

# Attachment 5

**DOCKET NO. 36185**

<b>PETITION OF INTRADO INC. FOR</b>	<b>§</b>	<b>PUBLIC UTILITY</b>
<b>COMPULSORY ARBITRATION WITH</b>	<b>§</b>	<b>COMMISSION</b>
<b>GTE SOUTHWEST INCORPORATED</b>	<b>§</b>	<b>OF TEXAS</b>
<b>D/B/A VERIZON SOUTHWEST UNDER</b>	<b>§</b>	
<b>THE FTA RELATING TO ESTABLISHMENT</b>	<b>§</b>	
<b>OF AN INTERCONNECTION AGREEMENT</b>	<b>§</b>	

**INTRADO COMMUNICATIONS INC. MOTION FOR RECONSIDERATION**

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Its Attorneys

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**INTRADO COMMUNICATIONS INC. MOTION FOR RECONSIDERATION**

Intrado Communications Inc. (“Intrado Comm”),<sup>1</sup> by its attorneys, hereby submits a Motion for Reconsideration of the *Order on Threshold Issue No. 1 and Denying Relief Requested in Petition (“Order”)* issued in the above-referenced docket on November 23, 2009.<sup>2</sup> As explained in more detail below, the *Order’s* conclusions are arbitrary and capricious and are based on errors of law and fact.<sup>3</sup> The material facts regarding the specifics of Intrado Comm’s services when applied to the law reflect that Intrado Comm’s service offerings meet the federal definition for “telephone exchange service” in the federal Communications Act of 1934, as amended (“FTA”)<sup>4</sup> and the decisions of the Federal Communications Commission (“FCC”) interpreting the appropriate application of that definition to services provided by carriers.<sup>5</sup> The

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<sup>1</sup> The name on Intrado Inc.’s service provider certificate of operating authority (“SPCOA”) was changed to Intrado Communications Inc. effective October 8, 2009. See Docket No. 37441, *Application of Intrado Inc. for an Amendment to its Service Provider Certificate of Operating Authority*, Notice of Approval (Oct. 8, 2009).

<sup>2</sup> On December 11, 2009, the Arbitrators extended the time for filing motions for reconsideration and responses thereto to December 28, 2009 and January 8, 2010, respectively.

<sup>3</sup> See, e.g., *Texas Ass’n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440 (Tex. 1993) (agency decisions must be reversed if determined to be an error of law, not reasonably supported by substantial evidence, arbitrary and capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion).

<sup>4</sup> 47 U.S.C. § 153(47). These material facts would have been presented at hearing on Intrado Comm’s arbitration and therefore bar a decision granting dismissal of Intrado Comm’s arbitration based on summary decision. See P.U.C. PROC. R. 21.69(a) (summary decision appropriate when “there is no genuine issue as to any material fact”).

<sup>5</sup> See, e.g., *Provision of Directory Listing Information under the Telecommunications Act of 1934, as Amended*, 16 FCC Rcd 2736 (2001) (“*Directory Assistance Order*”); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385 (1999) (“*Advanced Services Order*”) (subsequent history omitted); *Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, 13 FCC Rcd 24011 (1998) (subsequent history omitted); *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599 (1998) (“*BellSouth Louisiana II Order*”).

*Order* should therefore be reversed and Intrado Comm’s petition for arbitration against GTE Southwest d/b/a Verizon Southwest (“Verizon”) should be reinstated.<sup>6</sup>

## **I. GRANT OF SUMMARY DECISION IS NOT APPROPRIATE**

On October 17, 2008, the Arbitrators issued an order requesting briefs on four threshold legal issues.<sup>7</sup> Commission Rule 21.61(a) sets forth the process for the review of threshold issues, which includes the opportunity to brief the threshold issues and requires the Arbitrators to take up the threshold issues prior to proceeding with the other issues in the case.<sup>8</sup> Despite the procedural posture established by the *October 17 Order*, the *Order* inexplicably grants Verizon summary decision.<sup>9</sup> This ruling is arbitrary and capricious because there is no legal or procedural support for the *Order*’s grant of summary decision at this stage of the proceeding.

Under the Commission’s rules, summary decision may be granted, upon a motion, when the record demonstrates “that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor, as a matter of law, on the issues expressly set forth in the motion.”<sup>10</sup> As demonstrated by the Parties’ threshold brief filings, there are clearly issues of fact in dispute between Intrado Comm and Verizon regarding the functionality and features of Intrado Comm’s 911/E911 services. Indeed, there is no “record” on which a motion for summary decision could be granted because Intrado Comm has not had the opportunity to present testimony or factual evidence regarding the nature of its 911/E911 service offerings. This is supported by the *Order*’s confusion regarding Intrado Comm’s services (as discussed

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<sup>6</sup> The *Order* stated that grant of summary decision resolved all issues in the arbitration. *See Order* at 2.

<sup>7</sup> Docket No. 36185, *Petition of Intrado Inc. for Compulsory Arbitration with GTE Southwest d/b/a Verizon Southwest under the FTA Relating to Establishment of an Interconnection Agreement*, Order No. 2 (Oct. 17, 2008) (“*October 17 Order*”).

<sup>8</sup> P.U.C. PROC. R. 21.61(a).

<sup>9</sup> *Order* at 25, n.137.

