Attachment 2

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

ENTRY ON REHEARING

The Commission, considering the arbitration award issued March 4, 2009, the application for rehearing filed by The Ohio Bell Telephone Company dba AT&T Ohio (AT&T) on April 3, 2009, and the memorandum contra filed by Intrado Communications, Inc. (Intrado) on April 13, 2009, issues its entry on rehearing.

(1) On March 4, 2009, the Commission issued an award that decided issues presented for arbitration by Intrado and AT&T.

(2) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matter determined by the Commission within 30 days after the entry of the order upon the journal of the Commission.

(3) On April 3, 2009, AT&T filed an application for rehearing. In its application for rehearing, AT&T challenges the Commission's awards for issues 1(a), 1(b), 1(c), 4, 4(a), 5(a), 5(b), 6, 13(a), 24, 29(b), and 31. On April 29, 2009, the Commission granted rehearing to allow for further consideration of the issues raised by AT&T and the parties' language proposals for the interconnection agreement.

(4) For issues 1(a) and 1(b), AT&T contends that the arbitration award incorrectly interprets the federal definition of "telephone exchange service." AT&T relies upon the definition of telephone exchange service found in 47 U.S.C. §153(47), which reads 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 interpret this provision, AT&T relies upon decisions issued by the Federal Communications Commission (FCC) in its *Advanced Services Order*[1] and its *Directory Listing Order*.[2] Upon analyzing the elements of telephone exchange service pursuant to the standards set in the *Advanced Services Order* and the *Directory Listing Order*, AT&T concludes that Intrado's Intelligent Emergency Network (IEN) service does not meet the criteria of telephone exchange service pursuant to 47 U.S.C. §153(47). According to AT&T, the FCC defined the components of 47 U.S.C. §153(47). That is, the FCC defined "intercommunication," what it means to "originate" a telecommunications service, what it means to provide a service "within a telephone exchange or within a connected system of telephone exchanges within the same exchange area," what it means to be of a character ordinarily furnished by a single exchange and which is covered by the exchange service charge, and what it means for telephone exchange services to be "comparable."

(5) To begin, AT&T continues to claim that IEN does not provide call origination. AT&T contends that call origination applies to part A and part B of 47 U.S.C. §153(47). AT&T rejects the finding that a Public Safety Answering Point's (PSAP's) ability to transfer (hookflash) a call can be considered call origination. AT&T takes the position that the transfer of an already originated call is not origination, stating that calls cannot be originated twice. To highlight further that PSAPs cannot initiate calls, AT&T emphasizes that a PSAP must wait for an inbound 911 call. Without a 911 call, the PSAP can do nothing.

---

1 *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385 (1999).

2 *Provision of Directory Listing Information Under the Telecommunications Act of 1934, as Amended*, 16 FCC Rcd 2736 (2001).

Noting a requirement that subscribers must have the capacity to interconnect with a multiplicity of customers, AT&T declares that IEN does not meet that requirement. Instead, PSAPs can only contact predetermined points. For these reasons, AT&T concludes that the Commission erred in finding that call transfers and conferencing involve call originating.

AT&T proclaims that there are other sources that substantiate that PSAPs do not originate calls. Looking at Intrado's tariff, AT&T finds further support for its argument that a call transfer is not origination. AT&T points to language in the tariff that refers to transfers of existing calls, calls originated by the 911 caller, and emergency calls originated by personal communications devices. In addition to the tariff, AT&T points to the testimony of Intrado's witness, Ms. Spence-Lenss, who, it claims, testified that call transfer is not call origination. For additional support of its position, AT&T refers to the Florida and Illinois commissions that determined that Intrado's service does not provide call origination.

(6) Intrado argues that the Commission properly concluded that IEN fits within the definition of telephone exchange service. In disagreement with AT&T, Intrado asserts that IEN provides call origination. Differing from AT&T's reading of 47 U.S.C. 153(47), Intrado finds that origination is only relevant to part B of the statute. Nonetheless, Intrado believes that IEN fulfills the requirement of origination by enabling two-way communication between a PSAP and a 911 caller or between a PSAP and another PSAP. By functioning in such a way, Intrado believes that IEN necessarily provides a PSAP with the ability to originate and terminate a call.

Intrado rejects AT&T's claim that IEN's call transfer capability (hookflash) does not involve call origination. Intrado explains that when a PSAP receives a 911 call it can hookflash to receive dial tone. It then originates a call to a third party through the central office serving as the 911 selective router. The third party may be bridged to the 911 caller. The PSAP may either disconnect or remain on the line. Highlighting AT&T's misunderstanding, Intrado emphasizes that the PSAP originates a call and adds the 911 caller to an existing call. Contrary to AT&T's understanding, Intrado emphasizes that the PSAP does not add another party to the 911 caller's call.

Intrado states that AT&T misconstrued its witness' testimony on whether the transfer of a call is origination. In AT&T's reading of the testimony, AT&T claims that Intrado's witness admitted that the transfer of a 911 call is not origination. Intrado points out that its witness stated that transferring may involve originating.

(7) In the arbitration award, we determined that the capability of a PSAP to call another PSAP and engage in two-way communications with 911 callers satisfies the call origination and termination requirements. AT&T has presented no argument that would cause us to alter our decision. AT&T stakes its position upon whether a PSAP, by hookflashing, joins another party to a call originated by the 911 caller. AT&T does not contest whether PSAPs can originate calls to other PSAPs. Intrado, in response, alleges that AT&T's characterization is incorrect. According to Intrado, the PSAP, after receiving a 911 call, can hookflash to receive dial tone to originate a call to an emergency service provider. Taking into account that the evidence shows that, in addition to receiving 911 calls, Intrado's PSAP can originate calls to other PSAPs and emergency service providers, we must conclude, as we did in the arbitration award, that Intrado's service meets the "originating and terminating" requirement.

(8) Included in the definition of telephone exchange service is intercommunication. According to AT&T's reading of the *Advanced Services Order*, intercommunication is a component of parts A and B of 47 U.S.C. §153(47). AT&T rejects the Commission's determination that intercommunication is not quantified by 47 U.S.C. §153(47). AT&T also rejects the finding that intercommunication exists where PSAPs can contact other PSAPs and the public can communicate with PSAPs and local emergency personnel. According to AT&T's reading of the *Advanced Services Order* and the *Directory Listing Order*, the FCC defines intercommunicating as a service that permits all subscribers within a geographic area to make calls to one another.

AT&T claims that Intrado's service fails to meet the definition of intercommunicating because PSAPs cannot make calls to an entire community of interconnected customers within a geographic area. AT&T emphasizes that PSAPs cannot make

calls to anyone. PSAPs can only receive 911 calls. Even if call transfers were deemed to be call origination, AT&T still finds that Intrado's service lacks the intercommunicating requirement because PSAPs cannot engage an entire community of interconnected customers. AT&T likens Intrado's service to private line service. The FCC has rejected private line service as an intercommunicating service because customers who subscribe to a private line service can only communicate with predetermined points.

