Attachment 6

DOCKET NO. 36185

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

VERIZON'S OPPOSITION TO INTRADO COMMUNICATIONS INC.'S MOTION FOR RECONSIDERATION

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VERIZON'S OPPOSITION TO INTRADO COMMUNICATIONS INC.'S MOTION FOR RECONSIDERATION

Verizon Southwest asks the Commission to deny Intrado Communications Inc.'s Motion for Reconsideration ("Motion") of the November 23, 2009, Order on Threshold Issue No. 1 and Denying Relief Requested in Petition ("Order"). There, the Arbitrators found that Verizon cannot be compelled to arbitrate an interconnection agreement with Intrado under Section 251(c)(2) or Section 252(b) of the Communications Act of 1934, as Amended ("FTA"), for Intrado's 911 services.[1] The Arbitrators instead advised Intrado to seek interconnection with Verizon through a commercial agreement.[2]

Intrado's Motion argues that the Arbitrators' conclusions are arbitrary and capricious and based on errors of law and fact. Intrado is wrong. The Arbitrators correctly understood the specifics of the 911 services for which Intrado sought interconnection with Verizon, based on Intrado's own representations about those services. The Arbitrators correctly applied the law to these facts to find that Intrado's 911 services do not meet the federal definition of "telephone exchange service" in the

[1] Order at 2.
[2] *Id.* at 23.

FTA, so Intrado is not entitled to Section 251(c) interconnection for these services. This is the same, correct conclusion reached by the Illinois and Florida Commissions.[3]

The fundamental problem with Intrado's case is that the law under which it chose to petition for interconnection does not fit its 911 business plan. But, as the Illinois Commission concluded, having chosen to seek section 251(c) interconnection, Intrado cannot bend the law to suit that business plan:

> The Commission observes that Intrado chose its business model with full knowledge of the Federal Act. Its efforts to obtain interconnection under the Federal Act for that business model have not been entirely successful, at least thus far. It may occur that Intrado will modify its business plan to obtain interconnection more readily.[4]

Indeed, instead of continuing to pursue its futile efforts to obtain unreasonable interconnection arrangements to which it has no right under section 251(c), Intrado's resources would be better directed to entering commercial agreements—as it did with Embarq and Verizon once the Florida Commission dismissed Intrado's Petition for Arbitration with Embarq. Verizon remains willing, as it has from the outset, to negotiate a commercial agreement here that may better suit Intrado's emergency services business plan than the section 251(c) interconnection it seeks. The best way for the Commission to encourage Intrado to enter such negotiations is to affirm the Order denying Intrado's Petition.

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[3] *See Petition by Intrado Comm., Inc. for Arbitration of Certain Rates, Terms, and Conditions for Interconnection and Related Arrangements with AT&T Florida, Pursuant to Section 252(b) of the Comm. Act of 1934, as Amended*, Docket No. 070736-TP, Final Order (Fla. P.S.C. Dec. 3, 2008); *Petition by Intrado Comm., Inc. for Arbitration of Certain Rates, Terms, and Conditions for Interconnection and Related Arrangements with Embarq Florida, Inc., Pursuant to Section 252(b) of the Comm. Act, as Amended*, Docket No. 070699-TP, Final Order (Fla. P.S.C. Dec. 3, 2008); *Petition for Arbitration Pursuant to Section 252(b) of the Comm. Act of 1934, as Amended, to Establish an Interconnection Agreement with Illinois Bell Tel. Co.*, Docket No. 08-0545, Arbitration Decision (I.C.C. March 17, 2009) ("*Ill. Order*"), Notice of Commission Action Denying Intrado's Application for Rehearing (May 1, 2009).

[4] *Ill. Order* at 19.

I. The Arbitrators' Decision Was Procedurally Proper.

Intrado argues that the Arbitrators' ruling on the threshold issue was "arbitrary and capricious" because there was no motion for summary decision before them, and there were disputed fact issues that would have prevented granting of summary decision if such a motion had been filed.[5] This argument misconstrues the Commission's rules and misrepresents the facts as presented in Intrado's own filings.

A. Verizon Did Not Need to File a Motion for Summary Decision for the Arbitrators to Rule on Threshold Issue No. 1.

Contrary to Intrado's suggestion, Verizon did not have to file a motion for summary decision in order for the Arbitrators to rule on Threshold Issue No. 1—that is, "Are 'emergency services' 'telephone exchange service' or 'exchange access' for purposes of FTA § 251(c)(2)(A)?" This is an issue of subject matter jurisdiction. As the Order recognizes, "[t]he Commission's jurisdiction to approve, reject, or arbitrate FTA §§ 251/252 ICAs is found in federal law."[6] Section 251(c) interconnection is available only to telecommunications carriers and only "for the transmission and routing of telephone exchange service and exchange access."[7] The Arbitrators correctly understood that, if emergency services do not satisfy the federal definition of telephone exchange service or exchange access, then the Commission has no jurisdiction to arbitrate an interconnection agreement for such services. As the Illinois Commission observed:

> [T]he Commission is neither willing nor authorized to expand the specific provisions of the law beyond their apparent meaning. The Congress did not say that *any* market entrant is entitled to interconnection under subsection 251(c)(2). Rather, it described the entrants entitled to such interconnection with particularity. Irrespective of this Commission's

