

**UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

The Ohio Bell Telephone)
Company d/b/a AT&T Ohio,)
45 Erieview Plaza, #1600)
Cleveland, OH 44114)

Case No. 2:09-cv-00918-
ALM-MRA

Plaintiff,)

v.)

Judge Marbley

ALAN R. SCHRIBER, Chairman; RONDA)
HARTMAN FERGUS, Commissioner; VALERIE)
A. LEMMIE, Commissioner; PAUL A.)
CENTOLELLA, Commissioner, and CHERYL L.)
ROBERTO, Commissioner, in their official)
capacities as Commissioners of the Public Utilities)
Commission of Ohio)
180 E. Broad Street)
Columbus, OH 43215)

Magistrate Judge Abel

and)

Intrado Communications Inc.,)
1601 Dry Creek Drive)
Longmont, Colorado 80503)

Defendants.)

INITIAL BRIEF ON THE MERITS OF AT&T OHIO

Mary Ryan Fenlon
AT&T Ohio
150 E. Gay Street, Room 4-A
Columbus, OH 43215
(614) 223-3302

J. Tyson Covey
Kara K. Gibney
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

Attorneys for AT&T Ohio

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The Ohio Bell Telephone Company d/b/a AT&T Ohio (“AT&T”) respectfully submits its initial brief on the merits in its challenge to the decision of the Public Utilities Commission of Ohio (“PUCO”) in the arbitration of an “interconnection agreement” between Intrado Communications Inc. (“Intrado”) and AT&T Ohio under the federal Telecommunications Act of 1996 (“1996 Act” or “Act”) (codified at various sections of 47 U.S.C.).¹

INTRODUCTION

Congress passed the 1996 Act to promote competition, particularly in the market for local telephone service. That market previously had been served by “incumbent” local exchange carriers (“incumbent LECs” or “ILECs”), like AT&T, that had state-granted monopolies to provide local service for a defined area. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371-73 (1998). To open the market, the Act imposes special duties on ILECs. In particular, Sections 251(c) and 252 allow carriers that seek to “interconnect” their network with the ILEC’s network to negotiate and, if necessary, arbitrate an “interconnection agreement” with the ILEC. 47 U.S.C. §§ 251(c), 252(a)-(b). Seeking to take advantage of those special duties, Intrado requested interconnection to AT&T under Section 251(c)(2). To be eligible to compel interconnection under Section 251(c)(2), however, the requesting carrier must provide either “telephone exchange service” or “exchange access” as defined by federal law. *Id.* § 251(c)(2)(A); 47 C.F.R. § 51.305(b).

Whether a requesting carrier’s service meets this test has virtually never been an issue, until this case. That is because carriers that have interconnected to AT&T under Section 251(c)(2) have provided typical local exchange service to typical residential or business end-

¹ The PUCO’s Arbitration Award (“Order”) is Exhibit A to the Amended Complaint, and its Entry on Rehearing (“Rhg. Order”) is Exhibit B. They are provided as Attachments 1 and 2 hereto. All Attachments are provided separately, and the list of Attachments at the end of this brief shows where they can be found in the index to the administrative record filed by the PUCO here.

users. Intrado does not. Instead, it seeks to provide a specialized service limited to 911 emergency calls, and its customers will not be 911 callers, but rather those who answer 911 calls, referred to as Public Safety Answering Points (“PSAPs”). The novelty of Intrado’s service led the PUCO into two critical legal errors in trying to fit a square peg into a round hole.

1. To qualify as “telephone exchange service” under federal law, a service must permit the customer to “originate” calls.² 47 U.S.C. § 153(47). Intrado admitted that its service does not let its customers originate telephone calls. Rather, as Intrado’s Tariff shows, end-users originate 911 calls by using local exchange service bought from another carrier, and Intrado’s service at most offers its PSAP customers the ability to receive such 911 calls and transfer them to or conference in another PSAP. Intrado therefore does not provide “telephone exchange service.” The state commissions in Florida and Illinois recognized this and dismissed Intrado’s petitions for arbitration on that ground.³ The PUCO, however, erroneously concluded that the ability to transfer a call or conference in another PSAP is the same as originating a call. Order at 15-16. It is not, as the record and Federal Communications Commission (“FCC”) decisions show. *See infra* Part I (pp. 7-20).

2. If Intrado did provide telephone exchange service, however, it would be subject to the same rules as any other carrier interconnecting to an ILEC under Section 251(c)(2). Well-established law under Section 251(c)(2) requires the requesting carrier (here, Intrado) to establish its point of interconnection on the ILEC’s network. 47 C.F.R. § 51.305(a)(2); Ohio Admin. Code § 4901:1-7-06(A)(5). Intrado, however, sought unprecedented special treatment, asking

² Intrado admitted that it does not provide “exchange access.” Att. 7 at 120.

³ Arbitration Decision, *Intrado, Inc. Petition for Arbitration pursuant to Section 252(b) of the Communications Act of 1934 as amended, to establish an Interconnection Agreement with Illinois Bell Telephone Company, Ill.* Commerce Comm’n, Docket No. 08-0545, at 7-15, 19, 21, 2009 WL 2589163, at *5-*11, *14-*16 (Mar. 17, 2009) (“*Illinois Order*”); Final Order, *Petition by Intrado Communications, Inc. for Arbitration*, Fla. Pub. Serv. Comm’n Docket No. 070736-TP, 2008 WL 5381467, at *3-*4 (Dec. 3, 2008) (“*Florida Order*”).

the PUCO to flip the law and require AT&T Ohio to establish a point of interconnection on Intrado's network. The PUCO recognized that this violated Section 251(c)(2), Order at 21 – *but then went ahead and ordered it anyway*. Order at 34. To do this, the PUCO decided that different law would govern the interconnection depending on which direction the 911 traffic flowed. Specifically, it decided that Section 251(c)(2) applied when a 911 call went from Intrado to a PSAP served by AT&T, but that Section 251(a) applied when a 911 call went from AT&T to a PSAP served by Intrado. *Id.* The PUCO then decided that under Section 251(a) it could force an ILEC to interconnect on the competing carrier's network. *Id.*

That violated the Act in several ways. *See infra* Part II. First, neither Intrado nor AT&T Ohio ever raised Section 251(a) interconnection as an issue for arbitration, and the 1996 Act expressly prohibits state commissions from arbitrating issues the parties did not raise. 47 U.S.C. § 252(b)(4)(A); *infra*, pp. 22-25. Second, a competing carrier's request to interconnect with an ILEC's network is governed exclusively by Section 251(c)(2), not Section 251(a). *Id.*, § 251(c)(2); *infra*, pp. 25-30. Third, Congress did not give state commissions authority to implement Section 251(a) in arbitrations in any event. *Infra*, pp. 30-33. The PUCO's requirement that AT&T Ohio establish a point of interconnection on Intrado's network therefore violated the 1996 Act and was arbitrary and capricious. This error of law also infected other of the PUCO's rulings. The PUCO's other errors are discussed in Parts III (p. 33) and IV (p. 34).

For these reasons, the PUCO's decision should be vacated and reversed. Whatever policy objectives the PUCO may have had in mind with respect to 911 service, in the context of an arbitration under the 1996 Act it is bound by, and must follow, the established federal law – which it failed to do.

BACKGROUND

A. The 1996 Act

Section 251 of the 1996 Act imposes a three-tiered hierarchy of escalating obligations on different types of carriers. Section 251(a) imposes “relatively limited duties” on all telecommunications carriers; Section 251(b) imposes “more extensive duties” that apply only to local exchange carriers; and Section 251(c) imposes “the most extensive duties” on local exchange carriers that are “incumbents” under Section 251(h), like AT&T Ohio. *Guam Public Utilities Comm’n*, 12 FCC Rcd. 6925, ¶ 19 (1997); 47 U.S.C. §§ 251(a)-(c).

Most pertinent to this case, two subsections of Section 251 deal with interconnection of carriers’ networks. “Interconnection” is “the linking of two networks for the mutual exchange of traffic.” 47 C.F.R. § 51.5. In other words, interconnection is how different carriers connect their networks so that their customers can call each other. Section 251(a) imposes a generic duty on telecommunications carriers “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers,” but provides no further detail. 47 U.S.C. § 251(a)(1). Section 251(c)(2), by contrast, applies specifically to a request by a competing carrier to interconnect with an ILEC, and is more precise and more onerous. To be eligible for interconnection to an ILEC under Section 251(c)(2), the requesting carrier must provide either “telephone exchange service” or “exchange access” as defined by federal law. 47 U.S.C. § 251(c)(2)(A); 47 C.F.R. § 51.305(a)(1); First Report and Order, *Implementation of the Local Competition Provisions in the Federal Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶ 191 (1999) (subsequent history omitted) (“*First Report and Order*”). If the requesting carrier qualifies for interconnection under Section 251(c)(2), it is entitled to interconnect to the ILEC at “cost-based” prices under 47 U.S.C. § 252(d)(1)(A)(i). In order to make interconnection to ILECs cheap and promote local competition, these prices are “below-market,” “highly

favorable” to competitors, and so low as to be nearly confiscatory. *Verizon Comms. v. FCC*, 535 U.S. 467, 489 (2002); *Qwest Corp. v. Arizona Corp. Comm’n*, 567 F.3d 1109, 1114 (9th Cir. 2009). Importantly, however, the place where the requesting carrier interconnects, called the “point of interconnection,” must be on the ILEC’s network. 47 C.F.R. § 51.305(a)(2) (requesting carrier must interconnect at a “point within the [ILEC’s] network”); Ohio Admin. Code § 4901:1-7-06(A)(5) (same). Thus, while interconnection to an ILEC is inexpensive, the requesting carrier bears the costs of transporting traffic to and from that point on the ILEC’s network.