<sup>10</sup> P.U.C. PROC. R. 21.69(a).

below) and the *Order*'s improper reliance on Verizon's filings for support of its conclusions regarding the capabilities and features provided in conjunction with Intrado Comm's service offerings.<sup>11</sup> The law is clear - summary decision cannot be granted when there is a genuine issue of material fact and there is no question that such an issue is present here.<sup>12</sup>

In addition, from a procedural perspective, there is no motion for summary decision properly before the Commission. While the *Order* attempts to convert Verizon's initial threshold brief into a motion for summary judgment,<sup>13</sup> this does not satisfy the requirements of the rule. Specifically, the rule governing summary decisions requires the party filing the motion to demonstrate, by affidavit, that there are no facts in dispute and to specifically describe the facts upon which the request for summary decision is made.<sup>14</sup> Verizon's filing does not even come close to meeting this standard. Accordingly, no request for summary decision has been made in this proceeding, and thus the *Order* may not lawfully grant summary decision in Verizon's favor.

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<sup>11</sup> See, e.g., *Order* at 11, n.72.

<sup>12</sup> See, e.g., Docket 29828, *Complaint and Request for Interim Ruling of Accutel of Texas, L.P. dba 1-800-4-A-Phone for Post-Interconnection Agreement Dispute Resolution with Southwestern Bell Telephone, L. P.*, Denying Request for Oral Argument (July 16, 2004) (denying motion for summary decision because "the facts surrounding the specific orders to be relied upon by SBC Texas in this proceeding were not undisputed, as is required for summary decision"); Docket 26581, *Complaint of Basicphone, Inc., et al.*, Denying Complainant's Motion for Summary Decision and Request for Oral Argument (Mar. 9, 2004) (finding the filing of a motion for summary decision "is entirely outside the procedural framework" established by the arbitrators for the proceeding).

<sup>13</sup> *Order* at n.137 ("The Parties agreed to brief Threshold Issue No. 1 at the October 8, 2008 prehearing conference and Verizon's initial brief on that issue was effectively a motion for summary decision, to which Intrado responded in its reply brief.").

<sup>14</sup> P.U.C. Proc. R. 21.69(b).

## II. THE *ORDER* MISCONSTRUES THE NATURE OF INTRADO COMM'S SERVICES

The *Order* is ripe with inconsistencies and faulty assumptions regarding Intrado Comm's proposed service offerings. These flaws underlie the *Order*'s conclusion that Intrado Comm does not offer telephone exchange service, which warrants reversal of the *Order*.<sup>15</sup>

The *Order* wrongly concludes that Intrado Comm's only customers "are PSAPs and other public safety agencies."<sup>16</sup> Intrado Comm, however, noted in its petition for arbitration that its customers would include wholesale and retail customers calling other entities connected to the public switched telephone network ("PSTN").<sup>17</sup> The *Order*, however, completely ignores those acknowledged facts and bases its conclusions on inaccurate information regarding Intrado Comm's service offerings.<sup>18</sup> The *Order* recognizes that Intrado Comm plans to provide "911/E911 service" in Texas,<sup>19</sup> but improperly limits its review to a narrow subset of Intrado Comm's planned services to support its conclusions.

Specifically, Intrado Comm will use its Intelligent Emergency Network<sup>®</sup> to provide two primary types of 911/E911 services with additional features or capabilities available depending on the needs of the customer. First, Intrado Comm intends to provide 911 service to PSAP<sup>20</sup> end

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<sup>15</sup> These flaws are the direct result of the complete lack of any record evidence reviewing the material facts associated with Intrado Comm's services, and thus there is no record evidence to support the *Order*'s conclusions of law.

<sup>16</sup> *Order* at 11.

<sup>17</sup> Intrado Comm Petition for Arbitration against Verizon at 6-8. The nearly identical order issued in the AT&T arbitration docket cites to these statements made in Intrado Comm's petition for arbitration against AT&T. *See Order on Threshold Issue No. 1 and Granting AT&T's Motion for Summary Decision* at 6-7 (citing Intrado Comm Petition for Arbitration against AT&T at 15).

<sup>18</sup> For example, the *Order* relies on Verizon's filings for support of its conclusions regarding the capabilities and features provided in conjunction with Intrado Comm's service offerings. *See, e.g., Order* at 11, n.72.

<sup>19</sup> *Order* at 11.

<sup>20</sup> For ease of reference, Intrado Comm uses the term "PSAP" to refer to any public safety agency, 911 authority, 911 administrative agency, or other entity that may be responsible for purchasing and/or receiving 911/E911 services to ensure consumers living in the relevant geographic area can reach emergency responders.

users. This retail service will allow Intrado Comm's PSAP end users to receive 911 calls from all 911 callers located in the geographic area served by the PSAP. As part of its 911 service to PSAPs, Intrado Comm offers several additional features and capabilities: (1) PSAP-to-PSAP transfers;<sup>21</sup> (2) transfer of 911 calls to any 10-digit telephone number;<sup>22</sup> (3) three-way conference calling;<sup>23</sup> (4) outgoing calling;<sup>24</sup> and (5) reverse 911.<sup>25</sup> Second, Intrado Comm intends to provide 911 access services on both a retail and wholesale basis. On the retail side, Intrado Comm will provide enterprise and telematics customers a 911/E911 service that allows end users to dial 911 and reach the appropriate PSAP (whether it is an Intrado Comm-served PSAP or a PSAP served by another carrier) based on the 911 caller's location (instead of the location of the customer premise equipment managing the calls such as a private branch exchange or other customer call collection platform). On the wholesale side, Intrado Comm will provide 911 access service to carriers and voice over Internet protocol ("VoIP") service providers to access the appropriate PSAP for delivery of their end users' 911 calls.<sup>26</sup>

Intrado Comm's petition for arbitration was filed in September 2008, and the Parties' threshold issue briefs were filed in October and November 2008. Some of the features and

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<sup>21</sup> This capability provides PSAPs the ability to transfer 911 calls with automatic location information ("ALI") and automatic number information ("ANI") to any other PSAP served by Intrado Comm or to any PSAP served by another carrier assuming all necessary interconnection arrangements are in place with that carrier. The PSAP call taker also has the ability to exit the conference and allow the original 911 caller and the added party to continue their communication. The PSAP call taker line is then freed to receive another incoming 911 call.