[5] Motion at 2-3.
[6] Order at 5.
[7] 47 U.S.C. 251(c)(2)(A).

interest in expanding competition, we cannot exceed the limits established by the Congress.[8]

The Arbitrators here had not only the right, but the obligation, to determine whether proceeding to arbitrate an interconnection agreement for emergency services was within the jurisdictional limits Congress established in the FTA. Indeed, the Commission must find jurisdiction to resolve *every* case that comes before it; there is no need for any party to present the matter of jurisdiction though a motion for summary decision or any other particular procedure. "Subject matter jurisdiction is never presumed" and the lack of subject matter jurisdiction cannot be waived; it can be raised for the first time at any point, even on appeal.[9] A lack of subject matter jurisdiction will render a decision null and void.[10] As a legal, as well as practical, matter, it would make no sense for the Commission to proceed with arbitration, only to find, at the end of the arbitration, that it had no jurisdiction to conduct the arbitration in the first place.

Indeed, as Intrado itself recognizes, Commission Rule 21.61 explicitly "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."[11] This is exactly the procedure the Arbitrators followed. At the prehearing conference on October 8, 2008, "the Arbitrators

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[8] *Ill. Order* at 19.

[9] *See,* e.g., *Tex. Ass'n of Business v. Tex. Air Control Bd. and Tex. Water Comm'n*, 852 S.W.2d 440, at 443-44 (Tex. S.Ct. 1993); *Inquiry of the P.U.C. of Texas Concerning the Fixed Fuel Factor of Gulf States Util. Co., etc.*, Docket Nos. 6477, 6660, 6748, 6842, 1986 Tex. PUC Lexis 45, at *22 (Oct. 15, 1986).

[10] *See, e.g.*, *Dahiya v. Talmidge Int'l Ltd. etc.*, 371 F.3d 207, 210 (5th Cir. 2004) (recognizing that unless subject matter jurisdiction over a dispute exists, any orders other than dismissal or remand are void); *Gober v. Terra+Corp.*, 100 F.3d 1195, 1203 (5th Cir. 1996) (observing that a decision is void where it was rendered without subject matter jurisdiction); *Cooke v. Cameron*, 733 S.W.2d 137, 140 (Tex. S.Ct. 1987); *Browning, et al. v. Placke*, et al., 698 S.W.2d 362, 363 (Tex. S. Ct. 1985), at *Ex Parte: Robert C. Buckhanan Relator Original Application for Writ of Habeas Corpus*, 626 S.W.2d 65, at 68-69 (Tex. Ct. App. 1981).

[11] Motion at 2, *citing* P.U.C. Proc. R. 21.61(a).

instructed the parties that there are threshold legal issues that must be resolved before this matter can proceed so it is premature to establish a procedural schedule."[12] The Arbitrators defined those issues, memorialized them in Order No. 2, and called for briefs and reply briefs. At no time did Intrado protest this established procedure, demand to "present testimony or factual evidence" about its emergency services, or raise any question about the Arbitrators' authority to resolve any of the threshold issues before proceeding to arbitration. And there is no question that Intrado knew that resolution of Issue 1 against Intrado would be dispositive to its request for section 251(c) interconnection. Intrado claims procedural irregularity now for the first time on reconsideration only because it disagrees with the Arbitrators' determination of that Issue.

Disagreement with the result is not a legitimate basis for complaining about the procedure used to reach that result. The Arbitrators correctly determined the threshold jurisdictional issue before proceeding, and they followed the Commission's established procedure for doing so. There was no need for Verizon to file a motion for summary judgment or for any further development of an evidentiary record before the Arbitrators could decide the threshold jurisdictional issue of whether emergency services were the kind of services that would entitle an entity to section 251(c) interconnection.

Indeed, although Intrado was permitted to, and did, fully describe the emergency services for which it sought interconnection, the wording of Threshold Issue No. 1—which referred to "emergency services" in general, without indicating the need to review Intrado's particular emergency services--suggests that no factual development at all

[12] Order No. 2, Memorializing Prehearing Conference, Requesting Briefs on Threshold Legal Issues, and Restyling Docket (Oct. 17, 2008) ("Order No. 2"), at 1.

was necessary to decide this legal issue. This makes sense, because Texas law with respect to 911 emergency services recognizes that they are *not*, by definition, exchange-based services[13]—which, as explained below, in the Order and Verizon's previous filings, is a fundamental criterion for classification as "telephone exchange service" qualifying for section 251(c) interconnection under federal law. Because emergency services—Intrado's or anyone else's—are inherently not exchange-based services, as Intrado itself acknowledges,[14] they cannot, as a matter of law, be telephone exchange service.

If anything, the Arbitrators afforded Intrado *more* procedural protection than required under the Commission's interconnection rules. Rule 21.61(a)(2) specifies that: "*A decision on a threshold issue is not subject to motion for reconsideration.*" Therefore, the Arbitrators would have been justified in denying the parties any opportunity to seek reconsideration of their ruling on Threshold Issue No. 1. They, nevertheless, extended such an opportunity, apparently because the nature of the threshold issue was such that the adverse ruling to Intrado necessarily meant denial of its entire Petition for Arbitration. Intrado cannot rely on the Arbitrators' recognition of the practical effect of their ruling (and their procedural magnanimity) to bootstrap an argument that the ruling could be made only on a motion for summary decision. In any event, as discussed below, there was no material factual dispute preventing denial of Intrado's Petition, regardless of the procedure resulting in that denial.