An ILEC’s obligations under Section 251(c) are implemented via two-party interconnection agreements. Specifically, a competing carrier can compel an ILEC to negotiate an interconnection agreement to implement Section 251(c). 47 U.S.C. §§ 251(c)(1), 252(a)(1). If negotiations do not yield a complete contract, either party can petition the state public utility commission to arbitrate “open issues” that the parties identify. *Id.*, §§ 252(b)(2), (3). The state commission then arbitrates those “open issues,” and in doing so “shall limit its consideration of any petition . . . (and any response thereto) to the issues set forth in the petition and in the response, if any.” *Id.*, § 252(b)(4)(A). After negotiation and/or arbitration, the final contract must be submitted to the state commission for approval or rejection. *Id.*, § 252(e).

B. Arbitration Proceeding at the PUCO

Intrado seeks to provide what it calls “Intelligent Emergency Network” (“IEN”) service, which is related only to 911 emergency telephone calls. Att. 9 at 6-7. 911 calls are directed to PSAPs, which most people think of as the 911 operator. Each PSAP serves a defined geographic territory. These PSAPs need to obtain service from a 911 system service provider to have the 911 calls directed and delivered to them. AT&T, or occasionally another ILEC when AT&T is

not the principal ILEC in a county, has traditionally served as the 911 system service provider for PSAPs that handle 911 calls from end-user customers in AT&T's service territory. Intrado wants to replace AT&T as the 911 system service provider for those PSAPs. To do that, Intrado needs to interconnect with AT&T so that it can receive 911 calls originated by AT&T's customers and then deliver them to Intrado's PSAP customers. Att. 9 at 7.

On December 21, 2007, Intrado filed a Petition for Arbitration of certain rates, terms, and conditions in an interconnection agreement with AT&T Ohio pursuant to Section 252(b) of the 1996 Act ("Petition"), and AT&T later filed its Response. Atts. 9, 10. In its Petition, Intrado sought interconnection with AT&T under Section 251(c)(2) of the Act, based on AT&T's status as an ILEC. Att. 9 at 17-18; Att. 11 at 6, 34-36. AT&T, however, argued that Intrado's service did not qualify as "telephone exchange service" or "exchange access" and therefore Intrado was not entitled to interconnect under Section 251(c)(2) or to compel arbitration of an interconnection agreement under Section 252(b). Nevertheless, AT&T stated that it was willing to interconnect with Intrado, thus giving Intrado everything it needed to provide its competing service, under a "commercial agreement," which is not subject to arbitration. Att. 6 at 8. Whether Intrado's service qualified as telephone exchange service thus became the threshold issue in the arbitration, because if it did not all other issues in the proceeding would become moot. The most notable of those other issues was Intrado's request to require AT&T to establish a point of interconnection on Intrado's network.

The PUCO found that Intrado's 911 service fell within the federal definition of "telephone exchange service" and that Intrado therefore was entitled to interconnect to AT&T Ohio under Section 251(c)(2) and to arbitrate an interconnection agreement under Section 252(b). Order at 15-16. With regard to the point of interconnection, the PUCO declined to force

AT&T Ohio to establish a point of interconnection on Intrado's network under Section 251(c)(2), because that would violate the 1996 Act, but then invoked Section 251(a) of the Act and ordered AT&T Ohio to do that very thing. Order at 34. On June 17, 2009, the PUCO issued an Entry on Rehearing that affirmed its prior rulings.

STANDARD OF REVIEW

The issues here are legal. The PUCO's legal determinations are reviewed *de novo* and are entitled to no deference. *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 586 (6th Cir. 2002). The PUCO's determinations also may be reversed if they are arbitrary and capricious. *BellSouth Telecomms., Inc. v. Southeast Tel., Inc.*, 462 F.3d 650, 657 (6th Cir. 2006).

ARGUMENT

I. THE PUCO'S DETERMINATION THAT INTRADO'S SERVICE QUALIFIES AS "TELEPHONE EXCHANGE SERVICE" VIOLATES FEDERAL LAW AND IS ARBITRARY AND CAPRICIOUS

Section 251(c)(2)(A) of the 1996 Act makes clear that a requesting carrier can interconnect with an ILEC (and compel arbitration of an interconnection agreement for such interconnection) only if it will use the interconnection to provide "telephone exchange service" or "exchange access" service to others. *Accord*, 47 C.F.R. § 51.305(b); *First Report and Order*, ¶ 191. Intrado conceded that its service is not "exchange access," Att. 7 at 120, so the question was whether it qualified as "telephone exchange service."

The most critical requirement of a "telephone exchange service" is that the subscriber be able to "originate" or "make calls" to "all subscribers within a geographic area." *Advanced Services Order*,⁴ ¶¶ 20, 23, 24, 25, n.61; *Directory Listing Order*,⁵ ¶¶ 17, 21-22. Intrado's

⁴ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd. 385 (1999) ("*Advanced Services Order*").

⁵ *Provision of Directory Listing Information Under the Telecommunications Act of 1934, as Amended*, 16 FCC Rcd. 2736 (2001) ("*Directory Listing Order*").

subscribers, however, cannot originate *any* calls using Intrado's service, much less originate calls to all subscribers in a geographical area. Rather, Intrado's Ohio Tariff requires them to place all outgoing calls using service provided by another carrier. *See infra*, Part I.B. With Intrado's service, subscribers can only *receive* 911 calls and forward those 911 calls to a *limited number of predetermined, designated points, i.e.*, other PSAPs. *Id.* Accordingly, the PUCO's finding that Intrado's IEN service qualifies as telephone exchange service, and therefore that Intrado was entitled to interconnection with AT&T Ohio under Section 251(c)(2) and to compel arbitration of an interconnection agreement under Section 252(b) of the Act (Order at 15-16), is contrary to federal law. Order at 15-16.

A. Congress's Definition of "Telephone Exchange Service"

Congress defines "telephone exchange service" as follows (47 U.S.C. § 153(47)):

(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 FCC's *Advanced Services Order* and *Directory Listing Order* explain how to apply the elements of this definition. In those orders, the FCC explained that part A and part B of the definition have many of the same requirements because part B was created only to "ensure that the definition of telephone exchange service was not limited to traditional voice telephony, but included non-traditional means of communications within a local calling area." *Directory Listing Order*, ¶ 21. The FCC further explained that services under part B of the definition must be "comparable" to services under part A, *i.e.*, they must "retain [] key characteristics and qualities." *Advanced Services Order*, ¶¶ 29-30; *Directory Listing Order*, ¶¶ 20-21. The FCC

then defined and analyzed the “key characteristics and qualities” that all “telephone exchange services” must possess, which include the following:

Intercommunicating. The FCC explained that the “intercommunicating” requirement (explicit in part A) applies under both parts of the definition of “telephone exchange service,”⁶ and that an “intercommunicating” service is one that permits a “community of interconnected customers to make calls to one another,” i.e., to “all subscribers within a geographic area.” *Advanced Services Order*, ¶¶ 20, 23 (emphasis added).⁷ The FCC also made clear that because an “intercommunicating” service must enable the subscriber to make calls to “all subscribers” (i.e., “any other subscriber”) on the network, *Advanced Services Order*, ¶¶ 20, 23-24, n.61; *Directory Listing Order*, ¶¶ 17, 21, the requirement would not be met if the service only permitted a designated connection between one or more points, *Advanced Services Order*, ¶¶ 23-26, n.61; *Directory Listing Order*, ¶¶ 17, 21-22. Thus, intercommunication does not exist where the subscriber cannot “make calls,” or can only make calls to a few designated points. *Id.*, ¶¶ 20, 23-26, n.61; *Directory Listing Order*, ¶¶ 17, 21-22.

⁶ *Advanced Services Order*, ¶ 30 (The FCC has “reject[ed] the argument that subparagraph (B) eliminates the requirement that telephone exchange service permit ‘intercommunication’ among subscribers within a local exchange area” because “[a]s prior Commission precedent indicates, a key component of telephone exchange service is ‘intercommunication’ among subscribers within a local exchange area.”)