<sup>22</sup> This capability provides PSAPs the ability to transfer 911 calls to any 10-digit telephone number on the PSTN. The PSAP call taker also has the ability to exit the conference and allow the original 911 caller and the added party to continue their communication. The PSAP call taker line is then freed to receive another incoming 911 call.

<sup>23</sup> This capability provides PSAPs the ability to conduct three-way conference calls with the 911 caller and other public safety entities.

<sup>24</sup> This capability provides PSAPs the ability to activate outgoing calling capabilities to any 10-digit telephone number on the PSTN. This optional feature is available with an Intrado Comm IP interface and must be tested with the PSAP customer premises equipment ("CPE") to assure compatibility.

<sup>25</sup> This capability provides PSAPs the ability to offer emergency notification information to all 911 callers contained in the Intrado Comm E911 system database and located within a specific geographic area.

<sup>26</sup> Transiting is an optional service for carriers/VoIP service providers that permits all of their 911 calls to be completed by Intrado Comm, including those destined for a PSAP served by another carrier.

functionalities available with Intrado Comm’s service offerings were discussed in those filings, but there was no factual record developed to specifically review Intrado Comm’s services. Intrado Comm’s services are dynamic and continue to be developed and expanded to meet customers’ requests and perceived public interest needs. The evolving nature of carrier services is well-established.<sup>27</sup> The *Order*, however, wrongly limits its consideration to it’s and Verizon’s perception of Intrado Comm’s services to PSAPs.

The details of Intrado Comm’s service offerings are a material fact-based inquiry that must be developed and applied to the law to determine whether the services fall within the definition of “telephone exchange service” in the FTA<sup>28</sup> as implemented by the FCC.<sup>29</sup> The *Order* contains no such analysis. As explained below, if such analysis is undertaken, Intrado Comm’s services qualify as telephone exchange services for which Intrado Comm is entitled to Section 251(c) interconnection. Accordingly, the *Order* must be reversed because it erred in its application of law and fact.

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<sup>27</sup> See, e.g., Docket No. 5610, *Application of GTE Southwest Incorporated for a Rate Increase* (Feb. 23, 1989) (recognizing “the need to enable the telephone industry to keep up with rapid advances in telecommunications technology”); *Applications of Guam Cellular and Paging, Inc. and DoCoMo Guam Holdings, Inc., For Consent to Transfer Control of Licenses and Authorizations*, 21 FCC Rcd 13580, ¶ 32 (2006) (noting that companies may gain “certain competitive advantages by distinguishing itself in the marketplace, such as by offering new services or products” and that the introduction of “new services . . . may benefit consumers”); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, 20 FCC Rcd 14853, ¶ 40 (2005) (“as with any evolving technology, new products and providers will continue to emerge to complement existing market offerings and participants”); *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, 14 FCC Rcd 14409, ¶ 29 (1999) (recognizing that carriers will introduce new and improved services and products in a competitive market).

<sup>28</sup> 47 U.S.C. § 153(47). These material facts would have been presented through testimony and at hearing on Intrado Comm’s arbitration petition, and therefore bar a decision granting dismissal of Intrado Comm’s petition based on summary decision. See P.U.C. PROC. R. 21.69.

<sup>29</sup> See *supra* n.5.

### III. INTRADO COMM'S 911/E911 SERVICES PERMIT INTERCOMMUNICATION, PROVIDE CALL ORIGINATION, AND ARE COMPARABLE TO OTHER TELEPHONE EXCHANGE AND EXCHANGE ACCESS SERVICES

Under the FTA's definition, Intrado Comm's services must meet certain criteria to be deemed "telephone exchange services."<sup>30</sup> Under Part (A) of the definition, Intrado Comm's services must permit intercommunication.<sup>31</sup> Or, Intrado Comm's services may meet Part (B) of the definition, which requires a comparable intercommunicating service that can originate and terminate telecommunications.<sup>32</sup> The *Order* erred in its analysis of both prongs of the federal definition.

In its analysis of Part (A), the *Order* confuses two-way communication with two-way traffic. In its analysis of Part (B), the *Order* improperly focuses on "intercommunication" in assessing whether Intrado Comm's service is "comparable" and whether Intrado Comm's service can originate and terminate telecommunications.<sup>33</sup> Under the *Order*'s analysis, an "intercommunicating" service refers to a service that provides both "origination" and "termination."<sup>34</sup> The FTA, however, mandates that the analysis under Part (B) review whether a service is comparable with one that can originate and terminate telecommunications.<sup>35</sup> The FCC determined that this analysis is to consider whether the service permits "intercommunication," even though the language of the FTA does not mention the capability.<sup>36</sup> The *Order* wrongly employs a two-step analysis to determine whether a service is comparable by first asking

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<sup>30</sup> 47 U.S.C. § 153(47).

<sup>31</sup> 47 U.S.C. § 153(47)(A); *see also* Intrado Comm Initial Threshold Brief at 4; Intrado Comm Reply Threshold Brief at 4-5.

<sup>32</sup> 47 U.S.C. § 153(47)(B); *see also* Intrado Comm Initial Threshold Brief at 5-7; Intrado Comm Reply Threshold Brief at 3-5.

<sup>33</sup> *Order* at 19-20.

<sup>34</sup> *Order* at 20.

<sup>35</sup> 47 U.S.C. § 153(47)(B).