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[13] *See, e.g.*, Texas Health and Safety Code, §§ 772.102 (2), 772.202(2), 772.302(2) ("telephone exchange boundaries and central office service areas do not necessarily correspond to public safety and political boundaries"); §§ 772.105, 772.204, 77.2.205, 772.304, 772.305 (defining emergency communication districts by reference to political boundaries)

[14] *See, e.g.*, Motion at 12 n. 53.

B. There Was No Factual Dispute About Intrado's Emergency Services.

Intrado argues that "[a]s 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."[15] Because of these alleged factual disputes, Intrado argues that the Arbitrators could not grant a motion for summary decision without giving Intrado the opportunity to "present testimony or factual evidence regarding the nature of its 911/E911 service offerings."[16]

As noted, there was no requirement for Verizon to file a motion for summary decision, but even if Verizon's brief is treated as such, there was no factual dispute preventing denial of Intrado's Petition for lack of entitlement to section 251(c) interconnection. Contrary to Intrado's allegations, the pleadings demonstrate that Intrado and Verizon had a common understanding of the emergency services for which Intrado sought section 251(c) interconnection, and Intrado provides no descriptions of the alleged factual disputes existing when the Arbitrators ruled.[17] Although the parties certainly disagreed about the appropriate legal categorization of Intrado's emergency services, they did not disagree about what the services were. More importantly, the Order reflects Intrado's 911 emergency services as described *in Intrado's own pleadings*, and does take issue with the facts Intrado presented about those services.

With respect to those facts, Intrado's Initial and Reply Briefs on the threshold legal Issues repeated, over and over, that Intrado was seeking interconnection for "911/E-911 services" it planned to provide to "Texas public safety agencies and Public

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[15] Motion at 2.
[16] *Id.*
[17] *Id.*

Safety Answering Points."[18] Intrado explained that interconnection with Verizon would allow Verizon's end users to reach Intrado's PSAP "end users,"[19] and that its 911 emergency services would allow Intrado's "PSAP customers" to communicate with each other and with "Verizon's PSAP customers"[20] Intrado recognized that "911 trunks are generally one-way trunks," but characterized the PSAP's ability to "hookflash," or bridge a third party into a 911 call, as "originating a call in a conferencing capacity."[21]

The Order's description of Intrado's services tracked Intrado's own descriptions, reciting that "Intrado's 911/E911 customers are PSAPs and other public safety agencies."[22] The Order thoroughly described the aspects of Intrado's services just as Intrado did, including Intrado's explanation that "Intrado's PSAP and other emergency services customers will be able to conference and transfer emergency calls to other PSAPs or other public safety providers."[23]

A simple comparison of the Order with Intrado's own briefs reveals no misapprehension of Intrado's services. Now, however, despite Intrado's repeated references to its customers as only PSAPs and public safety agencies, Intrado's Motion accuses the Arbitrators of "wrongly conclud[ing]" that these are Intrado's only customers and "completely ignor[ing]" the "acknowledged facts" about other types of customers and service offerings.[24] This argument borders on the duplicitous. Intrado's briefs never described anything other than 911 services to PSAPs and public safety agencies, and no features or services other than those captured in the Order. Its Motion,

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[18] *See, e.g.*, Intrado Initial Br. at 2, 3, 4, 7, 8, 9; Intrado Reply Br. at 1, 2, 3, 4, 5, 7, 8.
[19] Intrado Initial Br. at 2.
[20] Intrado Reply Br. at 4.
[21] Intrado Initial Br. at 8.
[22] Order at 11, *citing* Intrado's Petition at 5.
[23] Order at 11, *citing* Intrado Reply Br. at 4-5.
[24] Motion at 4, 6.

however, emphasizes customers and features that Intrado never raised in any filings prior to its reconsideration request. In addition to the call transferring and conference calling capabilities Intrado described in earlier filings (and that the Order acknowledged), Intrado now alleges that it will also provide PSAPs "outgoing calling" and "reverse 911" capabilities.[25] Intrado further claims that it will serve customers other than PSAPs and public safety agencies—specifically, "enterprise and telematics customers," with a service allowing them to "dial 911 and reach the appropriate PSAP" based on the caller's location, rather than the location of the PBX or "other call collection platform" managing their calls.[26] Intrado also lists a transiting service whereby it would complete carriers' and VoIP providers' 911 calls to PSAPs.[27]

The Arbitrators could not have "completely ignored" these alleged facts about Intrado's services *that Intrado itself never presented*—and that are not reflected in Intrado's Rate Sheet filed with the Commission or covered in the draft interconnection agreement language. Indeed, despite Intrado's claims that the Arbitrators ignored Intrado's facts, Intrado admits that only "*[s]ome* of the features and functionalities" described in the Motion were discussed in previous filings,[28] and suggests that its services are "dynamic and continue to be developed."[29] In other words, having lost its argument that the services for which Intrado sought section 251(c) interconnection do not meet the definition of telephone exchange services or exchange access, Intrado has, for purposes of seeking reconsideration, concocted new services that it believes (albeit erroneously) might better fit the definition. This is much different from the

[25] Motion at 5.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 5-6 (emphasis added).
[29] *Id.* at 6.

situation where there is no dispute that a carrier seeking a section 251(c) interconnection agreement plans to provide telephone exchange service and then develops variations on those telephone exchange services after execution of the agreement. Here, the question is whether the services for which Intrado sought negotiation and arbitration of a section 251(c) agreement were, in the first instance, telephone exchange service.