⁷ See also *Directory Listing Order*, ¶ 17 (a telephone exchange 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). See also *Advanced Services Order*, ¶ 24 (service meets the “intercommunicating” requirement where the customer “may rearrange the service to communicate with any other subscriber located on that network.”) (emphasis added); *id.*, n.61 (service meets the “intercommunicating” requirement where it allows subscribers “to communicate with any other subscriber”) (emphasis added).

Call Origination. It is not surprising, then, that the call-origination requirement (explicit in part B) also applies under both parts of the definition.⁸ Call origination is the ability of a subscriber to *initiate or make* a call. The FCC also emphasized that subscribers must have control over the service by being able to choose with whom, from a multiplicity of customers, they will connect. *Directory Listing Order*, ¶¶ 17-18, 20-21; *Advanced Services Order*, ¶¶ 24-25.

Exchange Area. With respect to the requirements that a service be provided “within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area” and be “of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge,” the FCC explained that the service must operate within, and give the subscriber the ability to communicate within, a geographic area that is equivalent to a local exchange area. *Advanced Services Order*, ¶¶ 15, 27, 29; *Directory Listing Order*, ¶¶ 17, 19. It is not enough that the service connect the subscriber to a few designated points. *Advanced Services Order*, ¶¶ 23-26, n.61; *Directory Listing Order*, ¶¶ 17, 21-22.

As demonstrated below, Intrado’s service meets none of these requirements.

B. The Capabilities of Intrado’s Service

Intrado’s Ohio Tariff states that its IEN service permits PSAPs to *receive* incoming 911 calls, but explicitly forbids them from placing any calls using Intrado’s service. The Tariff explains that IEN services “are telecommunications services that permit a PSAP to *receive* emergency calls placed by callers dialing the number 9-1-1 and/or emergency calls *originated* by personal communications devices” (*i.e.*, devices used by end-user customers of some other carrier’s local service), and that “support interconnection to other telecommunications service providers for the purpose of *receiving* emergency calls *originated* in their [*i.e.*, the other

⁸ Because the “intercommunicating” requirement explicit in part A includes a call-origination component and applies under both parts of the definition (*Advanced Services Order*, ¶ 30), the call-origination requirement explicit in part B necessarily applies under both parts of the definition.

telecommunications carriers'] networks." Att. 3, Tariff, § 5.1 (emphasis added). (For example, if an AT&T customer makes a 911 call in Columbus it will be originated by her use of AT&T's local exchange service, and then carried over AT&T facilities until it is handed off to Intrado to deliver to the PSAP.) Moreover, as a condition to obtaining Intrado's service, its PSAP customers must agree to place all outgoing calls using service provided by another carrier: "The Customer must furnish [Intrado] its agreement to . . . subscribe to local exchange service at the PSAP location for administrative purposes, for placing outgoing calls, and for receiving other calls." *Id.* § 5.2.I.4. Intrado's Tariff further states that IEN service "is not intended to replace the local telephone service of the various public safety agencies which may participate in the use of this service." *Id.* § 5.2.C, Original Page 8. *See also id.*, § 1, Original Page 5 ("The Company is not responsible for the provision of local exchange service to its Customers.").

After Intrado's PSAP customer receives an incoming 911 call, the PSAP can transfer the incoming 911 call to another PSAP or conference in another PSAP to the existing 911 call. This capability is referred to as "hookflash." Att. 7 at 121-23. Intrado's Tariff explains that with hookflash the PSAP is not originating a call, but rather is transferring a call originated by the 911 caller (which is not Intrado's PSAP customer), and that the PSAP's transfer is of an existing call. Specifically, the Tariff defines the incoming 911 calls as "emergency calls *originated* by communications devices," *i.e.*, the telephones used by end-users subscribing to some other carrier's local service. Att. 3, Tariff, Definitions, Section 1, Original Page 1 (emphasis added); Att. 6 at Att. PHP-3. And when it comes to the capability to transfer calls, the Tariff uses the term "Call Transfer or Call Bridging," which it defines as "[t]he act of adding an additional party to an *existing call*." *Id.*, Definitions, Section 1, Original Page 1 (emphasis added). Intrado's hookflash capability is limited in that the PSAP can only transfer the 911 call to another PSAP or

conference in another PSAP. *Id.* § 5.1.2.C., Original Page 4. The PSAP cannot transfer the call to or join in anyone else with the call. *Id.*

C. Intrado’s IEN Service Does Not Meet Congress’s Definition of “Telephone Exchange Service.”

Applying the FCC’s decisions on “telephone exchange service” to the capabilities of Intrado’s service as described in Intrado’s Tariff and by its witnesses, the Illinois Commerce Commission and Florida Public Service Commission have refused to allow Intrado to arbitrate interconnection agreements under Section 251(c) of the 1996 Act because its service is not “telephone exchange service.” *Florida Order*, 2008 WL 5381467, *3-*4; *Illinois Order*, *5-*11, *14-*16. Arbitrators in Texas reached the same conclusion.⁹ The PUCO, however, misinterpreted and misapplied Congress’s definition and reached a different, unlawful result.

1. Intrado’s Service Does Not Provide Call Origination

The PUCO found that Intrado’s call-transfer capability (“hookflash”) is call origination. Order at 16; Rhg. Order at 4 (¶ 7). The PUCO, however, cited no authority and provided no explanation for how such capability could be origination or how a single call could be originated twice (once by the 911 caller and again by the PSAP transferring the call to another PSAP). Instead, the PUCO stated that “the statute does not quantify ‘originate,’” and because Intrado would “regard in some circumstances that call transfers and conferencing involve call originating,” then it must be so. *Id.* But the meaning of the term “originate” is not technical and

⁹ Order on Threshold Issue No. 1 And Granting AT&T’s Motion For Summary Decision, *In the Matter of Petition of Intrado, Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, to Establish an Interconnection Agreement with Southwestern Bell Telephone Company, d/b/a/ AT&T Texas*, Pub. Util. Comm’n of Texas, Docket No. 36176, at 13-22 (Nov. 23, 2009) (“*Texas Arbitrators’ Order*”) (Att. 5). That case is now on rehearing to allow submission of more evidence.

does not need to be “quantified.”¹⁰ Originating a call plainly means *initiating or making* a call. And the FCC has emphasized that subscribers must have control over the service by, for example, being able to choose with whom, from a multiplicity of customers, they will connect. *Directory Listing Order*, ¶¶ 17-18, 20, 21; *Advanced Services Order*, ¶¶ 24-25. Intrado’s PSAP customer cannot initiate or make calls using Intrado’s service, much less make any choices about who it will connect with, but rather must agree (as a condition to obtaining service) to place all outgoing calls using service from another carrier. Att. 3, Tariff, § 5.2.I.4. The PSAP customer must wait to *receive* a 911 call before it can do anything, *id.*, Definitions, § 1, Original Pages 1, 6 – and even then the PSAP is limited to transferring that existing 911 call, if necessary, to a predetermined point. *Id.*, § 5.1.2.C, Original Page 4. The transfer of a 911 call that was already originated by the 911 caller is not origination. *Florida Order*, 2008 WL 5381647, *3-*4; *Illinois Order*, 2009 WL 2589163, *6; *Texas Arbitrators’ Order* at 18-19 (Att. 5). Calls cannot be originated twice.

Consistent with its Tariff, Intrado’s witnesses have admitted that the hookflash capability does not give its subscribers the ability to originate or make a call:

Q. Now, when a PSAP conferences someone else in on an existing 911 call that was originated by an end-user, that’s not the same as the PSAP originating a call, is it?

A. It doesn’t sound like it.

* * *

Q. Okay. By the same token, Intrado’s service doesn’t allow a PSAP to originate a brand-new call to another PSAP; is that right?

¹⁰ As the Illinois Commission correctly observed, call origination is not “a *quantitative matter*. The appropriate inquiry is qualitative – *can* the customer originate a call using Intrado’s 911 service?” *Illinois Order* at n.23 (emphasis in original).

- A. As it says in our tariff, they would have to go get local exchange services elsewhere.

Att. 7 at 123-25. Intrado's witness made the same admission in a related arbitration (Att. 6 at Att. PHP-3, pp. 180-81):

- Q. Okay. But it's – but I'm asking you about call origination. Is it your position that the transfer constitutes an origination of the call that the 911 caller has already placed?

- A. No, sir. It's not an origination. It's basically a transfer.

In addition, Intrado's witness stated that an IEN customer cannot use Intrado's service "to independently place a call to anyone" or "*to originate* a call to anyone else." Att. 6 at Att. PHP-3, pp. 179-80) (emphasis added). He likewise testified "no, I'm not going to be providing services to the PSAP for them to generate outgoing calls, that would still be provided by their local service provider." Att. 6 at Att. PHP-6, p. 245.