<sup>36</sup> *Advanced Services Order* ¶ 30.

whether the service permits intercommunication and then asking whether it can originate and terminate. The appropriate analysis is one step: whether a service is comparable because it can originate and terminate a call permitting intercommunication between two end users. The *Order's* narrow interpretation means that only those services that permit all end users to originate and terminate calls permit “intercommunication.” This definition limits telephone exchange services to only the most basic service, which is contrary to the findings of the *Advanced Services Order*<sup>37</sup> and the well-established body of law regarding statutory interpretation.<sup>38</sup>

**A. The Service at Issue in the *Directory Assistance Order* Did Not Define the Characteristics and Standard for Determining If a Service Is a Telephone Exchange Service Under the FTA**

The *Order's* significant reliance on the FCC's *Directory Assistance Order* is erroneous.<sup>39</sup> The *Directory Assistance Order* does not define the characteristics of a “telephone exchange service” by which all other services are to be measured. Rather, the *Directory Assistance Order* is merely an example of the application of the statutory criteria to a particular service. The *Order* commits an error of law in analyzing Intrado Comm's services based on the functionality available as compared with directory assistance services rather than an independent analysis based on the elements in the statutory definition as implemented by the FCC as applied to the

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<sup>37</sup> *Advanced Services Order* ¶ 17 (“the definition of telephone exchange service was not limited to traditional voice telephony, but included non-traditional ‘means of communicating information within a local area’”).

<sup>38</sup> *See, e.g.*, Docket No. 1634, *Petition of Southwestern Bell Telephone Company for an Interim Order and for a Determination of Certain Public Interest Issues* (Mar. 18, 1981) (“it is reasonable to assume that the Legislature did not envision a static definition” of terms defined in Texas law); *Telephone Number Requirements for IP-Enabled Services Providers, et al.*, 22 FCC Rcd 19531, ¶ 23 (2007) (“to ensure that consumers retain this benefit as technology evolves, we continue to believe that Congress’s intent is that number portability be a “dynamic concept” that accommodates such changes”); *GTE Service Corp. and GTE Data Services Inc. v. FCC*, 474 F.2d 724, 730-31 (2d Cir. 1973) (“The fact that the [FTA] makes no reference to computers and data processing is not surprising. The [FTA] was passed in 1934 and although there may have been academic concepts of the computer at that time, its commercial exploitation and impact on regulated communications carriers was certainly not evident. The courts, however, have uniformly and consistently interpreted the [FTA] to give the [FCC] broad and comprehensive rule-making authority in the new and dynamic field of electronic communications.”); *see also* 137 Cong. Rec. S18784 (1991) (statement of Sen. Hollings) (“The FCC is given the flexibility to consider what rules should apply to future technologies as well as existing technologies.”).

<sup>39</sup> *Order* at 14-18.

specific facts of Intrado Comm’s service offerings. There is no requirement that all telephone exchange services provide a “second call comparable to the call completion provided to the originating 4-1-1 caller by the directory assistance provider” to meet the statutory requirement for either intercommunication or call origination as the *Order* suggests.<sup>40</sup> An analysis of the statutory definition of “telephone exchange service” depends on how a service is “implemented”<sup>41</sup> and “the circumstances in which [it is] provided.”<sup>42</sup> When analyzing how Intrado Comm’s services are “implemented” and “provided” it is clear that Intrado Comm’s 911/E911 services permit intercommunication and call origination, and therefore meet both prongs of the FTA’s definition of “telephone exchange service.”<sup>43</sup>

**B. Intrado Comm’s Services Permit Intercommunication under 47 U.S.C. § 153(47)(A)**

Intrado Comm’s services permit intercommunication by enabling two-way communication between a PSAP and a 911 caller or between a PSAP and another PSAP.<sup>44</sup> The key consideration is whether there is two-way communications, not two-way traffic.<sup>45</sup> The

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<sup>40</sup> *Order* at 16-17.

<sup>41</sup> *Directory Assistance Order* ¶ 16.

<sup>42</sup> *Advanced Services Order* at n.36.

<sup>43</sup> As the *Order* notes, 47 U.S.C. § 153(47) is written in the disjunctive and satisfying only one piece of the definition (either Part (A) or Part (B)) will qualify a service as a telephone exchange service. *See Order* at 12.

<sup>44</sup> *Advanced Services Order* ¶ 20; *see also* 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 at 16 (Mar. 4, 2009) (“*AT&T Ohio Arbitration Award*”) (“We thus find 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 requirement.”), *aff’d by* Entry on Rehearing (June 17, 2009) (“*AT&T Ohio Rehearing Order*”). The *Order* reaches its conclusions without the factual underpinnings of Intrado Comm’s services, which are necessary to determine whether the services meet the definition of telephone exchange service under the law.

<sup>45</sup> *Advanced Services Order* ¶ 20. Intrado Comm’s 911 service nonetheless satisfies both. It is also very important to note that 911 trunks are generally *required* under state law to be deployed as one-way trunks. *See* P.U.C. SUBST. R. 26.435; *see also e.g.*, ILL. ADMIN CODE TIT. 83, § 725.500(d); OHIO ADMIN. CODE § 4931.40. While those trunks can support two-way communications and are capable of being used for two-way traffic purposes, they are often legally required to be engineered as one-way for a very good reason - they are 911 trunks.