Intrado cannot blame the Arbitrators for basing their decision on Intrado's services and customers *as Intrado itself described them.* Intrado cannot attempt to generate such a factual dispute now, after a decision has been made, by raising new facts. It was Intrado's responsibility to fully and completely describe the services for which it sought section 251(c) interconnection and how the law should apply to those services in its briefs—particularly because Intrado knew the decision on Threshold Issue No. 1 would determine its section 251(c) interconnection rights. As noted, Intrado never complained that the briefing process was inadequate to do so; if it had been seeking section 251(c) interconnection to provide additional services it thought would fit the "local exchange service" rubric, there was no reason it could not have described them in its briefs in October and November, *before* the Arbitrators ruled.

In ruling on the Motion, the Commission should disregard Intrado's new allegations about the services it claims it will provide and reject Intrado's unsupported arguments that the Arbitrators could not decide Threshold Issue No. 1 without giving Intrado a further opportunity to develop a factual record about its services (despite Intrado's failure to seek such an opportunity). If, however, the Commission considers Intrado's new factual allegations, nothing in Intrado's descriptions of the additional

features or functionalities it claims it may offer someday changes the Arbitrators' conclusion that Intrado's emergency services do not constitute telephone exchange service or exchange access, as explained below.

II. The Arbitrators' Decision Was Substantively Correct.

There is no dispute that, under FTA section 251(c)(2)(A), a "telecommunications carrier"[30] may request interconnection with an incumbent's network only "for the transmission and routing of telephone exchange service and exchange access."[31] As the Order recognizes (at 6), Intrado has not claimed that it will provide exchange access, which is "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."[32] In its Motion, Intrado reiterates that "911 services are not toll services," so they do not fall within the definition of exchange access.[33] It, nevertheless, includes a discussion of why its alleged wholesale 911 access service (a service it never mentioned in its briefs) is *like* exchange access service.[34] It is not clear what the point of Intrado's ill-conceived analogy is, because Intrado does not ask the Commission to actually find that any of its services are exchange access (nor could it do so for the first time on reconsideration) and Intrado openly recognizes that they are not. The Commission should, therefore, disregard Intrado's exchange access discussion.

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[30] To the extent that Intrado will provide Internet-protocol-enabled services, Verizon does not concede that Intrado is a telecommunications carrier, but the legal issue of the regulatory classification of IP services is appropriately before the FCC.

[31] *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order 11 FCC Rcd. 15499, ¶ 191 (1996) (subsequent history omitted) (a carrier "that requests interconnection" that is "not for the provision of telephone exchange service and exchange access to others, on an incumbent LEC's network, is not entitled to receive interconnection pursuant to section 251(c)(2)").

[32] 47 U.S.C. § 153(40).

[33] Motion at 16.

[34] *Id.*

As the Order recognizes (at 6), because Intrado does not claim its services are exchange access, Intrado's entitlement to section 251(c) interconnection depends on whether it will provide "telephone exchange service."

Telephone exchange service is defined at 47 U.S.C. § 153(47) as:

> (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.

The Arbitrators correctly determined that Intrado's emergency services are not telephone exchange service under either part A or B of this definition.

A. Intrado's 911 Services Do Not Satisfy Subparagraph A of the Telephone Exchange Service Definition.

1. Intrado's Emergency Services Provide No Exchange-Based Intercommunication.

Intrado does not dispute that its service must permit intercommunication to satisfy Part A of the telephone exchange service definition, but it disagrees with the Arbitrators' conclusion that Intrado's services fail to satisfy this criterion, and it simply ignores the "exchange" component of "telephone exchange service." It continues to insist, as it did in its briefs, that intercommunication means only two-way communications, not two-way traffic.[35] It quotes the FCC as "'nowhere suggest[ing] that two-way voice service is a necessary component of telephone exchange service.'"[36]

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[35] Motion at 9.

[36] Motion at 12, *quoting Deployment of Wireline Services Offering Advanced Telecomm. Capability, et al.*, 13 FCC Rcd 24011 (1998), ¶ 43.

Intrado reiterates that even if its services do not enable two-way traffic,[37] they "permit intercommunication by enabling two-way communications between a PSAP and a 911 caller or between a PSAP and another PSAP,"[38] and it takes issue with the Arbitrators' legal analysis of its "hookflash" capability.[39] Intrado does not claim that its services (including the services it never mentioned before it filed the Motion)[40] are based on exchange boundaries, but contends that the 911 callers, PSAPs, and first responders in the relevant 911 jurisdiction is an "interconnected community" sufficient to satisfy the definition of telephone exchange access.[41]

Intrado is, again, trying to alter the law to fit its services. The Commission should, as the Arbitrators did, reject Intrado's arguments that one-way 911 services provided without regard to exchange boundaries are telephone exchange service.