Based on the substantially identical testimony and arguments, the Illinois and Florida Commissions correctly concluded that Intrado's "hookflash" capability is not call "origination." As the Illinois Commission held, "hookflashing is not call origination. It is a call transfer procedure that reroutes a call originated by the person placing the inbound 911 call to the PSAP." *Illinois Order*, 2009 WL 2589163, *6. Similarly, the Florida Commission held that:

Intrado Comm provides a service that cannot be used to originate a call. Intrado Comm witness Hicks states that Intrado Comm both originates and terminates calls from a 911/E911 caller because Intrado Comm can transfer calls from one PSAP to another PSAP. Intrado Comm witness Hicks, however, also admitted that the PSAP would not be able to call out with its service, which means that an outbound call cannot be placed unless a separate administrative local line is used. . . . Without the ability both to originate and terminate calls, Intrado Comm's proposed services do not meet the definition of "telephone exchange service."

Florida Order, 2008 WL 5381467, *3-*4.¹¹ Given that federal law requires that, in order to qualify as “telephone exchange service,” a service must enable the subscriber to originate a call himself, and that Intrado’s witnesses and Tariff concede that Intrado’s service does *not* provide the ability to originate a call, the PUCO’s finding that Intrado provides telephone exchange service was wrong as a matter of law.¹²

2. Intrado’s Service Does Not Provide Intercommunication

The PUCO’s Order did not mention, much less apply, the FCC’s controlling definition of the “intercommunication” requirement for “telephone exchange service.” Instead, it acted as though the federal definition did not exist and created its own definition – one contrary to the FCC’s *Advanced Services Order* and *Directory Listing Order* (which it never even cited). For example, although the FCC has explained that an “intercommunicating” service is one that allows subscribers to “make calls to one another,” the PUCO found that it was enough that the PSAP customer can *receive* a 911 call and thereafter “*communicate*” with the 911 caller and another PSAP to which the incoming 911 call might be transferred. Order at 15. That is not how

¹¹ Arbitrators in Texas reached the same conclusion: “Intrado’s ‘hookflash’ capability merely extends or completes the original 9-1-1 call. This finding is consistent with the fact that Intrado’s 911/E911 service customers must obtain telephone exchange service from another LEC to make calls to non-9-1-1/emergency services customers of other LECs with which Intrado is interconnected either directly or indirectly.” *Texas Arbitrators’ Order* at 19 (Att. 5).

¹² In the Rehearing Order (at 7-8), the PUCO took administrative notice of the fact that Intrado was directed to amend its Tariff to provide “reverse 911” “upon request,” and concluded that, although not necessary to its decision, it thought reverse 911 would meet the call-origination requirement. The PUCO, however, admitted (at 7) that reverse 911 service “was not discussed in the record of this case.” Reverse 911 service was not the subject of Intrado’s request for negotiation of an interconnection agreement with AT&T or its arbitration petition with the PUCO, and Intrado has never alleged that reverse 911 meets the definition of “telephone exchange service.” Section 252(b) requires the Commission to “limit its consideration” to the “open issues” raised for arbitration by the parties themselves in the Petition and Response, and because reverse 911 service was never raised as an open issue, the PUCO had no authority to rule on it. Moreover, because the record contains no evidence about reverse 911 service (and AT&T had no opportunity to submit evidence or argument regarding the service), any reliance on it by the PUCO is arbitrary and capricious and violates due process. *Chhetry v. U.S. Dept. of Justice*, 490 F.3d 196, 200 (2d Cir. 2007); *Kaczmarczyk v. INS*, 933 F.2d 588, 596 (7th Cir. 1991). Finally, while the PUCO claims (at 7) that a telephone exchange service must allow PSAPs and 911 callers to “transmit and receive messages using the same facilities,” its own description of reverse 911 service shows that it only permits the PSAP to send a single outgoing emergency message to which the receiving parties cannot respond. That does not meet the definition of “telephone exchange service.”

the FCC defines “Intercommunication.” “Intercommunication” requires the capability to “make calls,” and Intrado’s service does not allow the PSAP customer to make calls to anyone.

In addition, the PUCO (at 15) asserted that the “*statute . . .* does not quantify intercommunication,” and concluded that intercommunication can be “minimal,” and therefore the “community of interconnected customers” can be the 911 caller and its designated connection to the Intrado-served PSAP. While the *statute* might not quantify “intercommunication,” the FCC did when it said that an “intercommunicating” service must enable the subscriber to make calls to “all subscribers” (*i.e.*, “any other subscriber”) on the network. *Advanced Services Order*, ¶¶ 20, 23-24, n.61; *Directory Listing Order*, ¶¶ 17, 21.¹³ And the FCC explicitly rejected the notion that intercommunication could be “minimal” when it held that a designated connection between one or more points is not “intercommunication.” *Advanced Services Order*, ¶¶ 20, 23-26, n.61; *Directory Listing Order*, ¶¶ 17, 21-22.

For example, in the *Directory Listing Order* (at ¶¶ 17, 22), the FCC found that directory assistance (“DA”) call completion services (which permit the caller to complete a call to any requested number that is listed) meet the “intercommunicating” requirement, but that DA without call completion (which permits a connection only with the DA operator does not. The distinction drawn between DA with call completion and DA without call completion shows that when the FCC said “that the call completion feature of some DA services allows ‘an interconnected community of customers to make calls to one another,’ it is plainly referring to call recipients other than the DA service itself (the functional equivalent of the PSAP in this analysis).” *Illinois Order*, 2009 WL 2589163, *10. Indeed, “the ‘community of interconnected

¹³ Even if it were proper to consider Intrado’s PSAP customers, 911 callers, and first responders as a “community of interconnected customers” (which it is not, as explained in the text), under the FCC’s definition *all* members of that community must be able to place calls to all other members of that community using Intrado’s service. But here, 911 callers, PSAPs, and first responders cannot place any calls using Intrado’s service, and can only connect if and when the 911 caller places a call to the PSAP using another carrier’s service.

customers' made accessible to the DA caller is dramatically different than the single transferee made accessible through Intrado's 911 service." *Id.* at *9. "The interconnected community, for purposes of defining telephone exchange service, encompasses a more varied inter-customer communication than an inbound-only hub-and-spoke arrangement in which all calls must end with the hub PSAP (or another PSAP via call transfer)." *Id.* at *11.

Similarly, in the *Advanced Services Order* (¶¶ 24-25), the FCC explained that xDSL services meet the definition of "telephone exchange service" because "a customer may rearrange the service to communicate with *any other subscriber* located on that network," but that private line services (*i.e.*, services "whereby facilities for communications between two or more designated points are set aside for the exclusive use or availability of a particular customer and authorized users during stated periods of time") do not meet the definition because "customers subscribing to private line service . . . may communicate only between those specific, predetermined points set aside for that customer's exclusive use." (Emphasis added); *see also id.* ¶ 26 ("xDSL-based advanced service and private line service are distinguishable in that xDSL-based services permit intercommunication and private line services do not."). Intrado's 911 service to PSAPs – like private line service – allows the PSAPs to connect only with "specific, predetermined points" (*i.e.*, 911 callers, PSAPs, and first responders). It therefore does not provide subscribers with "intercommunication" and does not meet the definition of "telephone exchange service."

In the Rehearing Order (at 7), the PUCO paid lip service to the FCC's definition of "intercommunication," recognizing that it "refers to a service that permits a community of interconnected customers *to make calls* to one another." But in the very next paragraph the PUCO ignored the "make calls" requirement, stating: "We do not agree that intercommunication

necessarily means that PSAPs must have *the capacity to call*” and that “even though a PSAP may not be positioned to initiate a call to an end user, a PSAP can intercommunicate.”

(Emphasis added). But the ability to “make calls” is precisely what the FCC stated – and the PUCO acknowledged – an “intercommunicating” service must provide. *Advanced Services Order*, ¶¶ 20, 23, 24, n.61; *Directory Listing Order*, ¶¶ 17, 21

3. Intrado’s Service Fails to Meet the Exchange-Area Requirements¹⁴

The PUCO stated that to meet these requirements Intrado’s service does not have to coincide with the ILEC’s local exchange area boundary, but can be some other geographical area. Order at 15; Rhg. Order at 9. It may be true that the exchange area does not have to match the ILEC’s, but that does not mean that any so-called “geographical area” consisting of three designated points (the 911 caller, the PSAP, and first responder) is sufficient to meet the requirements. The FCC made clear that a telephone exchange service must operate within, and must permit intercommunication among all subscribers within, a local exchange area *or the equivalent of a local exchange area*, and a connection between designated points (a PSAP, 911 caller, and first responder) is not equivalent to a local exchange area. *Advanced Services Order*, ¶¶ 15, 25, 27, 29; *Directory Listing Order*, ¶¶ 17, 19, 22. Moreover, because Intrado’s PSAP customer does not “communicate within the equivalent of an exchange area,” any charge it pays for the service it receives is not an “exchange service charge.” *Advanced Services Order*, ¶ 27.