*Order* wrongly concludes that the FCC’s emphasis was on “two-way traffic.”<sup>46</sup> The FCC has “nowhere suggested that two-way voice service is a necessary component of telephone exchange service.”<sup>47</sup>

Intercommunication is not defined in the FTA, but the generally accepted definition is “to communicate with or to each other or one another”<sup>48</sup> and implies that “intercommunication can include a situation in which one person delivers a message to another even if the other person does not or cannot reply.”<sup>49</sup> The statute does not quantify “intercommunication” and only requires the existence of intercommunication.<sup>50</sup> A service permits “intercommunication” “as long as it provides customers with the capability of intercommunicating with other subscribers”<sup>51</sup> and “permits a community of interconnected customers to make calls to one another.”<sup>52</sup> The interconnected community for 911 services consists of 911 callers, PSAPs, and first responders located in the relevant geographic area.<sup>53</sup>

Intercommunication may take the form of PSAP-to-PSAP communication because it “provides [Intrado Comm’s] customers with the capability of intercommunicating with other

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<sup>46</sup> *Order* at 18.

<sup>47</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, 13 FCC Rcd 24011, ¶ 43 (1998) (subsequent history omitted).

<sup>48</sup> *Webster’s New World Dictionary*, Second College Edition (1972).

<sup>49</sup> North Carolina Docket P-1187, Sub 2, *Petition of Intrado Communications Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, with BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina*, Recommended Arbitration Order at 11-2 (April 24, 2009) (“*North Carolina RAO*”); *adopted and modified by Order Ruling on Objections and Requiring the Filing of a Composite Agreement* (Sept. 10, 2009).

<sup>50</sup> *AT&T Ohio Arbitration Award* at 15.

<sup>51</sup> *Advanced Services Order* ¶ 23.

<sup>52</sup> *Directory Assistance Order* ¶ 17.

<sup>53</sup> *Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, n.32 (2005) (“*VoIP 911 Order*”) (“unlike normal phone calls, 911 calls are routed based on the calling number (which is linked to a particular geographic area and political jurisdiction), not the called number”).

subscribers.”<sup>54</sup> Intrado Comm’s 911 service allows its PSAP customers to communicate with 911 callers, and with Intrado’s other PSAP customers and PSAP customers of other carriers. Intercommunication also occurs when misdirected 911 calls are transferred to another PSAP (either Intrado Comm’s PSAP customer or the PSAP customer of another carrier) or during a three-way conference call between police dispatchers, PSAP operators, and an individual in distress. PSAPs are likewise able to intercommunicate with telephone subscribers within the geographic area served by the PSAP when “reverse 911” or outbound messaging notification service is requested.<sup>55</sup> Thus, the *Order* is simply incorrect and has no factual basis for its finding that “all of the traffic between the interconnected parties will be one-way from Verizon to Intrado.”<sup>56</sup>

Intrado Comm’s 911 services likewise allow its enterprise, telematics, and wholesale customers to intercommunicate with others in the local community. Specifically, Intrado Comm’s 911 services provided to enterprise and telematics customers provide for the delivery of those customers’ 911 calls to the appropriate PSAP responsible for providing emergency response to the location of the 911 caller whether that PSAP is served by Intrado Comm or another carrier. Intrado Comm’s customer - the 911 caller in this instance - is able to intercommunicate with its designated PSAP and first responder whether that PSAP is served by Intrado Comm or not. For its wholesale customers, Intrado Comm aggregates, transmits, and routes 911 calls from the end users of those wholesale customers to the appropriate PSAP.<sup>57</sup>

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<sup>54</sup> *Advanced Services Order* ¶ 23.

<sup>55</sup> *See, e.g., AT&T Ohio Rehearing Order* at 7-8 (“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.”).

<sup>56</sup> *Order* at 18.

<sup>57</sup> Docket No. 23378, *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*, Order No.

**C. Intrado Comm’s Services Allow Subscribers to Originate and Terminate a Telecommunications Service to Permit Intercommunication under 47 U.S.C. § 153(47)(B)**

In addition to the intercommunication permitted and described above, Intrado Comm’s 911 services offer call origination in four specific ways. *First*, a PSAP has the ability to originate and terminate a call.<sup>58</sup> When a PSAP receives a 911 call and “hookflashes” to obtain a dial tone, the PSAP originates a call to a third party. This third party is then bridged to the 911 caller, and the PSAP may either disconnect or remain on the line to participate in the subsequent conversation. The PSAP’s function in this regard is no different than call transfers in a typical office environment (in which an individual transferring a call obtains a dial tone to do so) or three-way calling (in which the individual responsible for conferencing obtains a dial tone to connect a third-party number). When a transfer occurs, Intrado Comm adds an additional party, the *911 caller*, to an existing call – the call originated by the PSAP to the third party. It does *not* add the third party to the 911 caller’s existing call.

Moreover, this “hookflash” capability also allows the PSAP to transfer the call to any 10-digit telephone number on the PSTN. The *Order* incorrectly claims that Intrado Comm cannot “switch” the originating caller to another number of the originating caller’s choice, and thus Intrado Comm’s service cannot be classified as telephone exchange service analogous to directory assistance call completion service.<sup>59</sup> This is not accurate and there is no factual support for the *Order*’s erroneous conclusion. The *Order* fails to recognize in its analysis that Intrado Comm has different types of customers just as other carriers do. Its customers include 911

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8 Denying Motion to Dismiss at 11-12 (Jan. 4, 2002) (“*Texas SCC Order*”) (finding Intrado Comm’s service would “both transmit and route 9-1-1 calls, which calls are telephone exchange service and/or exchange access”).

<sup>58</sup> *Directory Assistance Order* ¶ 20.

<sup>59</sup> *Order* at 17.

callers, PSAPs, and service providers (some of which themselves are end users under the law).<sup>60</sup> Where the PSAP is Intrado Comm's customer, the PSAP is the caller to the third party and is transferring a call based on its choice, (*i.e.*, "the originating caller's choice"). The PSAP, not the 911 caller, is the entity that decides how the call is transferred based on the emergency situation at hand. This is another example of how the *Order's* comparison of Intrado Comm's services to directory assistance services is an error of law and fact.

