

ATTACHMENT A

**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,)

Plaintiff,)

v.)

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,)

and)

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

Defendants.)

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

Judge Marbley

AT&T OHIO'S REPLY BRIEF ON THE MERITS

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The Ohio Bell Telephone Company (“AT&T”) submits its reply brief on the merits in its challenge to the decision of the Public Utilities Commission of Ohio (the “PUCO”) in the arbitration of an “interconnection agreement” between Intrado Communications Inc. (“Intrado”) and AT&T under the federal Telecommunications Act of 1996 (“1996 Act” or “Act”).

INTRODUCTION

The issues here concern whether, and if so how, Intrado can compel interconnection to AT&T’s network under Section 251(c) of the 1996 Act, 47 U.S.C. § 251(c), for Intrado’s provision of 911 service to Public Safety Answering Points. As AT&T showed in its opening brief, the PUCO’s rulings on those issues are contrary to established federal law. In response, the PUCO offers little legal defense of its legal errors and largely tries to paint AT&T as impeding competition in 911 service. The record soundly refutes that. AT&T has always been willing to allow Intrado to interconnect with it on lawful terms. Thus, the main questions here have nothing to do with whether Intrado can enter the market, but rather deal with the purely legal matters of (i) whether Intrado can compel interconnection to AT&T at artificially low, regulated rates under Section 251(c) of the 1996 Act, which Intrado can do only if it provides “telephone exchange service” (AT&T’s brief showed Intrado does not), and (ii) whether, if Intrado is eligible for interconnection under Section 251(c)(2), it must also abide by the established law governing the location of the point of interconnection under Section 251(c)(2) (AT&T’s brief showed that Intrado must). As demonstrated below, the PUCO’s and Intrado’s arguments on those and the other issues here are long on rhetoric but short on law, and often inconsistent with the record. In such cases, it is the task of the federal courts to enforce the 1996 Act and require state commissions to be consistent with it. Accordingly, the Court should reverse and vacate the PUCO’s decision.

ARGUMENT

I. INTRADO'S SERVICE IS NOT "TELEPHONE EXCHANGE SERVICE"

As AT&T showed in its opening brief (at 10-20), Intrado's IEN service does not qualify as "telephone exchange service" under federal law because, among other things, it does not allow Intrado's only customers (Public Safety Answering Points ("PSAPs")) to originate calls or intercommunicate. The PUCO and Intrado respond by (i) seeking to evade the merits through a res judicata argument, and (ii) misconstruing the controlling law. Both approaches fail.

A. Nothing Precludes AT&T From Raising This Issue

The PUCO (at 20-23) and Intrado (at 8-11) argue that res judicata bars AT&T from arguing that Intrado does not provide "telephone exchange service" because that issue was already decided in the PUCO's *Certification Order* ("*Cert. Order*") and *Certification Rehearing Order* ("*Cert. Rhg. Order*") involving Intrado. (These orders are Attachments 3 and 4 to Intrado's Brief). That claim has no legal or factual basis. As a threshold matter, res judicata applies only to alleged relitigation of the same "cause of action," not the same "issue"; issue preclusion is collateral estoppel, a different doctrine. *Bennett v. Lopeman*, 598 F. Supp. 774, 780 n.7 (N.D. Ohio 1984). The certification proceeding did not involve any AT&T "cause of action," so res judicata cannot apply here. Moreover, res judicata (and collateral estoppel) apply only to administrative proceedings that are adjudicatory (or "quasi-judicial"). *Cincinnati Bell Tel. Co. v. PUCO*, 466 N.E.2d 848, 852 (Ohio 1984). The certification proceeding was not adjudicatory, as no expert testimony was filed, no evidence presented, and no hearing or cross-examination was held. *See id.*; *In re Lima Mem. Hosp.*, 675 N.E.2d 1320, 1323 (Ohio App. 1996). Under these circumstances, res judicata and collateral estoppel cannot apply. *Cincinnati Bell*, 466 N.E.2d at 852; *Lima Mem. Hosp.*, 675 N.E.2d at 1323.