The PUCO speculated that the “PSAPs must have a service that takes into account the location of fire, police, and other emergency service providers within the county that it serves,” and therefore Intrado’s “service area is akin to a single exchange.” Order at 15-16; Rhg. Order at

¹⁴ Specifically, the requirements that the service be “within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area” and be “of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge.” 47 U.S.C. § 153(47). These requirements apply under both parts of the definition of “telephone exchange service.” *Advanced Services Order*, ¶ 30.

9. There is no evidence in the record to support that assumption. More importantly, even if those three points could be viewed as “akin” to a local exchange area, Intrado’s service does not permit everyone within that “exchange” to call everyone else in that “exchange” (as required under the FCC’s definition of “telephone exchange service,” *Advanced Services Order*, ¶¶ 20, 23-26; *Directory Listing Order*, ¶¶ 17, 21-22.) – e.g., fire emergency services cannot call police emergency services, 911 callers cannot call other 911 callers, PSAPs cannot call 911 callers, etc. Intrado’s service only permits a *connection* between the 911 caller, the PSAP, and the first responder *when the 911 caller initiates a call* to the PSAP using another carrier’s service.¹⁵

4. Intrado’s Service Is Not Comparable to Any Service the FCC Has Held Meets the Definition of “Telephone Exchange Service”

To meet part B of the FCC’s definition, a service must also be comparable to other telephone exchange services, *i.e.*, they must “retain [] key characteristics and qualities.” *Advanced Services Order*, ¶¶ 29-30; *Directory Listing Order*, ¶¶ 20-21. The PUCO, however, claimed that it did not need to compare Intrado’s service to DA with call completion or xDSL service that the FCC held met the definition of “telephone exchange service,” because the “more precise comparison . . . is to services that fall within the scope of part A” of the definition. *Rhg. Order*, ¶ 22. But the PUCO does not compare Intrado’s service to any services meeting part A of the definition, *e.g.*, traditional circuit switched voice telephony, either. *Advanced Services Order*, ¶¶ 17, 19, 21; *Directory Listing Order*, ¶ 21. And Intrado’s service plainly is not comparable to traditional voice telephony because subscribers to that service can make calls to

¹⁵ The PUCO claims that AT&T is overlooking others in the “community,” such as “mobile service callers” (*i.e.*, persons calling 911 on a mobile phone), “nonsubscribing PSAPs,” and “out-of-territory emergency service providers.” But these are just different names for the same three designated points – 911 callers, PSAPs, and first responders – that do not qualify as a “community of interconnected customers” that can “make calls to one another” within “the equivalent of a local exchange area.”

any other subscriber of their choosing in the exchange, while Intrado's service does not allow subscribers to make any calls.

Moreover, contrary to the PUCO's suggestion, the FCC held that DA with call completion *does* meet part A of the definition (and part B). *Directory Listing Order*, ¶ 16. And a comparison with that service shows that Intrado's service bears no resemblance. As the Illinois Commission pointed out in making such a comparison, while DA with call completion allows the caller to communicate with a large number of people of its choosing, Intrado's service permits only a transfer to a designated point. *Illinois Order*, 2009 WL 2589163, *7-*10. And while DA with call completion allows the origination of a new call to the end-user's selected destination without further involvement by the DA provider, Intrado's service allows only a call transfer to a single destination with continued involvement by the PSAP. *Id.*

Intrado's service also is not comparable to the xDSL service the FCC held met the definition of telephone exchange service. As the Illinois Commission explained, while the xDSL services allowed the subscriber to communicate with any other subscriber of its choosing without an additional line, Intrado's service does not permit the PSAP to make any calls and allows for only a call transfer to a designated point. *Illinois Order*, 2009 WL 2589163, *9-*10.

5. The PUCO's Defenses Are Without Merit

In its Answer, the PUCO asserts that res judicata, estoppel, and waiver bar AT&T from raising the threshold issue regarding whether Intrado's service qualifies as "telephone exchange service" – defenses presumably based on the claim that the issue was already decided in the PUCO's February 5, 2008 *Certification Order* regarding Intrado.¹⁶ That is not true. In that case, the PUCO expressly stated that it was "not deciding in this case any issues pending in

¹⁶ Finding and Order, *Application of Intrado Communications, Inc. to Provide Competitive Local Exchange Services in the State of Ohio*, Case No. 07-1199-TP-ACE, 2008 WL 312963 (PUCO, Feb. 5, 2008).

Intrado's arbitration proceedings," including the threshold issues in the then-pending arbitration with AT&T Ohio, and that decisions on the "appropriateness and scope" of Intrado's requests were "to be addressed in the context of Intrado's ongoing arbitration proceedings, based on the case-specific facts of Intrado's actual proposal."¹⁷ Moreover, the *Certification Order* and rehearing order in that case never once mentioned or cited, much less applied, the federal definition of "telephone exchange service." Thus, nothing barred AT&T from litigating the threshold issue in this arbitration.

II. THE PUCO VIOLATED THE 1996 ACT IN REQUIRING AT&T OHIO TO INTERCONNECT ON INTRADO'S NETWORK

As shown above, Intrado does not provide telephone exchange service and is not entitled to interconnection with AT&T under Section 251(c)(2) of the 1996 Act. If Intrado were so entitled, however, it would have to be subject to the same rules that apply to any other carrier under Section 251(c)(2). Most importantly, when a requesting carrier interconnects with an ILEC under Section 251(c)(2), it must do so at a "point of interconnection" on the *ILEC's* network. 47 C.F.R. § 51.305(a)(2); Ohio Adm. Code § 4901:1-7-06(A)(5).

Unfortunately, the PUCO refused to follow that well-established law. Instead, for 911 traffic from an AT&T customer to a PSAP served by Intrado, it required AT&T Ohio to establish a point of interconnection on *Intrado's* network. Order at 34. This was odd, for Intrado sought interconnection under Section 251(c)(2) alone, and the PUCO expressly held that "there is no requirement under Section 251(c) that AT&T interconnect with Intrado on Intrado's network." *Id.* at 21. The PUCO's alleged rationale for ignoring Section 251(c)(2), however, was that different law applied depending on which direction the 911 call traveled. Overlooking the fact that a point of interconnection on an ILEC's network is by definition used for the "mutual

¹⁷ Entry on Rehearing, *Application of Intrado Communications, Inc. to Provide Competitive Local Exchange Services in the State of Ohio*, Case No. 07-1199-TP-ACE, 2008 WL 1294837, ¶ 18 (PUCO, April 2, 2008).

exchange of traffic” going both directions between the parties, 47 C.F.R. §§ 51.5, 51.305, the PUCO said that Section 251(c)(2) governed interconnection for 911 calls from an Intrado customer to a PSAP served by AT&T, but that Section 251(a) governed interconnection for 911 calls from an AT&T customer to a PSAP served by Intrado, and that under Section 251(a) AT&T could be required to interconnect on Intrado’s network. Order at 34; Rhg. Order at 18-19. This was unprecedented. It also was unlawful, violating the 1996 Act in three ways.

A. State Commissions Can Only Arbitrate Issues Raised By the Parties, and No Party Raised Any Issue for Arbitration Regarding Section 251(a)

When conducting a Section 252(b) arbitration, the 1996 Act expressly requires a state commission to “*limit its consideration . . . to the issues set forth in the petition and in the response.*” 47 U.S.C. § 252(b)(4)(A) (emphasis added). Neither Intrado’s Petition nor AT&T’s Response raised any issue regarding interconnection under Section 251(a).¹⁸ Indeed, the PUCO conceded that “neither party has raised an issue related to interconnection under 251(a).” Order at 16. Because that is so, the PUCO exceeded the scope of its authority when it imposed obligations on AT&T in the name of Section 251(a).

The PUCO’s alleged justification for not limiting its consideration to the issues raised by the parties was based on a fiction. Specifically, even though it was undisputed that AT&T had *not* requested interconnection to Intrado, the PUCO decided that for 911 traffic flowing from AT&T to a PSAP served by Intrado it could pretend that AT&T was the carrier requesting interconnection, that in that situation Section 251(a) would apply, and that it was “not prohibited

¹⁸ See Att. 9 at 17-18 (asserting that “Intrado is entitled to Section 251(c) interconnection” and listing the first issue in the arbitration as “Whether AT&T may deny Intrado its rights under Sections 251(c) and 252 of the Act”) (emphasis added). Likewise, Intrado’s post-hearing briefs on the issue of the location of the point of interconnection repeatedly and exclusively cited Section 251(c)(2) as the basis for its request. Att. 1 at 36-39; Att. 12 at 17-22. Moreover, in other arbitrations with ILECs that addressed the same issue, Intrado adamantly argued that Section 251(a) did not apply to its interconnection request. See Atts. 15 and 16.

from applying Section 251(a)” because affirmatively nothing “bar[red]” it from doing so. Order at 16, 34.