Second, PSAPs are technically capable of making outgoing calls with Intrado Comm's 911 service. This material fact satisfies the *Order's* "emphasis on the ability to make calls to one another."<sup>61</sup> This functionality can be provided to Intrado Comm's PSAP customers upon their request and when consistent with state 911 requirements. Where activated, PSAP personnel may initiate a call to any 10-digit number on the PSTN at any time from any work position. Generally, however, Intrado Comm's PSAP customers do not make requests to activate the call origination option, as call takers placing outgoing calls are then not available to receive highly critical incoming 911 calls when an outgoing call is in progress. Further, Intrado Comm's emergency notification messaging service also provides PSAPs, upon request, the ability to originate calls to telephone subscribers within the geographic area served by the PSAP.<sup>62</sup> Thus, while Intrado Comm's service is capable of call origination, whether that capability is deployed is a decision made by the PSAP customer.

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<sup>60</sup> In this context, Intrado Comm's VoIP service provider customers are considered Intrado Comm's end users. See *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, 22 FCC Rcd 3513 (2007); see also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd 9151, ¶ 11 (2001); *Amendments of Parts 60 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, nn.8, 53 (1988).

<sup>61</sup> *Order* at 18.

<sup>62</sup> See, e.g., *AT&T Ohio Rehearing Order* at 7-8 ("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.").

*Third*, there is no question that enterprise and telematics customers have the ability to originate calls when they utilize Intrado Comm’s 911 services. This is the sole purpose of the service - to allow those customers to originate 911 calls and be connected with the appropriate public safety agency. Intrado Comm’s retail enterprise E911 service offering allows enterprise and telematics customers to originate a 911 call and have it delivered to the appropriate PSAP whether the PSAP is served by Intrado Comm or another carrier.

*Fourth*, Intrado Comm’s wholesale 911 access services provide for the origination of 911 calls. Under the FCC’s rules implementing the Net 911 Act,<sup>63</sup> any entity that owns or controls a “capability” that can be used for 911 or E911 service must make that capability available to a requesting interconnected VoIP service provider.<sup>64</sup> With this service, Intrado Comm’s end users (*i.e.*, its VoIP service provider customers) have the capabilities needed to ensure their end user customers can originate 911 calls to reach the appropriate PSAP when they dial 911.

**D. Intrado Comm’s Service Is Comparable to Other Telephone Exchange or Exchange Access Services**

While the term “comparable” is not defined in the FTA, it is generally understood to mean “having enough like characteristics and qualities to make comparison appropriate.”<sup>65</sup> Congress provided little guidance on which characteristics and qualities must be present in order for a service to be deemed “comparable” under the definition, which leaves the FCC with the discretion to make such determinations.<sup>66</sup> The FCC therefore has adopted “a practical approach to applying [the “telephone exchange service”] definition” given “the evolving nature of the

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<sup>63</sup> New and Emerging Technologies 911 Improvement Act of 2008, PUB. L. NO. 110-283, 122 STAT. 2620 (2008).

<sup>64</sup> 47 C.F.R. § 9.7.

<sup>65</sup> *Advanced Services Order* ¶ 29.

<sup>66</sup> *Advanced Services Order* ¶ 29.

provision of services in the telecommunications market.”<sup>67</sup> There is no question that Intrado Comm’s 911 services are “comparable” to the types of services described in Part (A) of the telephone exchange service definition,<sup>68</sup> and the *Order* should therefore be reversed on those grounds.<sup>69</sup>

Intrado Comm’s 911 services are also comparable to those provided by Verizon, which have historically been classified as local exchange or telephone exchange services and found in Verizon’s local exchange tariffs.<sup>70</sup> The *Order*, however, completely ignores the treatment and classification of Verizon’s 911 services. The FCC has stated on many occasions that 911 is local in nature, which is reflected by the inclusion of the service in Verizon’s local exchange tariffs with its other telephone exchange services.<sup>71</sup> The *Order*’s determination to treat Intrado Comm’s service differently than Verizon’s service is arbitrary and capricious.<sup>72</sup>

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<sup>67</sup> *BellSouth Louisiana II Order* ¶ 29. The FCC’s decision reflects its understanding that such a determination is heavily fact-based and any analysis must look to the specifics of the services being provided. The *Order* fails to rely on any evidence of record to reach its conclusions regarding Intrado Comm’s services.

<sup>68</sup> North Carolina Docket P-1187, Sub 2, *Petition of Intrado Communications Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, with BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina*, Order Ruling on Objections and Requiring the Filing of a Composite Agreement at 10 (Sept. 10, 2009) (“The Commission has been persuaded by the preponderance of the evidence that the better interpretation is that Intrado’s competitive 911/E911 services meet the definitions set forth in 47 U.S.C. 153(47) and that the better course of action is to approve an interpretation which more closely conforms to the overall purpose of the Act - that is, one that allows for competition in telecommunications.”).

<sup>69</sup> *Order* at 20. As discussed above, whether Intrado Comm’s services met the definition of telephone exchange service under the FTA hinges on material facts that Intrado Comm was never given an opportunity to present and thus the *Order*’s ruling in favor of Verizon for summary decision was an error of law.

<sup>70</sup> Verizon Southwest General Exchange Tariff, Schedule No. A-12A; *see also* Intrado Comm Initial Threshold Brief at 8.

<sup>71</sup> *See, e.g., The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, 12 FCC Rcd 5572, ¶ 42 (1997) (finding 911 calls “are typically intrastate”); *id.* ¶ 58 (“most individual N11 calls are likely to be intrastate”).