Citing the FCC's *Directory Listing Order*, AT&T reaches the conclusion that intercommunicating requires more than a connection between designated points. As an example, AT&T points to the distinction made by the FCC concerning Directory Assistance (DA) with and without call completion. The FCC decided that DA with call completion is an intercommunicating service because it allows a caller to complete a call to any listed telephone number. DA without call completion, on the other hand, only allows connection with the DA service itself. To AT&T, Intrado's service is the equivalent of DA without call completion because a 911 caller similarly has no access to a community of interconnected customers. AT&T describes Intrado's service and DA without call completion as "inbound-only hub-and-spoke arrangements."

(9) Intrado rejects AT&T's claim that IEN does not provide intercommunication, as required in the definition of telephone exchange service. Procedurally, Intrado urges the Commission to reject AT&T's argument because it is merely a restatement of the argument that it has already asserted. Substantively, Intrado points out that the PSAP purchases 911 service from Intrado so that it can receive calls from all 911 callers programmed to reach the PSAP. Disputing AT&T's characterization, Intrado denies that there is a predesignated transmission path. Moreover, Intrado rejects any comparison of IEN to a dedicated, point-to-point service like private line service. Unlike private line service, Intrado distinguishes its service by its ability to receive calls from multiple locations and 911 callers.

Intrado argues that its 911 service complies with the *Directory Listing Order* by interconnecting all 911 callers in a specific geographic area to the PSAP authorized to receive 911 calls. To

Intrado, the issue is whether Intrado's PSAP customer can intercommunicate with 911 callers seeking emergency assistance. It is immaterial whether the "end user" can communicate with any other entity through 911 dialing. Citing the *Advanced Services Order*, Intrado contends that the intercommunication requirement is satisfied by customers having the capacity to intercommunicate with other subscribers. Because PSAPs can intercommunicate with Ohio consumers in a relevant geographical area, Intrado concludes that Intrado's service provides a key component of telephone exchange service.

Intrado challenges AT&T's presumption that Intrado's intercommunicative abilities are limited to call forwarding. It is Intrado's position that call forwarding encompasses call origination. Intrado adds that intercommunication occurs in PSAP-to-PSAP communications. Intrado notes that intercommunication may also occur during efforts to route properly a misdirected mobile emergency call. Three-way conference calls between police dispatchers, PSAP operators, and individuals in distress may also involve intercommunication.

Intrado believes that there is a relationship between the concepts of "geographical area" and "community of interconnected customers." Both, according to Intrado, tie into origination and conferencing abilities. Intrado emphasizes that the purpose of the 911 system is to aid in the rapid response of emergency providers closest to the 911 caller. From this perspective, Intrado likens the area served by the PSAP to extended area service where goods and services in a community are sought to be made available on a local calling basis. Intrado states that it employs selective routers to ensure that customers can call PSAPs regardless of exchange boundaries. In sum, Intrado concludes that its service is consistent with the *Directory Listing Order* because it allows a community of interconnected customers to make calls to one another. The community of interest consists of 911 callers, PSAPs, and first responders located in a relevant geographical area.

(10) The Commission finds it necessary to again note, as we did in the arbitration award, that the Telecommunications Act of 1996

(the Act)[3] does not define "intercommunication." Nor has the FCC precisely defined the scope of intercommunication that a provider must offer to meet the definition of telephone exchange service. In the *Advanced Services Order*, the FCC stated that intercommunication refers to a service that permits a community of interconnected customers to make calls to one another over a switched network. The FCC further concluded that a service satisfies the interconnection requirement as long as it provides customers with the ability to intercommunicate with other subscribers. In our arbitration award we noted that 47 U.S.C. §153(47) does not quantify intercommunication. It does not set limits on the size of the community or the number of interconnected customers. It is, therefore, open whether a community and customers may be more precisely defined.

Taking into account the network architecture of Intrado, we find, as before, that PSAPs are part and parcel of a community of PSAPs, local emergency service providers, and the public. We must note that there is a distinction between origination and intercommunication. We do not agree that intercommunication necessarily means that PSAPs must have the capacity to call potential 911 callers. We find that intercommunication exists where PSAPs and 911 callers can transmit and receive messages using the same facilities. Thus, even though a PSAP may not be positioned to initiate a call to an end user, a PSAP can intercommunicate with a caller after an end user initiates a call to the PSAP. We also find, based on the evidence, that PSAPs can intercommunicate, in the more traditional sense, with certain other PSAPs and emergency service providers. We thus find that Intrado's service provides intercommunication pursuant to the definition of telephone exchange service.

We further note that while it was not discussed in the record of this case, the Commission takes administrative notice of the fact that Intrado was directed to amend its tariff to provide "reverse 911" to PSAPs upon request from any county Intrado serves (Case No. 07-1199-TP-ACE, Finding and Order at Finding 16, February 5, 2008). Reverse 911 provides PSAPs with the ability to provide outbound emergency notification messaging to all telephone subscribers within the area served

---

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

by the PSAP. Having required Intrado to provide the capability upon request, this Commission cannot now ignore that capability in the current arbitration. Thus, even though reverse 911 is not necessary for our determination here, PSAPs will possess the ability through reverse 911 to initiate calls to 911 end users, providing further evidence of Intrado's ability to provide intercommunication and call origination.

(11) A third component of telephone exchange service is that service must be within a telephone exchange or within a connected system of telephone exchanges within the same exchange area. AT&T contends that Intrado's service does not meet this definition. AT&T concedes that the exchange area need not coincide with an incumbent local exchange carrier's (ILEC's) exchange boundary. Nevertheless, AT&T rejects the notion that a geographic boundary can be defined by the 911 caller, the PSAP, and a first responder. In its interpretation of the *Advanced Services Order* and the *Directory Listing Order*, AT&T regards the connection between a PSAP, a 911 caller, and first responders as merely a communication between designated points, not the equivalent of a local exchange area.

(12) In opposing AT&T, Intrado contends that its service meets the requirement that it serve an exchange area. Intrado rejects as a mischaracterization AT&T's assertion that Intrado's service is merely communication between designated points. In doing so, Intrado accuses AT&T of misconstruing the FCC's position and the design of Intrado's system.

To begin, Intrado criticizes AT&T for failing to understand how the "points" interact. A connection between the 911 caller, the PSAP, and the first responder is an inaccurate representation. Intrado points out that fixed and nomadic 911 callers within the community of interest can be connected to the designated PSAP. In the event of misdirected mobile emergency calls, PSAP-to-PSAP communications take on a critical role. Intrado states that it can route 911 calls from multiple callers to a PSAP and from one PSAP to another, including nonsubscriber PSAPs, to ensure that a caller is connected to the closest emergency service provider.

According to Intrado, federal authorities have determined that ILEC exchange boundaries are irrelevant to 911 services. In

support, Intrado cites a decision where a federal district court waived a local access and transport area (LATA) restriction to allow an ILEC to provide 911 service beyond a LATA boundary. The court also recognized that selective routers often serve 911 callers and PSAPs in more that one LATA.

