treatment of that and other 911/E911 services therefore have a direct bearing on the Commission's conclusions in this proceeding. If AT&T's 911/E911 service is treated as a local exchange service, there is no justification for treating Intrado's service any differently.

II. THIS ARBITRATION PROCEEDING HAS NO EFFECT ON THIRD PARTIES OR STAFF'S REQUEST FOR A GENERIC PROCEEDING

The only matter at issue in this proceeding is Intrado's right to interconnect and the interconnection arrangements that must be established between Intrado and AT&T to support Intrado's provision of 911/E911 services to Illinois PSAPs and public safety agencies consistent with Illinois and federal law. There are no third party rights at issue in this arbitration[26] and there is no need for the Commission to conduct a generic proceeding prior to resolving the interconnection arrangements at issue here.[27]

The legal framework necessary to grant Intrado's interconnection request is already in place. Interconnection is available to Intrado under Section 251(c) or Section 251(a) (or both) of

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22 Emergency Telephone System Act, 50 ICLS 75010, 750.11; 83 ILL. ADM. CODE PART 725.

23 *See, e.g.*, Docket No. 93-0037, *Revision of 83 Ill. Adm. Code 725*, Order (Sept. 13, 1995).

24 AT&T's 911/E911 service to PSAPs is located in its general exchange tariff and is classified as a "telephone exchange communications service" in the tariff. *See* Illinois Bell Telephone Company Ill. C.C. No. 20, Part 8, Section 3.

25 Docket No. 04-0406, *Ramsey Emergency Services, Inc. Application for a Certificate of Local Authority to Operate as a Provider of Telecommunications Services in All Areas in the State of Illinois*, Order (May 17, 2005), *aff'd Ramsey Emergency Services, Inc. v. Illinois Commerce Commission*, 367 Ill. App. 3d 351 (2006).

26 *Cf.* Staff BOE at 8.

27 *Cf.* Staff BOE at 10.

the Act as explained in Intrado's Brief on Exceptions (Intrado Exception No. II).[28] At a minimum, Intrado is a telecommunications carrier[29] and interconnection is a duty of all telecommunications carriers under Section 251(a) regardless of whether they offer "telephone exchange service" as the PAD acknowledges.[30] Indeed, the Commission has previously found that Section 251(a) "contains no restrictions on who may interconnect with whom."[31] The issue of 251(a) interconnection is properly before the Commission as a result of the positions taken by AT&T in this proceeding that Intrado is only entitled to a 251(a) or commercial agreement for interconnection.[32]

Further, Illinois law recognizes the possibility of a competitive provider of 911/E911 services to Illinois public safety agencies.[33] As long as Intrado's service complies with the Commission's rules for 911 system providers, Intrado should not be denied the right to provide this intrastate service.[34] Intrado's service offering will be detailed in its tariff, which can be

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[28] Intrado BOE at 6-10.

[29] PAD at n.3 ("Intrado is certificated to provide intrastate facilities-based and resold local and interexchange telecommunications services."); *see also* Docket No. 00-0606, *SCC Communications Corp. Application for a Certificate of Authority to Provide Telecommunications Services in the State of Illinois*, Order (Dec. 20, 2000); Docket No. 00-0606, *SCC Communications Corp. Application for a Certificate of Authority to Provide Telecommunications Services in the State of Illinois*, Amendatory Order (Jan. 31, 2001); *SCC Communications Corp. Name Change to Intrado, Inc.* (filed Oct. 11, 2001).

[30] PAD at 3; *see also* 47 U.S.C. § 251(a) (setting forth the interconnection obligation of all telecommunications carriers); 47 U.S.C. § 153(47) (defining "telephone exchange service").

[31] *Sprint-Rural Order* at 13.

[32] Intrado BOE at 6-7; *see also* Transcript at 132, lines 7-11 (Pellerin) ("Q: The [Florida] Staff recommendation, however, did determine that the parties can negotiate an interconnection agreement pursuant to Section 251A; is that correct? A: That's my understanding."); Transcript at 132, lines 12-16 (Pellerin) ("AT&T has never taken the position that it was not willing to negotiate a commercial agreement with Intrado. Whether you refer to that as 251A agreement or not, I don't have an opinion on that."); Transcript at 139, lines 8-19 (Pellerin) ("Q: Does AT&T have any obligation to negotiate or interconnect with Intrado outside of Section 251? A: Well, I think we are here talking about Section 251C interconnection negotiations and arbitration. Beyond that, all telecommunications carriers have obligations under 251A. Q: So the commercial agreement that you believe should be entered into would be pursuant to 251A? A: Potentially.").

[33] 83 ILL. ADMIN CODE TIT. § 725.500(c)(2); *see also* Direct Testimony of Marci Schroll on behalf of the Staff of the Illinois Commerce Commission at 5, lines 103-08 (Staff Hearing Exhibit 3).