Even if the certification proceeding had been of the type subject to collateral estoppel,

that doctrine can apply “only when (1) the issue in the subsequent litigation is identical to that resolved in the earlier litigation, (2) the issue was actually litigated and decided in the prior action, (3) the resolution of the issue was necessary and essential to a judgment on the merits in the prior litigation,” and (4) “the party to be estopped had a full and fair opportunity to litigate the issue.” *Hammer v. INS*, 195 F.3d 836, 840 (6th Cir. 1999). These elements are not met.

First, the issues are not “identical.” The issue in the arbitration was whether Intrado’s service meets the federal definition of “telephone exchange service.” Order at 15-16.¹ The issue in the certification proceeding, by contrast, was whether Intrado qualified for state certification as a “CLEC” (competitive “local exchange carrier”), which turns on whether its service qualified as “basic local exchange service” under state law. *Cert. Order*, ¶ 1; Ohio Adm. Code §§ 4901:1-6-01 (definition of CLEC) and 4901:1-6-10 (telephone company certification). The *state law* definition of “basic local exchange service” is entirely different from the *federal definition* of “telephone exchange service.” Compare 47 U.S.C. § 153(47) with Ohio Rev. Code § 4927.01(A) and Ohio Adm. Code 4901:1-6-01(B).

Second, because the issues were different, the issue in the arbitration case was not “actually litigated” in the certification proceeding. Rather, when parties submitted comments in the certification case, they addressed *only* whether Intrado met the definition for (and should be certified as) a CLEC under *state law*.² None of the intervenors’ comments discussed whether Intrado’s service qualifies as “telephone exchange service” under federal law.

Likewise, the question whether Intrado provides “telephone exchange service” under federal law was not “actually decided” in the certification case. Neither the *Certification Order*

¹ The Arbitration Award (“Order”) and the Entry on Rehearing (“Rhg. Order”) on appeal here were Attachments 1 and 2 to AT&T’s opening brief.

² Attachment 1 hereto includes the comments filed by intervenors in the certification proceeding, available at <http://dis.puc.state.oh.us/CaseRecord.aspx?CaseNo=07-1199>.

nor the *Certification Rehearing Order* even mentioned the federal definition of “telephone exchange service,” much less applied the elements of that definition to Intrado’s service or issued any specific findings or rationale, as collateral estoppel requires.³ All the PUCO found in the certification proceeding was that Intrado does not provide “basic local exchange service” as defined by state law. *Cert. Rhg. Order*, ¶¶ 1, 9.⁴ Indeed, it is telling that in the PUCO’s and Intrado’s lengthy arguments here about how Intrado’s service allegedly qualifies as “telephone exchange service,” there is not a single citation back to any purported analysis, finding, or conclusion on that issue in the certification orders.

Third, even if it had been litigated and decided (though it was not), the issue of whether Intrado’s service meets the federal definition of “telephone exchange service” would not have been “necessary and essential to a judgment on the merits” in the certification case. The issue there was whether Intrado was entitled to certification as a CLEC under state law, which turns entirely on whether Intrado’s service qualified as “basic local exchange service” under state law. Any statements regarding a different service definition under federal law would be entirely unnecessary to decide that issue.

Fourth, AT&T did not have a full and fair opportunity in the certification proceeding to litigate the issue of whether Intrado’s service meets the federal definition of “telephone exchange service.” Because Intrado’s application sought only to be certified under state law as a CLEC, none of the intervenors addressed the federal issue in their comments. *See* Att. 1. The intervenors also were not given any notice that the issue would be addressed or any opportunity to submit testimony or evidence, or participate in a hearing, regarding it. Thus, collateral

³ *See Gerstenberger v. Macedonia*, 646 N.E.2d 489, 493 (Ohio App. 1994); *City of Cleveland v. Cleveland Elec. Illum. Co.*, 538 F. Supp. 1227, 1230 (N.D. Ohio, 1980).