As a final argument against AT&T's interpretation of exchange area, Intrado accuses AT&T of taking an impermissibly narrow view of the "equivalent of a local exchange area." The FCC, according to Intrado, has defined the term more broadly. Intrado points out that the FCC has decided that the definition of telephone exchange service does not require a specific geographic boundary. A comparison to illustrate the point would be wireless geographic service areas, which are considered to be within a telephone exchange even though they are not consistent with wireline exchange area boundaries.

(13) Although conceding that an exchange area does not need to coincide with ILEC exchange boundaries, AT&T disputes the Commission's finding that an exchange area can be defined by the 911 caller, the PSAP, and a first responder. In our arbitration award we recognized that "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." AT&T's argument does not persuade us to change our determination on this matter.

AT&T's attempt to characterize Intrado's service as a linear connection from a 911 caller to a PSAP to an emergency service responder is not an accurate portrayal of Intrado's service. AT&T's characterization fails to take into account mobile service callers, nonsubscribing PSAPs, and out-of-territory emergency service providers. The service is not simply a predesignated point-to-point, spokes and hub arrangement. It is instead a service that facilitates communications between the public and emergency service providers within a particular geographic area. As we stated in the arbitration award, Intrado's service, because it must account for the location of fire, police, and other emergency service providers, does have geographical limitations that are generally consistent with a

community of interest. In accordance with 47 U.S.C. §153(47), we find that Intrado's service is of a character that is ordinarily furnished by a single exchange.

(14) According to Intrado, in order to qualify for interconnection under Section 251(c), a carrier must provide telephone exchange service or exchange access service. Intrado claims that these limitations are intended to prevent long distance carriers from using interconnection to avoid the payment of access charges. In its memorandum contra, Intrado argues that its 911 service is analogous to exchange access service and that it is entitled to interconnection as either a telephone exchange service provider or an exchange access service provider. In the Act, Intrado states that "exchange access" is defined as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." Intrado concedes that 911 services do not fall squarely within the definition of exchange access because it is not a toll service. Intrado, nevertheless, argues that its 911 service performs the same function as an exchange access service because it provides local exchange carriers access to PSAPs for the transmission and completion of 911 calls.

(15) The Commission finds that Intrado's qualifications as an exchange access provider are not at issue in this proceeding. The parties, in Issue 1(a), arbitrated the issue of what services Intrado provides or intends to provide in Ohio. AT&T and Intrado disputed whether Intrado is entitled to interconnect with AT&T under Section 251(c)(2)(A) as a provider of "telephone exchange service" or "exchange access." AT&T took the position that Intrado admitted that it does not qualify as an exchange access provider. AT&T, therefore, only discussed at hearing and in its application for rehearing whether Intrado meets the criteria of a provider of telephone exchange service. It is, therefore, beyond the scope of this proceeding whether Intrado is a provider of exchange access.

(16) AT&T disagrees with the Commission's finding that Intrado imposes an "exchange service charge," as embodied in the definition of telephone exchange service. AT&T asserts that a payment of a fee to Intrado by PSAPs is not enough. According to AT&T's understanding of the *Advanced Services Order*, the payment of a fee implies that an end-user obtains the

ability to communicate within the equivalent of an exchange area. The PSAP, AT&T claims, cannot make calls to anyone. It can only receive and forward 911 calls. AT&T, therefore, concludes that any charge that a PSAP pays to Intrado cannot be an exchange service charge. AT&T criticizes the Commission's award for finding that Intrado's service is of a "character ordinarily furnished by a single exchange." To AT&T, Intrado's service fails to meet this standard, being only a service that provides connectivity between designated points.

(17) Intrado commends the Commission for finding that Intrado's PSAP service fee meets the requirement of having an exchange service charge. Over AT&T's objection that the subscription fee paid by PSAPs is not enough, Intrado responds that the *Advanced Services Order* states that any charges assessed for services would be considered an "exchange service charge." In exchange for the payment of a service fee, Intrado provides the facilities to allow a PSAP to communicate within the equivalent of an exchange area.

(18) We find that in the *Advanced Services Order*, the FCC acknowledges that neither the Act nor the FCC's rules define exchange service charge. Analyzing the context in which the term is used, the FCC concluded that "exchange service charge" "implies that an end-user obtains the ability to communicate within the equivalent of an exchange area as a result of entering into a service and payment agreement with a provider of a telephone exchange service." According to the FCC, the purpose of the exchange service charge is to distinguish local from toll service. As applied to xDSL-based advanced services within the equivalent of an exchange area, the FCC concluded that any charge that an LEC assesses for originating or terminating traffic would be deemed an exchange service charge. The FCC explained that, if otherwise, LECs could remove services at will from the definition of telephone exchange service simply by calling the charges for the service something other than exchange service charges.

We have concluded above that Intrado's service will be provided in the equivalent of an exchange. In the arbitration award we found sufficient evidence of an exchange service charge in the form of a fee paid by PSAPs and public safety agencies to Intrado for the provision of telecommunications

service. We see no reason to deviate from our arbitration award.

(19) Upon considering other services deemed by the FCC to be telephone exchange services, AT&T finds no comparisons to Intrado's service. AT&T condemns the Commission's award for failing to compare Intrado's service to xDSL and DA call completion services. AT&T states that in the *Advanced Services Order*, the FCC determined that xDSL fell within the definition of telephone exchange service. Similarly, the FCC declared in its *Directory Listing Order* that DA call completion services are telephone exchange services. AT&T points out that the Illinois commission determined that Intrado's service lacks the attributes of either xDSL or DA with call completion. Pointing out the differences, AT&T argues that xDSL allows a subscriber to communicate with any other subscriber without an additional line. IEN, on the other hand, does not allow PSAPs to make calls and only permits the transfer of calls to a designated point. DA with call completion, AT&T argues, similarly allows communication with a large number of people whereas IEN only allows a transfer to a designated point.

(20) Relying on the FCC's *Advanced Service Order*, Intrado asserts that telephone exchange service is not limited to traditional voice telephony. It also includes non-traditional means of communicating information within a local area. Disagreeing with AT&T, Intrado contends that DA and xDSL services are directly comparable to Intrado's 911 service. Intrado rejects AT&T's claim that DA is distinguishable from Intrado's 911 service because DA allows callers to intercommunicate with a large community and because DA allows the origination of a new call to a large group of subscribers without further DA assistance. Intrado argues that the purposes of DA and 911 services account for the difference in their respective communities of interest. Calls to subscribing PSAPs or by subscribing PSAPs will only be limited by the 911 caller's geographic location and the caller's proximity to first responders.

Intrado rejects AT&T's assertion that Intrado's service only allows a call transfer to a single destination with continued involvement by the PSAP. To Intrado, such a description contradicts AT&T's characterization of the hookflash. Intrado

argues that AT&T cannot claim that the PSAP is merely a passive forwarding service that cannot originate calls and, at the same time, claim that the PSAP's continued involvement on bridged calls distinguishes the PSAP from DA services. Essential, in Intrado's view, is that DA and Intrado's services are similar in their ability to originate bridged communications between a caller and a third party. Intrado believes that involvement subsequent to the origination of a call is immaterial.