That ignores the plain language of the 1996 Act. A state commission conducting an arbitration under Section 252(b) is not acting as an independent agent. Rather, it acts only as a “‘deputized’ federal regulator[.]” whose authority is “confined to the role that the Act delineates.” *Pacific Bell v. Pac-West Telecomm., Inc.*, 325 F.3d 1114, 1126 (9th Cir. 2003), quoting *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 344 (7th Cir. 2000). In this arbitration, the PUCO’s delineated role was to “limit its consideration of any petition . . . to the issues set forth in the petition and in the response.” 47 U.S.C. § 252(b)(4)(A). Given the PUCO’s admission that “neither party raised an issue related to interconnection under Section 251(a),” Order at 16, it certainly was “prohibited from” applying Section 251(a) here.

The PUCO’s idea that it can do whatever it likes unless the 1996 Act expressly “prohibit[s]” it also turns the law on its head. State public utility commissions only have such authority as is delegated to them by the legislature. *New York Cent. R. Co. v. Public Utils. Comm’n of Ohio*, 154 N.E. 797, 798-99 (Ohio 1926). Accordingly, agencies cannot simply assume they have all powers that are not expressly “prohibit[ed].” To the contrary, “[w]ere courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with Chevron and quite likely with the Constitution as well.” *Railway Labor Executives Ass’n v. National Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994); *Mid-Atlantic Bldg. Sys. Council v. Frankel*, 17 F.3d 50, 52 (2d Cir. 1994) (“[W]e decline to imply a delegation from congressional silence.”). Moreover, Section 252(b)(4)(A) expressly “limit[s]” a state commission’s authority in an arbitration, and “[t]o permit an agency to expand its power in the face of a congressional limitation on its

jurisdiction would be to grant to the agency power to override Congress.” *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374-75 (1986). Indeed, as the Sixth Circuit has stated, “it is precisely because state utility commissions play such a critical role in administering the [1996 Act’s] regulatory framework that they must operate strictly within the confines of the statute.” *GTE North, Inc. v. Strand*, 209 F.3d 909, 923 (6th Cir. 2000). And as the Seventh Circuit has held, where the Act expressly limits a state commission’s authority, the commissions cannot “parlay its limited role” into authority to do other things beyond that role. *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm’n*, 359 F.3d 493, 497 (7th Cir. 2004).

Congress clearly thought it important to make sure state commissions limit their arbitration decisions to the issues set forth in the petition and response. This is because an open-ended approach simply will not work. As the West Virginia Commission explained in rejecting the PUCO’s approach to the identical issue:

[I]f a carrier files a petition for arbitration of its Section 251(c) interconnection request, the state commission is obligated to arbitrate that request as a Section 251(c) interconnection request. *The route taken by the Ohio Commission is fraught with the potential for abuse. It is too easy for state commissions to avoid or modify the requirements established by Congress in [the 1996 Act], and the more specific requirements established by the FCC in its rules and orders, if the state commission can unilaterally pick out different issues which it wishes to arbitrate in a manner different from what would be required under Section 251(c) and simply designate those issues as Section 251(a) issues. Such potential for abuse is untenable. A request for arbitration of a Section 251(c) interconnection request must be arbitrated in toto as a Section 251(c) interconnection request.*¹⁹ [Emphasis added.]

¹⁹ Arbitration Award, *Intrado Comms., Inc. and Verizon West Virginia Inc., Petition for Arbitration*, Case No. 08-0298-T-PC, 2008 W. Va. PUC LEXIS 3080, at *36-*37 (Pub. Serv. Comm’n of W. Va., Nov. 14, 2008) (“*West Virginia Order*”). This decision was adopted and affirmed by the full West Virginia Commission on December 16, 2008, 2008 W. Va. PUC LEXIS 3267.

The same analysis applies here and requires reversal of the PUCO's ruling. The PUCO cannot simply pretend that AT&T Ohio was the party seeking interconnection and use that as an excuse to address an issue neither party raised.²⁰

B. Intrado's Request Is Governed Exclusively By Section 251(c)(2)

The PUCO's decision on the point of interconnection also is contrary to the structure of Section 251, which imposes decidedly different interconnection duties in subsections (a)(1) and (c)(2). The text and structure of Section 251 show that a competing carrier's interconnection with an ILEC for the purpose of providing competing telephone exchange service is governed exclusively by Section 251(c)(2). Section 251(a) does not and cannot apply to that situation, and the PUCO's reliance on that subsection was an error of law.

As the FCC has explained, the subsections of Section 251 establish a "hierarchy of escalating obligations *based on the type of carrier involved.*" *Total Telecomms. Servs.*, 16 FCC Rcd. 5726, ¶ 25 (2001) (emphasis added; internal quotation marks omitted). With regard to interconnection, Section 251(a) imposes a general duty on all "telecommunications carriers," whereas Section 251(c)(2) "imposes a number of additional obligations exclusively on incumbent LECs." *First Report and Order*, ¶ 997. The FCC has therefore stated that "Section 251 is clear in imposing different obligations on carriers *depending upon their classification (i.e., incumbent LEC, LEC, or telecommunications carrier),*" and that, given the structure of Section 251, it "do[es] not agree . . . that the obligations of section 251(a) should apply equally to all telecommunications carriers," such as ILECs. *Id.* (emphasis added).²¹ Each carrier's

²⁰ Moreover, even if AT&T Ohio had requested interconnection to Intrado, the PUCO would have no jurisdiction to arbitrate the issue. The Act's negotiation and arbitration provisions apply only to requests by a non-ILEC to interconnect with ILECs under Section 251(c). See 47 U.S.C. §§ 251(c)(1), 252(a)(1), (b)(1) (all referring only to a request for interconnection with an ILEC).

²¹ Specifically, the FCC rejected one state commission's argument that Section 251(a) should apply to "incumbent LECs and non-incumbent LECs alike." *First Report and Order*, ¶ 987.

obligations are defined by the specific subsection that applies to it, and when a requesting carrier seeks interconnection with an ILEC for the purpose of providing telephone exchange service in the ILEC's territory, the only provision that applies is Section 251(c)(2). Accordingly, if Intrado's 911 service qualifies as "telephone exchange service," the details of its interconnection had to be governed by the well-established law under Section 251(c)(2).

Given the clear law, how did the PUCO justify applying Section 251(a) instead of Section 251(c)(2)? By adopting a double standard, namely, that different subsections of Section 251 apply depending on which direction a 911 call travels. The PUCO's approach is legally baseless and arbitrary and capricious.

First, the PUCO drew distinctions that have no basis in the Act. Intrado sought interconnection to AT&T under Section 251(c)(2) to provide what Intrado claims is telephone exchange service. If Intrado is entitled to interconnect under that Section, as the PUCO held it was, then the details of Intrado's interconnection must also be governed by Section 251(c)(2) – just as with any other provider of telephone exchange service. Section 251(c)(2) draws no distinction based on the type of "telephone exchange service" a requesting carrier provides, so it makes no difference that Intrado's service involves 911 calls rather than normal telephone calls.

Similarly, Section 251(c)(2) draws no distinction based on which way the call flows or which carrier serves the customer that receives the call. Interconnection is, by definition, used for the "mutual exchange of traffic" between the interconnecting carriers. 47 C.F.R. §§ 51.5, 51.305. Thus, when a competing provider of local voice service interconnects with AT&T under Section 251(c)(2), that carrier and AT&T use the point of interconnection on AT&T's network to mutually exchange all traffic between their customers in both directions, whether the call is from the competitor's customer to AT&T's customer or vice-versa. Att. 13 at 40, 44. There is no

legal basis for treating Intrado's interconnection any differently. Indeed, Intrado agreed that a point of interconnection on AT&T's network could be used to mutually exchange all 911 traffic going in either direction between AT&T's and Intrado's customers, including PSAPs. Att. 7 at 47; Att. 13 at 40, 44.

Second, Intrado itself has agreed that its request for interconnection had to be governed exclusively by Section 251(c)(2). In prior arbitrations of the same issue with other ILECs in Ohio, Intrado argued vehemently that it had *not* sought interconnection under Section 251(a) and that its interconnection to any ILEC is governed by Section 251(c)(2) alone, *regardless of which carrier is the 911 service provider to the PSAP*:

- “Section 251(c) Governs Interconnection between an Incumbent and a Competitor in All Circumstances.” Att. 15 at 3;
- “ILEC-to-competitor relationships are governed by Section 251(c).” *Id.* at 5;
- Applying different subsections of Section 251 depending on which carrier served the PSAP “runs afoul of the plain language and purpose of the Act.” *Id.* at 4-5;
- “The Commission Erred in Concluding That Section 251(c) Does Not Apply When Intrado Comm Is The 911/E911 Service provider” (Att. 16 at 1);
- The PUCO's decision to apply Section 251(a) rather than Section 251(c)(2) where Intrado provides 911 service to a PSAP “was an error of law” that used “an inequitable and unreasonable double standard” and “created an unreasonable distinction that has no basis in law [and] . . . runs afoul of the plain meaning of the Act.” *Id.* at 3;
- “Section 251(c) applies *whenever* a competitor like Intrado Comm seeks interconnection from an ILEC . . . , even when Intrado Comm is the designated 911/E911 service provider. The Act and rulings of the [FCC] are clear that all ILEC-competitor interconnection is governed by Section 251(c), not Section 251(a).” *Id.* at 4 (emphasis in original).