⁴ The PUCO then created a new category of state-certified carrier *i.e.*, a competitive emergency services telecommunications carrier, or CESTC, and certified Intrado as one, but that certification did not rest on any finding that Intrado provided “telephone exchange service” under federal law. *See Cert. Rhg. Order*, ¶¶ 1, 9.

estoppel does not apply. *See Robinson v. Springfield Local School Dist. Bd. of Educ.*, 2009 WL 462860, at *7 (Ohio App., Mar. 27, 2002).

In short, none of the elements of collateral estoppel exists here. Nevertheless, Intrado and the PUCO rely on paragraph 7 of the *Certification Order*, which makes passing reference to “telephone exchange service” and states that emergency telecommunications service providers “are entitled to all rights and obligations of a telecommunications carrier pursuant to Sections 251 and 252 of the 1996 Act.” That language, however, is mere dicta, for it has no bearing on the state-law certification issues, and nowhere did the PUCO actually apply or analyze the elements of the federal definition of “telephone exchange service,” much less make any specific findings that Intrado’s service met them. Moreover, AT&T sought clarification of the *Certification Order* for the specific purpose of ensuring that nothing in that decision would affect any issue in its arbitration with Intrado.⁵ The PUCO provided that clarification on rehearing by stating that its “determinations address ONLY the fundamental question as to Intrado’s right, as a *telephone company . . . to request AN interconnection agreement pursuant to Chapter 4901:1-7, O.A.C., and Sections 251 and 252 of the 1996 Act,*” and that its “decision does *not* address the appropriateness and scope of any specific request for interconnection. Such decisions are to be addressed in the context of Intrado’s ongoing arbitration proceedings, based on the case-specific facts of Intrado’s actual proposal.” *Cert. Rhg. Order*, ¶ 18 (use of all capitals in original).⁶

⁵ As AT&T stated in seeking rehearing and clarification in the certification case, “whether Intrado qualifies for Section 251-252 interconnection, and if so to what extent, are issues in Intrado’s ongoing arbitration proceedings with AT&T Ohio and Embarq and would be more properly addressed there, in cases actually filed under Sections 251 and 252 of the 1996 Act and in the specific factual context of Intrado’s actual proposal.” Intrado Att. 11 at 11. The subsequent clarification in the *Certification Rehearing Order* indicates that the PUCO agreed with AT&T.

⁶ Intrado argues (at n.13) that this just means the Certification Order did not address other arbitration issues, such as where the point of interconnection should be located. But that is not what the *Certification Rehearing Order* said. It stated (using all caps) that the “ONLY” question addressed was Intrado’s right to “request AN interconnection agreement” – not whether any such request for an interconnection agreement would be “appropriate[.]” *Cert. Rhg. Order*, ¶ 18. Whether a particular request for an interconnection agreement is appropriate can only be made through an analysis of whether the particular service for which Intrado seeks interconnection meets the federal definition of

Having thus assured AT&T that it was not pre-deciding *any* issues in the arbitration proceeding, but rather was simply finding that Intrado was a telephone company that could “request” interconnection, the PUCO cannot now disavow its own decision and claim to have ruled on an arbitration issue it expressly said it was not addressing.

B. The Order’s Determination That Intrado’s Service Qualifies as “Telephone Exchange Service” Violates Federal Law and Is Arbitrary and Capricious

Intrado claims that AT&T’s argument that Intrado’s service does not meet the definition of “telephone exchange service” “proffers an erroneous interpretation” of Intrado’s service offering and that “the large majority of the ‘evidence’ proffered by AT&T is in the form of citations and quotations from Illinois and Florida decisions.” That is not true. While AT&T cites the Illinois and Florida decisions because they properly apply the federal definition of “telephone exchange service” to the exact same service at issue here, AT&T’s “interpretation” of Intrado’s service offering and the evidence supporting that interpretation comes straight from Intrado’s own tariff (the legally binding document that fully sets forth the terms of Intrado’s IEN service offering at issue here) and Intrado’s own testimony. AT&T Br. 10-20.