(21) Intrado urges the Commission to reject AT&T's argument that Intrado's service must be compared to xDSL service. Intrado contends that AT&T ignores the reality of xDSL technology and has proffered misleading analysis. To Intrado, it appears that AT&T's reliance on whether an additional line is required overlooks the FCC's determination that intercommunication is a key criterion of telephone exchange service. It is Intrado's opinion that a comparison of 911 service to xDSL service is irrelevant.

(22) We note that in the *Advanced Services Order*, the FCC pointed out that the Act does not define "comparable." Relying on a dictionary definition, the FCC stated that comparable is generally understood to mean "having enough like characteristics and qualities to make comparison appropriate." In analyzing xDSL-based advanced services, the FCC concluded that the xDSL services in question meet the definition of telephone exchange service because the service originates and terminates within an exchange area.

Based on our reading of the *Advanced Services Order*, we agree with Intrado that it is not necessary to compare Intrado's service to the xDSL service at issue in the *Advanced Services Order* or to DA at issue the *Directory Assistance Order*. The more precise comparison, as stated in the *Advanced Services Order*, is to services that fall within the scope of part A of 47 U.S.C. §153(47). As stated alternatively in the *Advanced Services Order*, services in part B must share some of the same characteristics and qualities of the telephone exchange service definition in part A. The FCC further noted that neither the statutory text nor the legislative history provides guidance on which characteristics and qualities must be present in order for a service to fall within the scope of part B. For additional

clarification, the FCC pointed out that part B is not restricted to market substitutes for two-way, switched voice service. Absent clear congressional intent, the FCC presumed that it had discretion to determine which particular telecommunications services are sufficiently "comparable." If, as the FCC stated, a "comparable" service is a service that shares some of the same characteristics, it stands to reason that the "comparable" service need not share all of the same characteristics.

As did the FCC, we find, as we did in the arbitration award, that Intrado's service, by virtue of its ability to originate and terminate traffic within a geographically relevant area, not only meets the definition of telephone exchange service, but also is "comparable" to any service that may meet the criteria of part A of 47 U.S.C. §153(47). Absent clear legislative intent and a paucity of precedent we find sufficient latitude within the statute to find that Intrado's service meets the criteria of both part A and part B of 47 U.S.C. §153(47).

(23) AT&T noted in its application for rehearing that if the Commission reverses its decision on Issues 4 and 4(a) it would need to reverse its decision on issues 1(c) and 6(b). We agree. Because we are not reversing our decision on Issues 4 and 4(a), there is no reason to reverse, or address in detail, issues 1(c) or 6(b) on rehearing.

(24) In its application for rehearing of issues 4 and 4(a), AT&T asserts that the Commission erred by requiring AT&T to establish a POI on Intrado's selective router for delivery of AT&T's end users' 911 calls to PSAP customers of Intrado. AT&T again asserts that the location of the POI under Section 251(c)(2) does not vary depending on what type of service a carrier provides nor does there need to be multiple POIs serving the same purpose. AT&T avers that it is undisputed that AT&T has not requested interconnection to Intrado and that Intrado has requested interconnection to AT&T exclusively under Section 251(c)(2). AT&T avers that Congress, the FCC, and this Commission have repeatedly recognized, under Section 251(c)(2), a CLEC's point of interconnection with the ILEC must be on the ILEC's network and the ILEC has no obligation to build out to the CLEC or establish a POI on the CLEC's network.

AT&T contends that, at a minimum, the Commission should clarify whether its decision regarding the location of the POI, for 911 traffic when Intrado is the 911 service provider, is premised on Section 251(c)(2) or Section 251(a). If it is 251(a), AT&T contends the arbitration provisions do not apply, as it avers that the structure of Section 251 and 252 makes plain that state commissions have no authority to arbitrate issues under Section 251(a)(1). AT&T claims that the only time ILECs have a duty to negotiate with a requesting carrier under Section 252(b) is when the carrier requests an agreement to implement Sections 251(b) and (c), not Section 251(a)(1). AT&T argues that the only way a state commission would have authority to implement Section 251(a) would be if Congress expressly gave it that authority, for such power cannot be inferred. AT&T contends that the question is whether the Commission is affirmatively authorized to implement Section 251(a), not whether the Act precludes it from doing so. In addition, AT&T argues that the duty imposed by Section 251(a) is most reasonably interpreted as the duty to allow any other telecommunications carrier to connect to it and any other interpretation would have the effect of creating an unlawful taking by making the first carrier build or pay for facilities it would not otherwise need.

AT&T further avers that the arbitration award errs by going beyond the open issues the parties identified for arbitration. According to AT&T, neither Intrado nor AT&T asked to interconnect under Section 251(a)(1). Therefore, AT&T argues that, to the extent the Arbitration Award relies on Section 251(a)(1) for its decision on Issues 4 and 4(a), the ruling is beyond the Commission's jurisdiction and beyond the scope of the case and should be reversed. AT&T contends that Section 251 addresses interconnection in two discrete situations. If a competing carrier seeks to interconnect with an ILEC, it does so under Section 251(c)(2). On the other hand, AT&T contends that Section 251(a)(1) acts as a catchall for situations not covered by Section 251(c)(2), which comes with specific rights and obligations. According to AT&T, once interconnection has been established under Section 251(c), the ILEC has fulfilled its legal obligation and there is absolutely no duty to interconnect to the requesting carrier again under Section 251(a)(1). AT&T states that when the ILEC interconnects to a carrier under

Section 251(c)(2) it has fulfilled any conceivable duty it could ever have under Section 251(a)(1) as well.

Next, AT&T claims that the Commission's decision "makes bad policy" because it encourages arbitration and will open the door to imposing massive new costs and obligations on the ILECs. According to AT&T, the decision encourages arbitration as Intrado will have no actual end users making 911 calls and will need few trunk ports for interconnection. Where Intrado is the service provider to the PSAP, AT&T will be sending many calls to Intrado and will therefore need many more trunk ports for interconnection on Intrado's network at Intrado's market-based rates. AT&T contends that an even more serious offense will be that the Commission's award will open the door for every CLEC to demand that AT&T establish and pay for a POI on that CLEC's network since nothing in Sections 251(c)(2) or (a)(1) requires any special treatment for 911 carriers.

Finally, to the extent that the Commission does not reverse its decision, AT&T asks the Commission to, at a minimum, clarify that any POI AT&T would have to establish at an Intrado selective router would have to be within AT&T's service area. To the extent that the Commission does require AT&T to establish a POI on Intrado's network under Section 251(a), AT&T urges the Commission to clarify that this interconnection can be achieved indirectly as well as directly as permitted by statute.

(25) According to Intrado, AT&T's rehearing rehashes its arguments from its initial briefs to argue that a single mutual POI on AT&T's network should be implemented between the parties. Intrado states that it seeks a POI arrangement equal to AT&T's, which is vital to Intrado's ability to carry out its public safety duties under the Act. Intrado further points out that AT&T's arguments are predicated on the belief that state commissions are somehow powerless when interpreting and arbitrating particular portions of the Act. Intrado avers that this Commission has repeatedly rendered decisions under Sections 251(a) and (c) and it is entitled to apply any applicable law when rendering its decisions. Intrado points out that Section 252 does not foreclose state authority to arbitrate, nor does it somehow restrict such arbitrations to Sections 251(b) and (c). Specifically, Intrado states that Section 252(a) affords

any party to a Section 252 negotiation the right to petition a state commission for arbitration. Intrado notes that the Ohio Commission and several other state commissions have appropriately determined that the Section 252 arbitration process applies to all Section 251 agreements with ILECs.