[34] Intrado agrees with Staff that it is not necessary to classify 911/E911 service under Illinois law. *See* Staff BOE at 9. The Commission has already determined that 911/E911 services should be regulated in adopting the Part

examined by the Commission pursuant to the same process applied to all other carriers.[35] To treat Intrado any differently would amount to a barrier to entry under Section 253 of the federal Act[36] and would be inconsistent with the Commission's prior conclusion that promoting competition in previously non-competitive markets "greatly serve[s] the public interest."[37] Thus, the proposed revisions suggested by Staff under Exceptions No. 4 and 5 are unnecessary and should be rejected.

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725 rules. *See* 83 ILL. ADMIN CODE TIT. Part 725. Moreover, the PAD makes clear that 911/E911 service is a local service. *See* PAD at 15.

[35] 220 ILCS 5/13-505 (stating that a competitor like Intrado is only required to demonstrate that its proposed rates are reasonable); *see also* Transcript at 148, lines 13-20 (Pellerin) (AT&T's witness acknowledging that "just and reasonable rates" is the standard in Illinois).

[36] To ensure that the competition contemplated by Section 251 would flourish, the Act specifically condemns state statutes, regulations, or legal requirements that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Thus, no state may "erect legal barriers to entry to telecommunications markets that would frustrate the 1996 Act's explicit goal of opening local markets to competition." *TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e) and 253*, 13 FCC Rcd 16400, ¶ 8 (1998).

[37] *Sprint-Rural Order* at 13; *see also* Intrado BOE at n.6 (discussing the goals of Sections 251 and 253 to promote competition).

CONCLUSION

For the foregoing reasons and those set forth in Intrado's Brief on Exceptions, Intrado respectfully requests that the Commission reject the PAD's finding that Intrado does not offer telephone exchange service and direct the ALJs to arbitrate the remaining issues between the Parties pursuant to Section 251(c), Section 251(a), or both.

Respectfully submitted,

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Dated: March 2, 2009

Its Attorneys

CERTIFICATE OF SERVICE

I, Angela F. Collins, certify that on this 2nd day of March 2009, I electronically filed a copy of the foregoing Reply Brief on Exceptions of Intrado Inc. with the Clerk of the Illinois Commerce Commission and served a copy on the following via electronic mail.

/s/ Angela F. Collins
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Attachment 5

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

CASE NO. 08-0298-T-PC (REOPENED)

INTRADO COMMUNICATIONS, INC. and
VERIZON WEST VIRGINIA INC.,

Petition for Arbitration filed pursuant to §252(b) of 47 U.S.C. and 150 C.S.R. 6.15.5.

DIRECT TESTIMONY ON BEHALF OF

VERIZON WEST VIRGINIA INC.

WITNESS PANEL:
Peter J. D'Amico
Kathleen M. Cerrati

EXHIBIT 1.0

DATED: September 9, 2008

164 will be offered; the rates, terms and conditions that will apply; and customers'
165 rights and responsibilities.

166 **Q. Is Verizon required to provide interconnection to Intrado for any purpose**
167 **Intrado wishes?**

168 A. No. Incumbent local exchange carriers provide interconnection to
169 requesting carriers only "for the transmission and routing of telephone exchange
170 service and exchange access."[4] As we discussed above, Intrado has not yet
171 filed the tariffs required by the Commission's certification order, so it's not entirely
172 clear what services Intrado intends to provide. Nevertheless, Verizon has agreed
173 to negotiate and arbitrate an interconnection agreement with Intrado on the same
174 basis it does with any CLEC—although we understand that the fundamental
175 issue of Intrado's right to section 251(c) interconnection is now before the FCC's
176 Wireline Competition Bureau, as well as other state commissions, in a number of
177 Intrado arbitrations with AT&T, Embarq and Cincinnati Bell Telephone
178 Company.[5] In any event, Verizon's position here is that it will provide Intrado the
179 same interconnection and other services it provides to any CLEC, but Intrado is

[4] 47 U.S.C. § 251(c)(2).

[5] These proceedings are pending in the states of Florida (Embarq Docket No. 070699-TP, filed Nov. 27, 2007; AT&T Docket No. 070736-TP, filed Dec. 21, 2007); Ohio (Embarq Case No. 07-1216-TP-ARB, filed Nov. 28, 2007; AT&T Case No. 07-1280-TP-ARB, filed Dec. 21, 2007; Cincinnati Bell Case No. 08-537-TP-ARB, filed April 21, 2008); North Carolina (AT&T Docket P-1187, Sub. 2, filed Dec. 21, 2007); and at the FCC (Embarq Case No. PUC-2007-00112, filed Nov. 27, 2007; referred from the Va. S.C.C. to the FCC, WC Docket No. 08-33). In addition, Intrado has filed for arbitration with Verizon in Delaware (Docket 08-61, filed Mar. 5, 2008); Florida (Docket 080134-TP, filed Mar. 5, 2008); Maryland (Case No. 9138, filed Mar. 5, 2008); Ohio (Case No. 08-198-TP-ARB, filed Mar. 5, 2008); North Carolina (Docket P-1187, Sub. 3; filed Mar. 5, 2008); Virginia/FCC (Case No. PUC-2008-00021, filed Mar. 5, 2008; now referred to the FCC, WC Docket No. 08-185).