The Arbitrators correctly analyzed the relevant statute and FCC precedent to conclude that "the term intercommunicating includes the concept of local subscribers being able to call one another; *i.e.*, to originate and terminate calls to one another."[42] They, therefore, rejected Intrado's argument that its 911 services need not permit two-way traffic to provide intercommunication, but only "two-way communications"—that is, the parties to a call can hear and be heard simultaneously. The Arbitrators pointed to

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[37] Intrado states that its 911 service could nevertheless satisfy the two-way traffic condition, if its 911 trunks weren't required by state law to be deployed as one-way trunks. (Motion n. 45.) This observation proves only that 911 service, by definition, does not and cannot satisfy the two-way traffic aspect of intercommunication.
[38] Motion at 9.
[39] *Id.* at 12-13.
[40] Here, Intrado references its alleged "reverse 911" service and 911 call delivery services for "enterprise, telematics, and wholesale customers." (Motion at 14.) As noted earlier, Intrado did not mention these services before it filed for reconsideration, so the Commission should not consider them in ruling on the Motion. In any event, based on Intrado's own descriptions, these one-way, non-exchange-based services do not change the Order's conclusion that Intrado will provide no services that meet the definition of telephone exchange service.
[41] Motion at 10.
[42] Order at 15.

the FCC's *Advanced Services Order*, where the FCC relied on the statutory context and its own precedent to "support a conclusion that telephone exchange services must permit 'intercommunication' among subscribers within the equivalent of a local exchange area;" and that "'intercommunication' refers to a service that 'permits a community of interconnected customers to make calls to one another over a switched network."[43]

The Arbitrators further observed that the FCC's *Directory Assistance Order* reflected the same emphasis on intercommunication as permitting local telephone subscribers to make calls to other local telephone subscribers.[44] They properly rejected Intrado's attempt to analogize the "hookflash," or call transfer, capability of Intrado-served PSAPs to directory-assistance-with-call-completion service (which the FCC deemed telephone exchange service), pointing out that Intrado's service lacked the ability to transfer the originating 911 caller to another local exchange number of the caller's choice using Intrado's facilities or resale.[45]

Intrado, however, continues to insist that its call transfer feature is comparable to the telephone exchange service under the *Directory Assistance Order.* But its new theory—that because the Intrado-served PSAP decides where to route the call, the PSAP should be considered the originating caller—makes no sense.[46] The fact that the

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[43] Order at 14, *citing In the Matter of the Deployment of Wireline Services Offering Adanced Telecomm. Capability*, Order on Remand, 15 FCC Rcd. 385 (1999) ("*Advanced Services Order*"), ¶ 24.
[44] Order at 14-15, citing *Provision of Directory Listing Information Under the Telecomm. Act of 1934, as Amended*, First Report and Order, 16 FCC Rcd. 2736 (2001) ("*Directory Assistance Order*").
[45] Order at 16-17.
[46] Motion at 12-13.

PSAP is Intrado's customer does not make the PSAP the originating caller.[47] As Intrado's own description of the feature demonstrates, "hookflashing" is nothing more than the PSAP *transferring* a 911 call originated by a local telephone subscriber of another company.[48] A local telephone subscriber that originates a 911 call is still the originator of that call when it is transferred to another PSAP.

In addition, nothing in the quote Intrado uses from an early order in the FCC's *Advanced Services* docket supports its "two-way communications" theory. The quoted passage relates only to the FCC's ruling that "telephone exchange service" or "exchange access" is not limited to an ILEC's *circuit-switched voice* services, but could include *packet-switched data* services, as well. The FCC's focus was technology; the decision says nothing at all about the meaning of "intercommunication," let alone anything that would support Intrado's unique view of intercommunication. Intrado's use of the isolated quote is simply irrelevant to the dispute here.

Nor does FCC precedent or anything else support reading the "exchange" concept out of "telephone exchange service," as Intrado's position would require. As the statute plainly states, telephone exchange services must give subscribers within an *exchange* or system of *exchanges* in the same *exchange* area the ability to communicate with one another in return for an *exchange* service charge. And the FCC

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[47] Intrado's new theory that the PSAP is the originating caller making the choice of the party to which the call will be connected is also at odds with its original argument that "Intrado's provision of services to the PSAP allows the 911 caller to connect to *its requested party*, i.e., the first responders answering the emergency call." (Intrado Initial Br. at 9 (emphasis added).)

[48] Intrado also argues that the Order's "significant reliance" on the FCC's *Directory Assistance Order* is erroneous. This argument is confusing, but it appears to fault the Arbitrators for comparing Intrado's "hookflash" capability with the directory assistance service in the *Directory Assistance Order*—even though the Arbitrators were responding to Intrado's own comparison between the services (*see* Order at 15-17; Intrado Initial Br. at 5, 9; Intrado Reply Br. at 5). The Order does not err in following the FCC's guidance with respect to the kind of functionality that will count as "telephone exchange service." Intrado's complaint about the Order's reliance on FCC precedent boils down to a simple disagreement with the Order's application of that precedent.

considers the ability to "interconnect *all* subscribers"—to allow them to make calls to one another—within the exchange-based area essential to defining telephone exchange service.[49] Exchanges are not arbitrarily determined, but, under Commission Rule 26.5(79), delineated by official Commission boundary maps. In addition, as noted, the Texas 911 statutes recognize that exchanges are *not* the same as 911 districts.