Furthermore, Intrado rejects AT&T's argument that the issue of selective router POIs was not open for the purpose of arbitration. Intrado notes that the issue of one-way POIs was clearly an issue for arbitration under issue 4 and 4(a) and that it is improper for AT&T to claim that an issue argued under one legal theory and decided under another is somehow no longer open for Commission resolution. According to Intrado, the Commission has well-established authority to apply any applicable law, and it properly considered the issue of one-way POIs under the law.

Next, Intrado argues that the Commission's decision to compel AT&T to establish a POI at the selective router of Intrado when it is serving a PSAP was consistent with its decisions in the Embarq/Intrado[4] and CBT/Intrado[5] arbitration awards. Intrado claims that apart from AT&T's discredited theories regarding why the Commission may not arbitrate Section 251(a) issues, AT&T's only other argument against the Commission's decision is that Section 251(a) is simply the duty of a carrier to allow any other telecommunication carrier to connect to it. Intrado disagrees with AT&T's claim that Section 251(a) is redundant in comparison to Section 251(c)(2) and argues that, given the nature of Intrado's 911 services, both provisions are complimentary. Specifically, Intrado avers that "Section 251(c)(2) compels AT&T to allow Intrado to enter the competitive 911/E911 marketplace by opening its network under 251(c)(2), whereas Section 251(a) governs the substantive arrangements between selective routers that enable 911/E911 service to function as it has under the incumbent."

Finally, Intrado refutes what it claims is AT&T's throw-away argument regarding the effect of the Commission's ruling to be,

---

4 *In the Matter of the Application of Intrado Communications, Inc. for Arbitration of an Interconnection Agreement with Embarq*, Case No. 07-1216-TP-ARB (Case No. 07-1216-TP-ARB).

5 *In the Matter of the Application of Intrado Communications, Inc. for Arbitration of an Interconnection Agreement with Cincinnati Bell Telephone Company*, Case No. 08-537-TP-ARB (Case No. 08-537-TP-ARB).

in effect, an unlawful taking. First, Intrado notes that, in the two cases relied upon by AT&T, the Supreme Court found that no unlawful taking had occurred. Next, Intrado claims that AT&T misses the point that such takings are only unlawful if they are not compensated, which, according to Intrado, is not the case here. Third, Intrado points out that Intrado is not the sole beneficiary of AT&T's need to deploy facilities to connect to the selective router of Intrado. Intrado avers that AT&T's customers and AT&T itself are the principle beneficiaries when AT&T customers are able to continue to complete emergency calls to an Intrado-served PSAP.

(26) With regard to issue 4 and 4(a), the Commission finds that AT&T's application for rehearing should be granted in part and denied in part. We find that AT&T's application for rehearing with regard to the requirement that AT&T establish a POI on Intrado's network fails to raise any new arguments for the Commission's consideration. Therefore, AT&T's application for rehearing with regard to this issue is denied. We find, however, that AT&T's arguments with regard to the location of the POI on Intrado's network should be granted, as discussed in more detail below.

We will first address some of the specific arguments raised by AT&T concerning the requirement of a POI on Intrado's network when it is the 911 service provider. In the arbitration award, as in our previous arbitration awards for Intrado and other ILECs, the Commission clarifies that the determination that the POI be on Intrado's selective router when Intrado is the 911 service provider to the PSAP is based on Section 251(a). Section 251(a) establishes the duty of a telecommunications carrier to interconnect directly or indirectly with the facilities of other telecommunications carriers. This determination is appropriate in light of the scenario where Intrado is the 911 service provider to a PSAP serving an ILEC's end user customer. It is the ILEC that will need to interconnect to complete its end users' emergency calls to the PSAP. While the award language did not specifically reference 251(a), the aforementioned Commission decisions, which again are noted in the award, are clear as to the applicability of 251(a). The record also reflects that both parties understood the Commission's previous decisions with regard to 251(a). Furthermore, AT&T, in its brief, presented many of the same

arguments regarding the applicability of 251(a) as it provided in its rehearing application.

With respect to AT&T's claim that the Arbitration Award for issues 4 and 4(a) goes beyond the open issues because both parties argued that it fell under 251(c) is without merit. The Commission agrees with Intrado that the record clearly reflects that the proper location of the POI when Intrado is the 911 service provider to the PSAP is a primary issue. Furthermore, AT&T discussed Section 251(a) at length on the record in arguing against Intrado's desire to have AT&T establish a POI on Intrado's network. Further, it would be inappropriate to apply the requirements of Section 251(c) in this scenario when the Commission has already determined that the applicable section of the Act is Section 251(a), regardless of whether or not both parties contend such arrangements fall under Section 251(c). In sum, AT&T has asserted no facts or arguments that would give us a basis for varying from the award issued in this matter or in Case Nos. 07-1216-TP-ARB and 08-537-TP-ARB. Therefore, AT&T's request for rehearing on this point is denied.

The Commission further agrees with Intrado that it has also previously determined that Section 252(b) of the Act delegates to state commissions the authority to arbitrate disputes pertaining to a request for interconnection, services, or network elements pursuant to Section 251 of the Act. Nor is the Commission limited to disputes pursuant to Section 251(c) of the Act. In its Application for Rehearing, AT&T raises no new arguments that the Commission has not previously considered regarding the applicability of Section 252(b) to disputes regarding Section 251(a) arrangements. Therefore, AT&T's request for rehearing based on its position that matters under Section 251(a)(1) cannot be arbitrated under Section 252 is denied.

With regard to AT&T's argument that the Commission's decision sets bad policy, the Commission must address AT&T's misunderstanding. According to AT&T, pursuant to this decision, each CLEC will now demand that AT&T establish and pay for a POI on the CLEC's network. As AT&T is well aware, the FCC and this Commission have interpreted the Section 252(i) of the Act to say that a CLEC may only opt in to an agreement as a whole and may not "pick and choose"

portions of that agreement (Rule 4901:1-7-07(A)(3), Ohio Administrative Code (O.A.C.)). In other words, a CLEC that is not a CESTC like Intrado cannot avail itself of an interconnection agreement unless it takes the entire agreement. The POI established under Section 251(a) for the point of interconnection at the selective router of a 911 service provider to a PSAP would not be applicable to a CLEC offering retail services to non-PSAP end users. In fact, in the arbitration award, the Commission reminded Intrado that it is to avail itself of the service or elements it receives from AT&T for the provision of its CESTC services only (Arbitration Award at 23, 26-27). Therefore, unless the CLEC is also a CESTC, and to date, only Intrado is certified as such in Ohio, then it may not utilize this agreement or the Commission's findings to require AT&T to have a POI on its network. Furthermore, we agree with Intrado that our decision does not represent an unlawful taking as the interconnection agreement includes compensation to AT&T, where appropriate, and the facilities in question do not accrue to the sole benefit of Intrado.