Thus, Intrado's request for interconnection had to be governed exclusively by Section 251(c)(2). Under Section 251(c)(2), a requesting carrier must establish its point of interconnection on the *ILEC's* network. 47 U.S.C. § 51.305(a)(2); *First Report and Order*, ¶ 192; Ohio Admin. Code § 4901:1-7-06(A)(5). The PUCO itself recognized this. Order at 21.

Likewise, other state commissions have recognized that if Intrado is entitled to interconnect to an ILEC to provide telephone exchange service, that interconnection is governed by Section 251(c)(2) alone, and under Section 251(c)(2) Intrado's point of interconnection must be on the ILEC's network – *regardless of which carrier is serving the PSAP*. The West Virginia Commission, for example, stated that “this issue is quite simple to decide” because the law requiring that the point of interconnection be on the ILEC's network “is clear and unequivocal” and it was “ludicrous” to argue that the ILEC must interconnect on Intrado's network just because Intrado serves a PSAP:

Section 251 makes no distinction between interconnection for POTS [plain old telephone service] and interconnection for more specialized services. . . . If the provision of 911/E911 service on a competitive basis is a local exchange service, the same statutory language applies to interconnection to provide that service as for any other telecommunications exchange service.

West Virginia Order, 2008 W. Va. PUC LEXIS 3080, *32. Similarly, the Massachusetts Commission, in another arbitration between an ILEC and Intrado, held that “there is no ambiguity within this statutory provision [Section 251(c)] and implementing rules, which require that the POI [point of interconnection] must be within the incumbent's network,” and that it was “bound by the express provisions concerning interconnection set forth elsewhere in the Act (*i.e.*, § 251(c)(2)(B)).”²² The Staff of the Illinois Commerce Commission was equally emphatic in an arbitration between AT&T Illinois and Intrado, stating that “Intrado's proposal is completely unlawful” and “a fairly blatant attempt to shift costs.”²³ As the Illinois Staff explained, “[t]he

²² Arbitration Order, *Petition for Arbitration of an Interconnection Agreement between Intrado Communications Inc. and Verizon New England Inc. d/b/a Verizon Massachusetts*, D.T.C. 08-9, at 33-35 (Mass. Dept. of Telecomms. and Cable, May 8, 2009) (Att. 4).

²³ Initial Brief of the Staff of the Illinois Commerce Commission, at 25, filed in *Intrado Inc.: Petition for Arbitration*, Docket No. 08-0545 (Ill. Comm. Comm'n, Jan. 5, 2009) (Att. 14), publicly available at www.icc.illinois.gov (on e-docket). The Illinois Commerce Commission never had to decide this issue because, as noted above, it held that Intrado did not provide telephone exchange service.

problem with Intrado's position in this proceeding is that it is absolutely contrary to existing law. Section 251(c)(2)(B) of the federal Act, and FCC Regulation 51.305(a)(2) clearly, explicitly and unquestionably require that, for purposes of the Section 251(c) interconnection that Intrado seeks here, the POI [point of interconnection] must be located on the ILEC network."²⁴

Third, the PUCO's ruling turns Section 251 upside down by shifting virtually all the costs of interconnection onto AT&T. As noted above, the most stringent duties under Section 251 are those imposed on ILECs under Section 251(c). But even with Section 251(c)(2) interconnection to ILECs, there is a balance: the requesting carrier can interconnect to the ILEC at regulated, below-market rates, but bears its own costs of getting traffic to and from the point of interconnection on the ILEC's network. Under the PUCO's ruling, however, AT&T would not only have to allow Intrado to interconnect to it at below-market rates, but also would have to bear the costs of transporting 911 calls from its end-users to Intrado and pay Intrado's market-based, unregulated rates for interconnection on its network. Att. 7 at 57. In other words, the PUCO used Section 251(a) to impose an *additional, more onerous* interconnection duty on the ILEC, one that it could never impose under Section 251(c)(2). That is not what the Act is designed to do or what Congress intended. As the FCC has said, "[t]he express language and structure of section 251 compel rejection of any approach" that would use one subsection of Section 251 to impose duties on a type of carrier that is not subject to that subsection, since that would "contravene the carefully-calibrated regulatory regime crafted by Congress" in Section 251. *Guam Public Utilities Comm'n*, 12 FCC Rcd. 6925, ¶ 19.

²⁴ *Id.* See also *In the Matter of Petition of Intrado Comms. Inc. for Arbitration*, Docket No. P-1187, Sub 2, at 16, 2009 WL 2939811 (N.C. Utils. Comm'n, Sept. 10, 2009) ("explicitly declin[ing] to require AT&T to establish interconnection at Intrado's selective routers when Intrado served as the designated 911/E911 service provider").

C. State Commissions Have No Authority to Apply Section 251(a) in Arbitrations in Any Event

A third reason to reverse the PUCO's decision on the point of interconnection is that state commissions have no authority to apply Section 251(a) in arbitrations in any event. The PUCO's assumption that it had such authority is refuted by the text and structure of the 1996 Act.

The PUCO's Order never points to anything in the 1996 Act that expressly authorizes it to implement Section 251(a). That is because there is nothing. Rather, the PUCO simply claimed that it had inherent authority because nothing in the Act expressly "prohibited [it] from applying Section 251(a)." Order at 16. As shown above in Part II.A, however, state commissions cannot simply assume they have all powers that are not expressly denied them. Rather, they have only such powers as are delegated to them. Thus, the PUCO could only have authority to implement Section 251(a) if Congress gave it that authority. It did not.

Section 252(b) of the Act authorizes state commissions to arbitrate disputes arising from the negotiation of interconnection agreements under Section 252(a). The duty to negotiate such interconnection agreements arises from Section 251(c)(1) alone and applies *only* to requests to interconnect to ILECs under Section 251(c)(2). Specifically, Section 251(c)(1) applies only to ILECs and requires negotiation only of "the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection [c]." 47 U.S.C. § 251(c)(1). No mention of Section 251(a). Consistent with this, Section 252(a) specifically references negotiation of a request to interconnect to an ILEC regarding "the standards set forth in subsections (b) and (c) of Section 251." 47 U.S.C. § 252(a)(1). No mention of Section 251(a). Consistent with this, Section 252(c)(1) requires state commissions conducting arbitrations to resolve disputed issues consistent with Section 251, which necessarily is limited to Sections 251(b) and (c), since arbitration applies *only* to requests to interconnect to

ILECs and an ILEC's duties to carriers requesting interconnection are defined *only* by Sections 251(b) and (c). *Qwest Corp. v. Public Utils. Comm'n of Colorado*, 479 F.3d 1184, 1197 (10th Cir. 2007) (“a CLEC may only compel arbitration of issues that an ILEC is under a duty to negotiate pursuant to § 251(c)(1)”); *MCI Telecomms. Corp. v. BellSouth Telecomms. Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002) (requiring arbitration on all issues “is contrary to the scheme and text of [the] statute, which lists only a limited number of issues on which incumbents are mandated to negotiate” under Sections 251(b) and (c)). The next subsection confirms this, specifying that the rates a state commission can set in an arbitration by referring exclusively to the “rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251.” 47 U.S.C. § 252(d)(1). No mention of Section 251(a).

Simply put, the sole purpose of negotiation and arbitration under Sections 252(a) and (b) is to implement the ILEC-specific duties established in Sections 251(b) and (c), including interconnection under Section 251(c)(2). There is no basis in the text or structure of Sections 251 or 252 to find that the PUCO has authority to implement Section 251(a), which not only is never mentioned in Section 251(c) or Section 252, but also applies to all telecommunications carriers and is not subject to any compulsory negotiation or arbitration requirement.