<sup>72</sup> Further, treating Intrado Comm differently than other 911 service providers impermissibly discriminates against Intrado Comm in violation of federal and Texas law. Federal law supports regulatory parity among providers because, “in a market where carriers are offering the same services and competing for the same customers, disparate treatment of different types of carriers or types of traffic has significant competitive implications” by giving other providers “a competitive advantage.” *See Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, ¶ 21 (2005); *see also Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd 5901, ¶ 53 (2007) (noting that the “disparate treatment” of competitors “would introduce competitive distortions into the marketplace”). Regulatory parity is important to ensure a level playing field. *See Bright House Networks, LLC et al. v. Verizon Cal., Inc. et al.*, 23 FCC Rcd 5857, ¶ 30 (2008); *Petition of ACS of*

Further, Intrado Comm’s service is comparable to “exchange access” service. In the FTA, “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.”<sup>73</sup> A carrier providing exchange access service provides local access to other carriers (or to itself) to originate and terminate toll or long distance calls.<sup>74</sup> Intrado Comm’s 911 service does not fall squarely within the definition of “exchange access” because 911 services are not toll services.<sup>75</sup> However, Intrado Comm’s 911 service does provide “access to the local network for the purpose of originating or terminating” a communication.<sup>76</sup> Intrado Comm’s 911 service offers comparable functionality as an exchange access service when it provides other carriers access to its PSAP customers for the transmission and completion of 911 calls. In fact, Intrado Comm is required by FCC rules to provide “access” to interconnected VoIP service providers because Intrado Comm owns or controls capabilities used to provide 911 services.<sup>77</sup> Thus, similar to traditional exchange access services, the primary purpose of Intrado Comm’s wholesale 911 access service provided to carriers and VoIP service providers is to provide “access” to the appropriate public safety entity for the completion of 911 calls.

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*Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended*, 22 FCC Rcd 16304, ¶ 129 (2007) (“disparate treatment of carriers providing the same or similar services is not in the public interest as it creates distortions in the marketplace that may harm consumers”). The disparate treatment between Intrado Comm and Verizon undermine that goal as well as violate Texas law. *See, e.g.*, PURA §§ 55.005, 55.006.

<sup>73</sup> 47 U.S.C. § 147(16).

<sup>74</sup> *Local Competition Order* ¶ 191.

<sup>75</sup> *Order* at 25 (noting that Intrado Comm admits it does not provide “exchange access” as defined in the FTA).

<sup>76</sup> *Advanced Services Order* ¶ 45.

<sup>77</sup> 47 C.F.R. § 9.7

#### **IV. THE ORDER CONFUSES THE FEES INTRADO COMM WILL CHARGE ITS CUSTOMER WITH THE LINE-ITEM 911 FEE COLLECTED BY ALL CARRIERS**

One component of Part (A) of the statutory definition of “telephone exchange service” under the FTA is that the service must be “covered by the exchange service charge.”<sup>78</sup> In its filings, Intrado Comm explained that it satisfied this portion of the definition because Intrado Comm’s customers - public safety agencies, enterprise and telematics customers - will be subject to an “exchange service charge” for their receipt of service from Intrado Comm.<sup>79</sup> This was based on the FCC’s determination “that any charges” assessed for a service would be considered the “exchange service charge.”<sup>80</sup> The *Order*, however, appears to confuse the concept of “exchange service charge” with the line-item 911 fees collected by all carriers from their end user customers making 911 calls.<sup>81</sup>

First, the *Order* states that it does not agree with Intrado Comm’s analogy that 911 fees collected for maintaining a 911 network are not equivalent to or serve the same purposes as fees for extended area service (“EAS”) or expanded local calling service (“ECLS”).<sup>82</sup> Intrado Comm never made such an analogy. 911 fees collected as line items on end user bills have nothing to do with whether Intrado Comm’s service offerings are “covered by the exchange service charge” as required in the FTA definition of “telephone exchange service.” As explained in Intrado Comm’s threshold issue briefs, whether a “charge” is imposed on end users dialing 911 has no bearing on the classification of Intrado Comm’s competitive 911/E911 services to be provided in

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<sup>78</sup> 47 U.S.C. § 153(47)(A).

<sup>79</sup> Intrado Comm Reply Threshold Brief at 7-8.

<sup>80</sup> *Advanced Services Order* ¶ 27.

<sup>81</sup> *Order* at 21.

<sup>82</sup> *Order* at 21.

Texas.<sup>83</sup> The “evidence of an exchange service charge” is found in the fees paid to Intrado Comm by its customers, (*i.e.*, PSAP customers, enterprise, and telematics customers, and, if a 911 access service tariff is filed, for service providers).<sup>84</sup>

Nor do EAS and ECLS fees have anything to do with the charge imposed by Intrado Comm for its service offerings.<sup>85</sup> Intrado Comm referred to EAS and ECLS service to demonstrate that, while its service did meet the statutory requirement to operate within a telephone exchange,<sup>86</sup> there was no requirement that Intrado Comm’s service operate within incumbent-defined exchange boundaries to qualify as telephone exchange service.<sup>87</sup> Indeed, the *Order* agreed that Intrado Comm would not be required to operate entirely within Verizon’s exchange boundaries.<sup>88</sup> Thus, the *Order*’s comparison to fees charged for EAS and ECLS service is irrelevant and unnecessary to the determination.