Finally, the Commission grants AT&T's application for rehearing in order to clarify that, as in the previous Intrado arbitration awards, any POI AT&T would have to establish at an Intrado selective router would have to be within AT&T's service area. The Commission further clarifies that as interconnection in this scenario is based on Section 251(a), interconnection can be achieved directly or indirectly with Intrado when Intrado is the 911 service provider to the PSAP.

(27) Responding to the Commission's arbitration award for issues 5(a) and (b), AT&T again claims that it does not object to establishing PSAP-to-PSAP call transfer capability, also known as inter-selective routing, when appropriate terms can be worked out with the PSAPs. AT&T, however, does not believe that the topic should be addressed in a two-party interconnection agreement because such capability does not involve interconnection between AT&T and Intrado. AT&T argues that the Commission held in the Intrado-Embarq arbitration that inter-selective routing involves a peering arrangement between two carriers and does not involve interconnection of a competing carrier's network with an ILEC's network (Arbitration Award, Case No. 07-1216-TP-ARB at 8). AT&T then argues that if Section 251(c) does not apply to

inter-selective routing because it does not involve interconnection, the Commission cannot impose terms regarding inter-selective routing under Section 251(a) because the definition of interconnection is the same under Section 251(c) as it is under Section 251(a).

(28) Intrado avers that AT&T misconstrues the Embarq Arbitration Award to mean that inter-selective routing constitutes a peering arrangement, not interconnection between the parties and, therefore, Sections 251(a) and 251(c) cannot be invoked. Intrado contends that the Commission's point was that Section 251(c) was inapplicable because selective routing transfers between PSAPs cannot be analogized to the interconnection between competitive networks such as ILEC and CLEC networks, not that inter-selective routing is not interconnection. Furthermore, Intrado points out that inter-selective routing is vital to an efficient and reliable 911 system, and AT&T's plan to engage in PSAP-by-PSAP negotiations amounts to a piecemeal approach to public safety.

(29) We affirm our conclusion in the Embarq Arbitration Award that inter-selective routing arrangements do not involve the interconnection of a competing carrier's and an ILEC's networks. This does not mean interconnection is not necessary to achieve inter-selective routing, only that it was the Commission's determination that it was not interconnection subject to Section 251(c). Instead, inter-selective routing involves the interconnection of two 911 network service providers' networks in separate, adjacent geographic areas. Clearly, inter-selective routing involves the linking of two networks for the mutual exchange of traffic as interconnection is defined in 47 C.F.R. §51.5. The Commission further points out that in the Embarq Arbitration Award cited by AT&T, the Commission states that it "has mandated that each competitive emergency services telecommunication carrier shall *interconnect* with each adjacent countywide 911 system" (Embarq Arbitration Award at 36, emphasis added). As it is the determination of the Commission that inter-selective routing involves interconnection under 251(a), AT&T's application for rehearing on this point is denied. With regard to AT&T's rehearing request to exclude inter-selective routing from the interconnection agreement to allow for PSAP input, the Commission finds that AT&T raises no new arguments and

that nothing will preclude PSAPs from providing input on inter-selective routing arrangements. Therefore, AT&T's request for rehearing on this point is denied.

(30) For Issue 13(a), AT&T indicates in its memorandum of support of its rehearing application that "the current law on ISP (Internet Service Provider)-bound traffic fully supports AT&T's proposed language." AT&T first states that the controversy addressed in the FCC's *ISP Remand Order*[6] addressed only local calls to an ISP, since there was no dispute that a call to an ISP in another exchange was an "access call,"[7] AT&T further notes that the FCC defined the issue it addressed in the *ISP Remand Order* as "whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end-user customer to an ISP *in the same local calling area.*"[8]

AT&T goes on to note that, in its review of the *ISP Remand Order*, the DC Circuit Court stated that the FCC had held that "calls made to [ISPs] located within the caller's local calling area" are not subject to Section 251(b)(5). Instead, compensation for such calls is subject to the "interim provisions devised by the Commission." [9] AT&T additionally argues that the U.S. Second Circuit Court of Appeals had rejected the position that the FCC's *ISP Remand Order* preempted state commissions with regard to virtual NXX (VNXX) traffic delivered to ISPs.[10] AT&T also points out that the U.S. First Circuit Court of Appeals rejected the claim that the *ISP Remand Order* applies to all ISP-bound calls and stated that the FCC "expressly states at a number of points that ISP-bound traffic is not subject to reciprocal compensation under §251(b)(5)." AT&T highlights that "[t]here is no express statement that ISP-bound traffic is not subject to access charges."[11] In further discussion of VNXX traffic, AT&T points out that the FCC itself

---

6 *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*).

7 AT&T's Application for Rehearing at 30.

8 *Id.* at 30-31, citing *ISP Remand Order.*

9 *Id.* at 31, citing *WorldCom, Inc. v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002).

10 *Id.* at 31-32, citing *Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91 (2d Cir. 2006).

11 *Id.* at 32, citing *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59 (1st Cir. 2006).

noted that "the *ISP Remand Order* did not purport to address VNXX calls."[12]

Finally, AT&T takes issue with the Commission's reliance on the *November 2008 Remand Decision*[13] stating that the decision did not change in any way the manner of compensation for ISP-bound traffic, despite the fact that the FCC had removed the word "local" from the discussion.

(31) Intrado, in its Memorandum Contra concerning this issue, points initially to the specific question that the arbitration of this issue put before the Commission the definitions of "Section 251(b)(5) Traffic," "ISP-Bound Traffic," and "Switched Access Traffic." Intrado notes that the Commission approved the definitions of these terms with reference to applicable law. Intrado believes that the definitions approved by the Commission adequately resolve the question placed before the Commission.[14]

Intrado notes that these definitions bind both parties to the applicable law and that AT&T's dispute with these definitions is based in part on the possibility of disputes as to proper application of the law. Intrado states that the flaw in AT&T's argument is that, should such a dispute exist, AT&T should not be permitted to circumvent the resolution of that dispute through language in the interconnection agreement that binds Intrado to AT&T's preferred resolution.[15]

Intrado goes on to state that AT&T's proposed definition uses the term "local" to classify traffic that is subject to reciprocal compensation, a distinction that the FCC has already determined to be inappropriate in this context. In support of this statement, Intrado points to the FCC's holding that ISP-

---

12 *Id.* at 33-34.

13 *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*)

14 Intrado Memorandum Contra at 36.

15 *Id.* at 36-37.

bound traffic is interstate traffic that falls within the scope of 251(b)(5),[16] and notes that the FCC has removed the term "local" from its rules on the subject. Intrado maintains that using the interconnection agreement to bind it to a specific resolution of whatever ambiguity may exist is not a proper resolution of that ambiguity.[17]

Intrado states that AT&T is "simply wrong" when it asserts that the FCC's rulings regarding ISP-bound traffic addresses only a certain subset of ISP-bound traffic, and notes that the FCC has addressed ISP-bound traffic as a single concept. In support, Intrado points to both the FCC's *ISP Remand Order* and the *November 2008 Remand Decision,* particularly with regard to designating types of traffic. Intrado emphasizes that the FCC did not give any indication that its decisions do not apply to all ISP-bound traffic.[18]

(32) The Commission notes that AT&T makes a long and detailed defense of how its definition meets the FCC's definition under current law. However, at no point does AT&T indicate that the language the Commission approved is inconsistent with current law. It would be difficult for the approved language to be inconsistent with current law, since the approved language defines the term with regard to "current law." AT&T has advanced no new argument for its preferred language and has advanced no new argument refuting the approved language. Rehearing could be denied on that basis alone.