In Intrado's unique view, however, an exchange, for purposes of defining "telephone exchange access" is anything Intrado says it is, defined only by the reach of Intrado's 911 services. Intrado acknowledges that 911 services, by their nature, are not tied to exchange boundaries. But under Intrado's convoluted logic, the fact that 911 services are *not* required to be exchange-based makes them telephone exchange service.

Intrado points to an FCC statement that the "telephone exchange service" definition "'does not require a specific geographic boundary,'"[50] but fails to supply the rest of the quote or its context. In the decision quoted, the FCC considered whether certain broadband PCS offerings satisfied the FTA's definition of "telephone exchange service" for purposes of assessing whether BellSouth met the FTA section 271 requirements to enter the long-distance market. What the FCC actually said, in finding that the PCS services at issue were telephone exchange services, was that the

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[49] *Advanced Services Order,* ¶ 20 (emphasis added). *See also Directory Assistance Order*, ¶ 17 ("to come within the definition of telephone exchange service, a service must permit 'intercommunication' *among subscribers within the equivalent of a local exchange* area. . . . We believe that the call-completion service offered by many competing DA providers constitutes intercommunications because it permits *a community of interconnected customers* to *make calls* to one *another* in the manner prescribed by the statute") (emphasis added); *Id.* ¶ 21 ("Call completion offered by a DA provider ... 'allows a local caller at his or her request to connect to another local telephone subscriber' thereby permitting a *community of interconnected customers to make calls* to one *another*") (emphasis added).

[50] Motion at 6, quoting *Application of BellSouth Corp., BellSouth Telecom. Inc. and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599 ("*BellSouth Louisiana Order*"), (1998), ¶ 30.

definition "does not require a specific geographic boundary *other than an area covered by an exchange service charge.*"[51] With respect to the exchange service charge, the FCC observed that PCS "home service areas" ("HSAs") were not arbitrary designations, but "local service areas" for PCS providers, which "generally apply rates to calls *originating and terminating* within HSAs in a manner similar to the BOCs' exchange service charge."[52] With respect to the functionality assessment for "telephone exchange service," the FCC emphasized that subscribers within a PCS provider's service area "are interconnected to the public switched network by means of a central switching complex, *and thus are able to place and receive calls both to other users of the PCS system and to users of other networks connected to the public switched network.*"[53] In short, the FCC agreed that the PCS services satisfied the "telephone exchange service" definition by offering service "over a radio-based equivalent to an ordinary wireline exchange."[54]

As discussed, Intrado's services here in no way equate to ordinary wireline exchange service, which, as the FCC observed, permits users to place and receive calls to all users connected to the public switched network. Instead of supporting Intrado, the FCC's findings in the *BellSouth Louisiana Order* confirm that the Arbitrators here made the right decision.

Again, Intrado is trying to shoehorn 911 services into a rubric where they don't fit, to get benefits to which it is not entitled. As the Illinois Commission observed, Intrado cannot bend the law to suit its business plan. While it is entirely appropriate to

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[51] *BellSouth Louisiana Order*, ¶ 30.
[52] *Id.*, emphasis added.
[53] *Id.*, ¶ 28.
[54] *Id.*, ¶ 29.

administer a 911 system by political subdivision, that does not make 911 services exchange-based for the purpose of meeting the definition of telephone exchange access. As Verizon explained in its briefs, while many concepts were obviated or altered by the FTA, the historic notion of the single exchange and the "character [of service] ordinarily furnished by [it]," were not.[55] The difference is not merely semantic or hypertechnical; rather, the entire premise of competitive entry – the cost-modeling, regulation and deregulation of services, and overall network design all center on the local wire-center (and its respective "exchange service charge"), not the governing political jurisdiction. Because the exchange concept is, by Intrado's own admission, not relevant to "emergency services," these services do not meet the plain-language definition set forth in subparagraph (A) for "telephone exchange services."

2. Intrado's Services Are Not Covered by an "Exchange Service Charge."

Because Intrado's 911 services are not exchange-based, it follows that they are not covered by the "exchange service charge" that is a requirement of telephone exchange service under part (A) of 47 U.S.C. § 153(47).

Intrado repeats the argument, made in its brief, that the FCC determined that *any* charges assessed for a service are considered exchange service charges.[56] This interpretation of FCC precedent has not become any sounder since the Arbitrators first rejected it.[57] What the FCC actually said in the *Advanced Services Order* passage Intrado references is:

> The final requirement in section 3(47)(A) is that telephone exchange services be covered by "the exchange service charge." Although this term

[55] Verizon Initial Br. at 3, referencing 47 U.S.C. §153(47)(A).
[56] Motion at 17, *citing Advanced Services Order*, ¶ 27.
[57] Order at 21.