Second, the *Order* finds that a fee charged for telephone exchange service is an “exchange service charge” under the statute and because Intrado Comm does not offer telephone exchange service it cannot satisfy the requirement for an “exchange service charge.”<sup>89</sup> This reasoning is circular. Whether an “exchange service charge” exists is an element of the statutory definition of “telephone exchange service” - there cannot be a requirement that you provide telephone exchange service in order satisfy an element of the definition. Such an interpretation would render the elements of the definition meaningless. The FCC has specifically found that, “in a competitive environment, where there are multiple local service providers and multiple

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<sup>83</sup> Intrado Comm Reply Threshold Brief at 7-8.

<sup>84</sup> *AT&T Ohio Arbitration Award* at 16.

<sup>85</sup> *Order* at 21.

<sup>86</sup> 47 U.S.C. § 153(47)(A).

<sup>87</sup> Intrado Comm Reply Threshold Brief at 6-7.

<sup>88</sup> *Order* at 21.

<sup>89</sup> *Order* at 21.

services, there will be no single ‘exchange service charge.’”<sup>90</sup> The only requirement is that Intrado Comm’s customers obtain “the ability to communicate within the equivalent of an exchange area as a result of entering into a service and payment agreement with” Intrado Comm.<sup>91</sup> A fact specific-based analysis, which if undertaken would have revealed that Intrado Comm customers do communicate within the equivalent of an exchange and do pay Intrado Comm for this local exchange service.

## V. THE ORDER WRONGLY APPLIES COMMISSION PRECEDENT

In the *Texas SCC Order* - issued as part of Intrado Comm’s prior arbitration with AT&T - the Commission determined that Intrado Comm was entitled to Section 251(c) interconnection because it was a telecommunications carrier offering telephone exchange service and/or exchange access.<sup>92</sup> The *Order*, however, declined to follow this prior Commission ruling for two primary reasons. Each of these reasons represents an error of law and fact supporting reversal of the *Order*.

First, the *Order* finds that whether Intrado Comm was offering telephone exchange service was not at issue in the *Texas SCC Order*.<sup>93</sup> The *Order* is wrong. The *Texas SCC Order* specifically states that AT&T challenged Intrado Comm’s petition for arbitration “because SCC ‘was neither a LEC nor a telecommunications carrier.’”<sup>94</sup> Indeed, when explaining AT&T’s position, the *Texas SCC Order* reiterates that AT&T raised “[a]s a separate ground for dismissing” Intrado Comm’s arbitration petition the fact that Intrado Comm did not provide

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<sup>90</sup> *Advanced Services Order* ¶ 28.

<sup>91</sup> *Advanced Services Order* ¶ 27.

<sup>92</sup> *Texas SCC Order* at 12. AT&T never appealed this decision to the full Commission.

<sup>93</sup> *Order* at 22.

<sup>94</sup> *Texas SCC Order* at 2 (quoting AT&T Motion to Dismiss at 4). The FTA defines a “LEC” as a person that is engaged in the provision of telephone exchange service or exchange access. *See* 47 U.S.C. § 153(26).

telephone exchange service or exchange access.<sup>95</sup> In response to the two arguments made by AT&T, the arbitrators made two findings - one that Intrado Comm qualifies as a telecommunications carrier under the FTA<sup>96</sup> and two that “the 9-1-1 calls that [Intrado Comm] aggregates and transports are clearly telephone exchange service and/or exchange access.”<sup>97</sup> The *Texas SCC Order* specifically rejected AT&T’s “overly narrow interpretation of FTA § 251(c)(2)” and determined that AT&T “is under the obligation to provide interconnection.”<sup>98</sup> Accordingly, the *Order*’s conclusion that the *Texas SCC Order* did not address whether Intrado Comm provides telephone exchange service is incorrect.

Second, the *Order* finds that the conclusions from the *Texas SCC Order* do not apply here because the previous arbitrators were looking at the end-to-end 911 call, not the 911 service as a “stand-alone product.”<sup>99</sup> This factual finding misconstrues the nature of Intrado Comm’s services. Intrado Comm offers significantly more robust services than the services offered by its predecessor, which were at issue in the *Texas SCC Order*. In the *Texas SCC Order*, Intrado Comm’s predecessor would deliver 911 calls to the incumbent’s selective router. The service Intrado Comm provides today offers the service at issue in the *Texas SCC Order*, plus other services to PSAPs, enterprise and telematics customers, and service providers that are terminated in some instances to the PSAP, not just to the selective router. If Intrado Comm was entitled to 251(c)(2) interconnection under the *Texas SCC Order*, then it only follows that it is so entitled in the present case. The facts in the instant Motion demonstrate that Intrado Comm’s services today are more robust and offer more local exchange services than its previous filing at issue in

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<sup>95</sup> *Texas SCC Order* at 9.

<sup>96</sup> *Texas SCC Order* at 10.

<sup>97</sup> *Texas SCC Order* at 11.

<sup>98</sup> *Texas SCC Order* at 11, 12.

<sup>99</sup> *Order* at 22-23.

the *Texas SCC Order*. As part of its retail enterprise service offering (discussed above), Intrado Comm can carry the 911 call from the enterprise location, to the selective router, and then to the appropriate PSAP if that PSAP is served by Intrado Comm. Given that the services at issue in the *Texas SCC Order* were more limited than those to be offered by Intrado Comm today, there is no justification for the *Order*'s decision to ignore the Commission's previous classification of Intrado Comm's services.

## CONCLUSION

For the foregoing reasons, Intrado Comm respectfully requests that the *Order's* conclusions be reversed, and the Arbitrators move forward with addressing Intrado Comm's arbitration petition.

Respectfully submitted,

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Dated: December 28, 2009

Its Attorneys

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing MOTION FOR RECONSIDERATION OF INTRADO COMMUNICATIONS INC. has been served on all parties of record via the method indicated below on this 28th day of December 2009.

  
\_\_\_\_\_  
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