However, in the interest of clarity, and addressing AT&T's argument, the Commission notes that the FCC's decision in the *Declaratory Ruling*[19] that ISP-bound traffic was interstate by nature applied to both local and interexchange ISP-bound traffic. That the *Declaratory Ruling* made no functional difference for the small minority of calls where the caller and the ISP are in different exchanges does not affect the universality of that *Declaratory Ruling*. As AT&T itself notes, the FCC decision that Section 251(b)(5) is not limited to "local"

---

16 *Id.* at 37, citing the FCC's *November 2008 Remand Decision.*

17 *Id.* at 37.

18 *Id.* at 38-39.

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

traffic and is not inconsistent with that prior declaration. Further, we observe that when the FCC stated in the *November 2008 Remand Decision* that "[as] a result, we find that ISP-bound traffic falls within the scope of section 251(b)(5)," it made no distinction between "local" or any other type of ISP-bound traffic.

AT&T attempts to make a case that the Commission did not indicate that ISP-bound traffic was subject to reciprocal compensation, citing to the Award. However the language cited by AT&T reads:

> In 1999, the FCC found that ISP-bound traffic was jurisdictionally interstate, since users contact websites across state lines. Because the FCC had previously determined that Section 251(b)(5) applied only to local traffic, the FCC concluded that ISP-bound traffic was not subject to reciprocal compensation (Arbitration Award at 47, emphasis added).

If that statement is not sufficient to make the point that ISP-bound traffic is not "local," the arbitration award goes on to note that "[i]n 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 (Arbitration Award at 48). The Commission further noted that 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" (*Id.* Emphasis added).

As AT&T notes, in the *November 2008 Remand Decision,* the FCC did reaffirm its existing rules, which at the time of that reaffirmation identified ISP-bound traffic as interstate, interexchange traffic. Therefore, the question of whether ISP-bound traffic is "local" has been addressed, in the negative, by the FCC. ISP-bound traffic is Section 251(b)(5) traffic; however, it is "interstate, interexchange" Section 251(b)(5) traffic.

The FCC has established, under its authority, a distinct compensation structure for ISP-bound traffic. At this time, all compensation structures are under review in the context of the ongoing review of FCC CC Dockets 99-68 and 01-92. The Commission sees no reason to bind either AT&T or Intrado to a definition that the FCC has already changed, and may well change again in the near future.

AT&T further makes a great deal of the fact that carriers have attempted to use the *ISP Remand Order* to try and carry VNXX traffic without proper compensation. The Global NAPs decision concludes, as AT&T itself noted, that the *ISP Remand Order* "does not govern charges imposed by the originating carrier for the delivery of VNXX traffic." AT&T further notes that the FCC "itself has confirmed that the *ISP Remand Order* does not apply to VNXX traffic." The Commission agrees that it is settled law that the *ISP Remand Order*, and the subsequent remands, do not apply to VNXX traffic. If it is indeed settled law, then AT&T loses nothing by a definition of ISP-bound traffic that is based on "current law." If AT&T believes that some carrier has acted in violation of law regarding VNXX traffic, it has the opportunity to respond to that violation. However, the question before the Commission in this arbitration is not an issue of VNXX traffic, it is whether the language proposed by AT&T or the language proposed by Intrado is appropriate for inclusion in the interconnection agreement between these two parties.

With regard to that question, the Commission concludes, again, that language in an interconnection agreement should not be used to bind carriers to terminology that the FCC has abandoned as confusing and that is not consistent with current law. Rehearing on this issue should, therefore, be denied.

(33) For Issue 24, AT&T claims that the Commission addressed a settled issue and left a disputed issue unresolved. AT&T states that Issue 24 involved General Terms and Conditions (GTC) Section 8.1 and Section 15.7. Section 8.1 relates to limitation of liability for Intrado's end users' fraud. Section 15.7 addresses 911 limitation of liability language. AT&T states that the parties settled the dispute relating to Section 15.7 prior to the arbitration award. AT&T claims that the Commission ruled upon Section 15.7 but not Section 8.1.

The issue in Section 8.1, according to AT&T, is whether Intrado's proposed language should be included in the interconnection agreement. The language provides that AT&T would be liable to Intrado for any fraud associated with Intrado's end user's account that is "attributable to AT&T." AT&T notes that the Commission rejected Intrado's proposed "attributable to" language in Section 15.7. AT&T urges the Commission to reject the language in Section 8.1 as well. AT&T advocates the elimination of the language because it is vague and expands, rather than decreases, AT&T's exposure to liability beyond that which is normally applied under fraud law. AT&T also condemns the language for being unnecessary, since Intrado could identify any circumstances where a customer's fraudulent behavior could be attributed to AT&T. Finally, AT&T regards Intrado's proposed language as unfair because there is no reciprocal language that would hold Intrado liable. AT&T, therefore, urges the Commission to adopt its language for Section 8.1.

(34) Intrado contends that AT&T is mistaken in its position that the Commission did not resolve limitation of liability language for Section 8.1 of the interconnection agreement. It is Intrado's interpretation of the arbitration award that the Commission properly addressed both Section 8.1 and 15.7. Intrado points out that the Commission was clear in its rejection that AT&T can protect itself from losses resulting from gross negligence or willful misconduct.

(35) The Commission notes that in their initial briefs and reply briefs, the parties refer to Section 8.1 and Section 15.7. AT&T points out that Intrado proposes similar language for both provisions. It is not until the parties filed a revised joint issues matrix that there is an indication that Section 15.7 has been resolved. Understanding that the parties have resolved Section 15.7, we, nevertheless, apply the same principles set forth in the arbitration award to Section 8.1. In the arbitration award, we sought to craft limitation of liability language that was sufficiently broad but not so broad as to provide absolute immunity. We recognized that without broad protection the potential risk and liability exposure inherent in providing 911 service would be prohibitive. However, we acknowledged that protection from liability should not go so far as to protect AT&T from gross negligence or willful misconduct. Adhering

to these principles and limitations, AT&T's recommended language for Section 8.1 should be revised to hold it liable for any losses that arise from gross negligence or willful misconduct. To accomplish this goal we suggest the following revision to Section 8.1: AT&T Ohio shall not be liable to CLEC for any fraud associated with CLEC's End User's account, including 1+ IntraLATA toll, ported numbers, and Alternate Billing Traffic (ABT) unless any resulting loss is attributable to AT&T's gross negligence or willful misconduct.