> is not defined in the Act or the Commission's rules we glean its meaning from the context in which the phrase is used. We agree with those commenters who argue that the phrase 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. Specifically, we concur with AT&T that the "covered by the exchange service charge" clause comes into play only for the purposes of distinguishing whether or not a service is a local (telephone exchange) service, by virtue of being part of a "connected system of exchanges," and not a "toll" service. Specifically, we concur with AT&T that the "covered by the exchange service charge" clause comes into play only for the purposes of distinguishing whether or not a service is a local (telephone exchange) service, by virtue of being part of a "connected system of exchanges," and not a "toll" service.[58]

An exchange service charge is, therefore, not any charge Intrado may assess on its customers for any service in any geographic area; rather, the charge must apply to a service that allows end users to "communicate within the equivalent of an exchange area," such as the "connected system of exchanges" that constitute extended area services, or the PCS providers' home service areas discussed in the *BellSouth Louisiana Order*. An emergency services district does not have the attributes of a local exchange, as the FCC has described them, so Intrado's emergency-service-related charges cannot be exchange service charges.

The FCC's discussion of the exchange service charge also demonstrates that Intrado was unjustified in criticizing as "circular" the Order's reasoning that "because Intrado's 911/E911 is not telephone exchange service, its fee is not an exchange service charge"[59]. That is exactly the FCC's own reasoning, as stated in the above-quoted passage. As the FCC explained, the "exchange service charge" issue only arises if there is a need to distinguish between the "local (telephone exchange)" and toll services provided by a telephone exchange service provider. Having determined that

[58] *Advanced Services Order*, ¶ 27 [footnotes omitted].
[59] Order at 21, *cited* in Motion at 18.

Intrado is not providing telephone exchange service, there is no need to reach the exchange service charge inquiry.

B. Intrado's 911 Services Do Not Satisfy Part B of the Telephone Exchange Service Definition.

As the Order notes (at 19), if a service does not satisfy part A of the federal definition of telephone exchange service, it may still be classified as telephone exchange service under Part B of the definition, which allows for alternative technologies but requires "comparable service" that allows a customer to "originate and terminate" a telecommunications service.

The FCC has clarified that this prong of the definition requires "intercommunication," just as subsection A of the definition does.[60] The FCC has explicitly "reject[ed] the argument that subparagraph (B) eliminates the requirement that telephone exchange service permit 'intercommunication' among subscribers within a local exchange area."[61] "We conclude that a service falls within the scope of section 3(47)(B) if it permits intercommunication within the equivalent of a local exchange area and is covered by the exchange service charges."[62] As explained above, Intrado's emergency services provide no exchange-based intercommunication that is covered by an exchange service charge, so they necessarily fail part B, just as they failed Part A. Therefore, the Commission need not reach Intrado's claims that its services "offer call origination in four specific ways,"[63] but if it does, it will conclude that Intrado's arguments are unavailing.

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[60] Order at 20, *citing Advanced Services Order*, ¶ 30.
[61] *Advanced Services Order*, ¶ 30 ("[a]s prior Commission precedent indicates, a key component of telephone exchange service is 'intercommunication' among subscribers within a local exchange area").
[62] *Id.*, ¶ 29.
[63] Motion at 12.

First, Intrado trots out its "hookflash" argument again. Verizon addressed this argument above and in its briefs. In short, the PSAP does not originate a call when it transfers a 911 call to a third-party emergency responder. There would be no call transfer but for the originating 911 call (and Intrado does not even claim to be providing the dial-tone the PSAP obtains to effect the transfer). In short, Intrado does not provide call origination service simply because a PSAP decides where to route a call based on the 911 caller's input about the nature of his emergency.

Second, Intrado states that "PSAPs are technically capable of making outgoing calls with Intrado's 911 service" if they request this functionality and "when consistent with state 911 requirements"—but "call takers placing outgoing calls are then not available to receive highly critical incoming 911 calls."[64] This is a frivolous argument. Obviously, a 911 service with a feature that prevents "highly critical incoming 911 calls" from reaching the PSAP is not a 911 service at all—and it would certainly not be consistent with Texas' requirements for 911 systems. Indeed, as Intrado itself notes, 911 trunks "are often legally required to be engineered as one-way for a very good reason—they are 911 trunks."[65] A theoretical capability that is not part of Intrado's 911 offerings and that would not be consistent with 911 requirements in Texas (or anywhere else) is not a service at all.

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[64] Motion at 15.

[65] Motion at 11 n. 45. Intrado's discussion of the "technical capability" of making outgoing calls with its 911 services also mentions, for the first time, an "emergency notification messaging service" that Intrado claims PSAPs can request to give them "the ability to originate calls to telephone subscribers within the geographic area served by the PSAP." Motion at 13. The Commission should disregard this discussion of a service that Intrado raises for the first time on reconsideration, that is not in Intrado's price list, and that is not related to the interconnection terms included in negotiations or Intrado's arbitration request. If the Commission considers it, it is clear from Intrado's own description that this one-way, non-exchange-based notification service is not telephone exchange service.

Third, Intrado argues that "enterprise and telematics customers have the ability to originate calls when they utilize Intrado Comm's 911 services."[66] As Verizon explained, the Commission should not consider any Intrado claims with respect to 911 services offered to enterprise and telematics customers, because Intrado never mentioned any such services before its Motion for Reconsideration. In addition, based on Intrado's own description of the alleged services, they are not services that permit the kind of two-way, exchange-based intercommunication among local subscribers that is necessary for classification as a telephone exchange service.[67] In any event, it is not clear how these services would have anything to do with interconnection with Verizon, even if Intrado did offer them. If they do, Intrado can include them in the negotiations of a commercial contract that Verizon expects Intrado to seek once the Commission affirms the Order denying Intrado's Petition for Arbitration.