Other decisionmakers agree. The Western District of Texas rejected an attempt to compel Section 252(b) arbitration of a request to interconnect under Section 251(a), finding that Sections 251 and 252 prohibited it. As that court explained, subsections “251(a) and (b) say nothing at all about ‘agreements,’ ‘negotiations,’ or ‘arbitration’”; thus, “[a]lthough there are duties established by § 251(a) . . . the Court cannot find any language in the Act indicating that these duties independently give rise to a duty to negotiate or to arbitrate,” because “the only duty to negotiate arises under § 251(c).” *Sprint Comms. Co., L.P. v. Public Util. Comm'n of Texas*,

2006 WL 4872346, at *5 and n.4 (W.D. Tex. 2006). Therefore, the court held that a state commission “could not compel [a local exchange carrier] to arbitrate an interconnection agreement with [a requesting carrier] with respect to [the local exchange carrier’s] duties under § 251(a).” *Id.* at *5. Similarly, the Colorado Commission interpreted the language and structure of Sections 251 and 252 just as AT&T Ohio does, holding that “§ 252 gives the Commission jurisdiction only over matters arising under §§ 251(b) and (c)” and that “a state commission’s § 252 authority is limited to requests for interconnection agreements implicating §§ 251(b) and (c) obligations. *As such, a state commission has no arbitration authority over § 251(a) matters.*”²⁵

At bottom, the PUCO’s decision is merely an attempt to use the power given to state commissions to arbitrate interconnection agreements under Section 252(b) as an excuse to impose duties under other parts of the 1996 Act that Congress did not give it authority to implement. The federal courts have consistently held that such state commission attempts to assert powers not expressly delegated by the 1996 Act are unlawful – even if the state commission thinks it is following the general objectives of the Act. *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 445 (7th Cir. 2003). For example, numerous state commissions have tried to use Section 271 of the 1996 Act (which establishes prerequisites for ILECs to provide long distance service) as a tool to impose extra non-Section 251(b) or (c) obligations on ILECs in Section 252 arbitrations. The federal courts have consistently reversed those decisions, finding that they exceed state commissions’ authority. *E.g., Qwest Corp. v. Arizona Corp. Comm’n*, 567 F.3d 1109, 1116-18 (9th Cir. 2009); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm’n*, 530

²⁵ *Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996*, 2003 Colo. PUC LEXIS 109, *22-*23 (¶¶ 33-34) (Colo. Pub. Utils. Comm’n, Jan. 17, 2003) (emphasis added).

F.3d 676, 682 (8th Cir. 2008); *Verizon New England, Inc. v. Maine Pub. Utils. Comm'n*, 2007 WL 2509863 (1st Cir. 2007). The same principle applies here.²⁶

III. THE PUCO'S RULING ON PSAP-TO-PSAP TRANSFERS VIOLATES THE ACT

Arbitration Issues 5(a) and (b) dealt with establishing a specialized transfer capability for 911 calls between PSAPs served by AT&T Ohio and by Intrado when the PSAPs – which are not a party to the interconnection agreement – request it. AT&T Ohio did not object to establishing such transfer capability when appropriate terms can be worked out with the PSAPs, but did not believe the topic should be addressed in a two-party interconnection agreement, because it does not involve interconnection between AT&T Ohio and Intrado. The PUCO, however, concluded that “Section 251(a) of the Act is the applicable statute relative to this scenario” and that “it is appropriate to include terms and conditions for Section 251(a) arrangements in the parties’ arbitrated interconnection agreement.” Order at 38.

This conclusion is unlawful in three ways. *First*, Intrado never asked the PUCO to impose this duty on AT&T Ohio under Section 251(a), so this was not an open issue that the PUCO had authority to resolve. *Second*, as shown above, interconnection to ILECs is governed exclusively by Section 251(c)(2), and Section 251(a) issues are not arbitrable under Section 252(b) in any event. *Third*, as the PUCO itself found, a PSAP-to-PSAP transfer “do[es] *not involve interconnection* of a competing carrier’s network with an ILEC’s network.” Arbitration Award, Case No. 07-1216-TP-ARB, 2008 WL 4426582, *7 (PUCO, Sept. 24, 2008) (emphasis added). If something is not interconnection, it cannot be governed by Section 251(a).

²⁶ In addition, the PUCO admitted that two other rulings, which address the ordering process and the prices if AT&T Ohio had to interconnect on Intrado’s network, must also be reversed if it is reversed on this point of interconnection issue. Rhg. Order, ¶ 23; *see* Am. Cmplt., Count Four.

IV. ALLOWING INTRADO TO AUTOMATICALLY HAVE THE LOWEST RATE NEGOTIATED WITH ANY OTHER CARRIER VIOLATES THE FCC'S RULES

It is possible that Intrado may order, and AT&T Ohio may inadvertently provide, a product or service that is not contained in the ICA or covered by an AT&T tariff. In such cases, AT&T Ohio proposed to charge Intrado its standard generic rate for the product or service. The PUCO, however, required AT&T Ohio to charge only “the lowest price in effect at that time” for any other carrier. Order at 58. That requirement is contrary to federal law and the FCC’s “All-or-Nothing” Rule, 47 C.F.R. § 51.809(a), which requires a carrier that wants the benefits of a rate from another interconnection agreement to adopt that *entire* agreement, including *all* its rates, terms, and conditions.²⁷ The Order violates the All-or-Nothing Rule and the logic and policy behind it by allowing Intrado to automatically obtain the benefits of an isolated rate from another interconnection agreement without taking that entire agreement. In fact, the Order not only permits Intrado to use an isolated rate from another agreement, but guarantees Intrado the absolute lowest rate that any other carrier was able to negotiate, without Intrado having to make any of the concessions or compromises that went along with that rate. That gives Intrado something no other carrier would ever be entitled to. If Intrado orders a product not covered by its agreement (and not covered by any tariff), then it should be treated like any other carrier in that situation.

²⁷ See Second Report and Order, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd. 13494, ¶ 1 (2004) (“*FCC All-or-Nothing Order*”).

CONCLUSION

For the reasons stated herein, the Court should grant judgment in favor of AT&T Ohio. If AT&T Ohio prevails on Count I, the entire PUCO decision must be vacated. If AT&T Ohio prevails on other Counts, the PUCO determinations on those Counts must be reversed.

Respectfully submitted,

/s/ J. Tyson Covey

Mary Ryan Fenlon
AT&T Ohio
150 E. Gay Street, Room 4-A
Columbus, OH 43215
(614) 223-7928
Fax: (614) 223-5955
jk2961@att.com
mf1842@att.com

J. Tyson Covey
Kara K. Gibney
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600
Fax: (312) 706-8630
jcovey@mayerbrown.com

Attorneys for AT&T Ohio

LIST OF ATTACHMENTS

1. PUCO Arbitration Award (Ex. A to Complaint) (Record Index. No. 36)
2. PUCO Entry on Rehearing (Ex. B to Complaint) (Record Index. No. 46)
3. Intrado Ohio Tariff
4. Arbitration Order, D.T.C. 08-9, Mass. Dept. of Telecomms. and Cable (May 8, 2009)
5. Order on Threshold Issue No. 1 And Granting AT&T's Motion For Summary Decision, Pub. Util. Comm'n of Texas, Docket No. 36176 (Nov. 23, 2009)
6. Excerpts of Direct Testimony and Exhibits of Patricia Pellerin (Record Index. No. 18)
7. Excerpts of October 14, 2008 Transcript before the Public Utilities Commission of Ohio (Record Index. No. 21)
8. Excerpts of October 15, 2008 Transcript before the Public Utilities Commission of Ohio (Record Index. No. 23)
9. Intrado's Petition for Arbitration (Record Index. No. 1)
10. AT&T Ohio's Response to Petition for Arbitration (Record Index. No. 6)
11. Excerpts of Initial Brief of Intrado Communications Inc. (Record Index. No. 24)
12. Excerpts of Reply Brief of Intrado Communications Inc. (Record Index. No. 26)
13. Excerpts of Direct Testimony and Exhibits of Mark Neinast (Record Index. No. 18)
14. Excerpts of Initial Brief of the Staff of the Illinois Commerce Commission, ICC Docket No. 08-0545
15. Excerpts of Application for Rehearing of Intrado Communications Inc., PUCO Case No. 07-1216-TP-ARB
16. Excerpts of Application for Rehearing of Intrado Communications Inc., PUCO Case No. 08-537-TP-ARB

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Initial Brief on the Merits of AT&T Ohio was served, via the Court's electronic delivery system, on this 19th day of February, 2010 to the following:

Chérie R. Kiser
Angela F. Collins
Cahill Gordon & Reindel LLP
1990 K Street, N.W., Suite 950
Washington, DC 20006
202-862-8900 (telephone)
202-862-8958 (facsimile)
ckiser@cgrdc.com
acollins@cgrdc.com

Samuel N. Lillard
[McNees Wallace & Nurick LLC](http://McNeesWallace&NurickLLC.com)
Fifth Third Center
21 East State Street, Suite 1700
Columbus, OH 43215
614-469-8000 (telephone)
614-469-4653 (facsimile)
slillard@mwn.com

Attorneys for Intrado Communications Inc.

William Wright
Thomas Lindgren
Ohio Attorney General's Office
Public Utilities Section
180 E. Broad Street, 6th Floor
Columbus, Ohio 43215-3793

Attorneys for the PUCO Commissioners

/s/ J. Tyson Covey