(36) In its application for rehearing, AT&T challenges the Commission's award for Issue 29(b). AT&T argues that the Commission's arbitration award errs in granting Intrado the lowest rate used by any other carrier when Intrado requests and AT&T inadvertently provisions services that are not included in the interconnection agreement. AT&T avers that allowing Intrado to pay AT&T the lowest rate in effect at that time for Ohio CLECs is contrary to federal law and the FCC's all-or-nothing rule. AT&T contends that if a CLEC wants a product or service that is not covered by its interconnection agreement, it cannot simply adopt the lowest price AT&T charges any other CLEC. AT&T argues that any such attempt to "pick and choose" a favorable rate from another interconnection agreement would violate the FCC's all-or-nothing rule that requires a CLEC to adopt another interconnection agreement in its entirety.

(37) Intrado avers that the Commission's decision is perfectly consistent with the FCC's all-or-nothing rule, which concerns products or services provided under an agreement. The Commission's decision, Intrado contends, focuses on instances where products or services are explicitly provided outside of the terms and conditions of the interconnection agreement. Intrado contends that if AT&T has agreed not to provision particular products or services, they will not be priced within the interconnection agreement. Intrado contends that the Commission was correct to point out that if Intrado requests, and AT&T begins to provide such a product or service, that "Intrado is not solely to blame." Intrado avers that if AT&T got its way, AT&T would be free to charge Intrado whatever price it saw fit, with resulting negotiations reflecting an imbalance in bargaining power against Intrado. Intrado points out that the Ohio CLEC rate would only be instituted for a

short time as AT&T would be allowed, pursuant to the contract language, to reject future orders for the product or service until such time as terms and conditions are incorporated into the interconnection agreement. Intrado contends that AT&T's argument totally ignores the conditions under which the Ohio CLEC rate will be imposed despite its clear inclusion within the conforming language. Intrado contends that the kind of protection AT&T seeks from artificially low rates will only arise in the context of a deliberate choice by AT&T to provide an unlisted product or service without negotiation, and may be terminated at any time by AT&T after the initial billing occurs.

(38) In our arbitration award, we made it clear that the lowest price available to other CLECs would only be available to Intrado under very limited circumstances, one of which is that AT&T inadvertently provisioned a product or service to Intrado that is not in the interconnection agreement. Therefore, AT&T has the ability to prevent Intrado from receiving the current lowest CLEC rate for that product or service simply by not provisioning it. Once AT&T has "inadvertently" provided a service to Intrado, the Commission has agreed with AT&T that it can refuse to provide any more of that product or service until terms and conditions can be incorporated into the interconnection agreement, therefore, any potential harm to AT&T is mitigated.

(39) Further, given that AT&T can refuse to provision future Intrado orders for the "inadvertently" provided product or service (something AT&T is unable to do if the service is part of an interconnection agreement or tariff), that service would be provided under terms less advantageous to Intrado than those that the CLEC with the lowest rate enjoys. As the terms and conditions that the CLEC with the lowest rate and the terms and conditions that Intrado would receive are different, and in fact more onerous for Intrado, the Commission's award is not inconsistent with the FCC's all-or-nothing rule. Therefore, AT&T's request for rehearing on this issue is denied.

(40) In the arbitration award for Issue 31, the Commission determined that an "end user" means "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." AT&T disagrees and urges the Commission to adopt AT&T's language.

AT&T notes the Commission's reliance upon Case No. 07-1216-TP-ARB in reaching its decision. AT&T distinguishes this case from Case No. 07-1216-TP-ARB on the basis that the parties agreed to a broader definition of end user. In Case No. 07-1216-TP-ARB, Embarq and Intrado agreed that "end user" would include Intrado's PSAP customers and retail end user customers who make emergency 911 calls. By contrast, AT&T states that it never agreed to expand the definition of end user beyond its customary meaning. Citing the Commission's 911 Service Program Rules, AT&T regards an end user as one who makes a 911 call. AT&T also relies on Intrado's certification order which defined end users as customers of basic local exchange services that can dial 911 to access emergency services, not Intrado's PSAP customers. For further support, AT&T relies upon the National Emergency Number Association's (NENA) definition of "end user" as the 911 caller.

(41) In arguing for its proposed definition of "end user," Intrado disagrees with AT&T's attempt to distinguish the present case from Case No. 07-1216-TP-ARB on the basis that Embarq and Intrado agreed on the definition of "end user." Claiming that AT&T's analysis is flawed, Intrado contends that the definition of end user involves more than just the parties' agreement. To Intrado, the agreement between Embarq and Intrado is immaterial to whether PSAPs are end users. According to Intrado, the Commission's certification order determined that Intrado is "engaged in the provision of telecommunications due to its transmission of 911 end user information from the end user's location to the PSAP." In Intrado's review of the Commission's decision, it concludes that the decision is consistent with Ohio telecommunication rules and AT&T's boilerplate definition of end user. Intrado claims that the Commission did not dispute this interpretation in its entry on rehearing.

(42) AT&T has presented no new facts or arguments that would cause us to reverse or modify the arbitration award concerning the definition of end user. In the arbitration award, we considered not only the implications of our carrier-to-carrier

rules on the definition of customer but we also considered Rule 4901:1-8-01, O.A.C., (911 Service Program Rules).

In its application for rehearing, AT&T urges the Commission to also consider NENA standards. The NENA standards point out that its recommendations are solely for the voluntary use of entities involved with E911 products and services. NENA recognizes that advances in technology or operations may precede its published standards. Because Intrado presents the advent of competitive 911 services, we must depart from the usual norms in defining "customer" and "end user." We believe that our award for Issue 31 recognizes a significant change in the technology and operations regarding 911 services. Moreover, the arbitration award accommodates the competing interests of AT&T and Intrado. Accordingly, we maintain that "end user," for the purpose of the interconnection agreement shall mean the retail, end-user, 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.

(43) On April 3, 2009, both parties filed a conforming interconnection agreement pursuant to the arbitration award. The parties differ in their interpretations of the arbitration award in two sections of the agreement. These are sections 8.1 and 44.4.1. Section 8.1 was discussed and resolved in Finding 35, herein, as a result of the AT&T's rehearing of Issue 24. The disputed language in Section 44.4.1 is related to Issues 1(a) and 2(b) but was not specifically mentioned by AT&T in its application for rehearing. Rather, each party explained its rationale for its version of the language for Section 44.4.1. in filings related to the conforming interconnection agreement. Upon review of each party's proposed language for Section 44.4.1, the Commission finds that AT&T's language more closely tracks the original language proposed by the parties with necessary modifications and specificity to conform it to the arbitration award for Issues 1(a) and 2(b). Therefore, the Commission directs the parties to include AT&T's proposed language for Section 44.4.1 in the final interconnection agreement.

It is, therefore,

ORDERED, That the application for rehearing filed by AT&T is granted in part and denied in part in accordance with the findings of this entry on rehearing. It is, further,

ORDERED, That the parties file within 15 days a complete executed interconnection agreement that is consistent with the findings and conclusions in Paragraphs (35) and (43) of this entry on rehearing. It is, further,

ORDERED, That copies of this entry on rehearing be served upon all parties, counsel, and 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

LJD/CK/LS/MT/vrm

Entered in the Journal
JUN 17 2009

Reneé J. Jenkins
Secretary