Fourth, Intrado argues that its "wholesale 911 access services *provide for* the origination of 911 calls" (emphasis added)—without saying that Intrado itself is providing the call origination. In fact, Intrado's own description of the service reveals that the VoIP provider, not Intrado, will provide the call origination capability.[68] In any event, the Commission should disregard Intrado's claims about the "wholesale 911 access services" Intrado failed to discuss at all before its Motion for Reconsideration.

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[66] Motion at 14.

[67] In addition, it is worth note that Intrado carefully avoids claiming that Intrado itself would provide the facilities or services necessary to permit enterprise and telematics customers to "have the ability to originate calls" to PSAPs. (Motion at 16.) But it is not necessary for the Commission to consider that issue, because it relates to services Intrado raises for the first time on reconsideration; and, as noted, Intrado's own description of the service proves that it is not telephone exchange service.

[68] Motion at 14. ("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 each the appropriate PSAP when they dial 911." (Emphasis added)).

Finally, Intrado argues that its 911 services meet subparagraph (B)'s comparability requirement because they are comparable to Verizon's own 911 services, and treating them differently is "arbitrary and capricious."[69] Once again, Intrado's legal argument has nothing to do with the language of the statute, which addresses comparability to the exchange-based services described in paragraph (A) of the definition, not comparability to other companies' services. The classification of Verizon's own 911 services is not at issue in this proceeding and, in any event, there is no question that Verizon provides actual telephone exchange service , as defined in the Act; and Verizon has never claimed section 251(c)(2) interconnection rights for any stand-alone 911 services, as Intrado has.

In short, Intrado fails both prongs of the telephone exchange service test because none of its services are exchange-based, but instead jurisdictionally designed services not developed for "exchange" of local telephone calls at all – which is a marked departure from the carefully prescribed language and underlying policy of the FTA.

III. The Arbitrators Did Not Wrongly Apply Commission Precedent.

Intrado claims that the Commission, in a 2002 order in an arbitration between AT&T and Intrado's predecessor, SCC, already found that Intrado was entitled to section 251(c) interconnection "because it was a telecommunications carrier offering telephone exchange service and/or exchange access."[70] Intrado argues that the Arbitrators committed "an error of law and fact" because they did not follow this prior Commission ruling as Intrado has characterized it.

There is no error of law or fact in the Order.

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[69] Motion at 15.
[70] Motion at 19.

First, Intrado has mischaracterized the *SCC Order*. As the Arbitrators here pointed out, the issue there was whether SCC was a "telecommunications carrier" providing "telecommunications service" as defined under federal law—not whether it was providing telephone exchange service. ("Telecommunications service" is a much broader term that includes, for example, long-distance and wireless services.) There was no holding on the latter issue, as is apparent from the recitation of the holding at the end of the Order: "In conclusion, the Arbitrators hold that SCC is a telecommunications carrier as defined by the Act."[71]

The telephone exchange service/exchange access discussion appeared only briefly, in the context of the arbitrators' addressing AT&T's broader argument that SCC was not seeking interconnection under the Act[72] and the arbitrators' finding that SCC's services met the "telecommunications" definition.[73]

Second, the Order correctly states that the comments about telephone exchange service or exchange access in the *SCC Order* were focused on the calls delivered to SCC, not any stand-alone 911 service—let alone the emergency services here that were not at issue in the previous arbitration. As the Arbitrators point out, the services in this case are different than the services examined in the SCC Order, so there is no "precedent" to be applied,[74] and the Arbitrators, the triers of fact here, are justified in reaching a different result than the triers of fact in the SCC Order on the basis of a different record.[75]

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[71] *Petition of SCC Comm. Corp. for Arbitration Pursuant to Section 252(b) of the Telecomm. Act of 1996, to Establish an Interconnection Agreement with SBC Comm.*, Order No. 8, Denying Motion to Dismiss (Jan. 4, 2002) ("*SCC Order*"), at 12.
[72] *SCC Order* at 9.
[73] *Id.* at 11.
[74] Order at 23.
[75] Order at 22.

Intrado has no response to these points, other than to argue that the services here are more "robust" and to point to its alleged services that Intrado never mentioned before (and that are not properly raised on reconsideration). Contrary to Intrado's accusation, the Arbitrators cannot have "misconstrued" facts that were never presented—and, as noted, none of Intrado's new facts transform Intrado's services into telephone exchange service, anyway.

Third, and perhaps most importantly, Intrado ignores the Arbitrators' point that their decision does not deny Intrado the opportunity to interconnect with Verizon to provide its 911 services. The Arbitrators' decision is, rather, that Intrado is not entitled to *section 251(c)* interconnection for these services. They advise that Intrado is free to seek interconnection "through a commercial agreement, not through an ICA"[76]—the same advice the Florida Commission gave Intrado, and that finally prompted Intrado to enter into commercial agreements there. Verizon expects Intrado to do the same here, once the Commission affirms the Order. Verizon stands ready to enter negotiations with Intrado for a commercial agreement.

[76] Order at 23.

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Certificate of Service

I certify that a true and correct copy of the foregoing was sent on the 8th day of January, 2010 to all parties of record via e-mail, facsimile or regular mail.

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Ann M. Coffin