Intrado and the PUCO, on the other hand, do not cite Intrado’s tariff or testimony anywhere in their discussions of whether Intrado’s service meets the definition of “telephone exchange service.” They ignore the tariff because its description of Intrado’s service defeats any claim that Intrado provides “telephone exchange service.” The tariff states that Intrado “is not responsible for the provision of local exchange service to its Customers” (AT&T Br., Att. 3, Tariff, § 1, Original Page 5) and that Intrado’s service “is not intended to replace the local telephone service of the various public safety agencies which may participate in the use of this

“telephone exchange service” – something the *Certification Order* and *Certification Rehearing Order* did not need to do and did not do, as they did not even mention, much less apply, the elements of that definition.

service.” *Id.* § 5.2.C, Original Page 8.⁷ In fact, as a condition to obtaining service, the PSAP 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 shows that its PSAP customers cannot originate any calls using Intrado’s service. Rather, the service permits a PSAP only “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). *Id.* § 5.1 (emphasis added).⁸ The tariff also 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.”⁹

Intrado argues (at 15-16) that AT&T has mischaracterized the testimony of its witnesses. That is not true. That testimony clearly admits that hookflash is not the origination of 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?
- A. As it says in our tariff, they would have to go get local exchange services elsewhere. [AT&T Br., Att. 7 at 123-25.] * * *
- 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?

⁷ Intrado’s tariff was Exhibit PHP-5 to Ms. Pellerin’s Testimony, Record Index 18.

⁸ See also *id.* (IEN services “support interconnection to other telecommunications service providers for the purpose of receiving emergency calls originated in *their* [*i.e.*, the other carriers’] networks.”) (emphasis added).

⁹ *Id.*, Definitions, Section 1, Original Page 1 (emphasis added) (911 calls defined as “emergency calls originated by communications devices,” *i.e.*, the telephones used by end-users subscribing to some *other carrier’s* local service.); *id.*, Definitions, Section 1, Original Page 1 (Hookflash or “Call Transfer or Call Bridging” are defined as “[t]he act of adding an additional party to an *existing call*.”) (emphasis added).

A. No, sir. It's not an origination. It's basically a transfer. [AT&T Br., Att. 6 at Att. PHP-3, pp. 180-81].

The vague statements referenced by Intrado do not change these specific admissions, which are consistent with the descriptions of Intrado's service in its tariff.

Contrary to the plain terms of its tariff and its witnesses' testimony, Intrado (at 14-15) now claims that "hookflashing is the means by which [a PSAP] obtains a *dial tone* to place a call" to another PSAP. But Intrado does not cite any provision of the tariff or anything else in the record to support this contention – because there is nothing. Quite the contrary, Intrado admitted that it does not provide dial tone to its PSAP customers (AT&T Br., Att. 7 at 123-124):

Q. Now, Intrado doesn't actually provide dial tone to its PSAP customers; is that right?

A. As part of our 911 tariff we don't[.]

Intrado (at 15) relies on an FCC decision discussing an entirely different service in a completely unrelated case that has nothing to do with Intrado's service, or even with the "origination" component of a "telephone exchange service." The FCC decision addresses a "three-way calling" *feature* that "offers parties to a telephone call a way to *add* a third party to the call,"¹⁰ and the decision in no way suggests that this feature is like Intrado's service or that it satisfies the "origination" component of a "telephone exchange service."¹¹

Because Intrado's tariff and its witnesses' testimony concede that hookflash is not the origination of a call, it was error for the Order to find that it is. But even if the Order were correct, Intrado's service still would not meet the definition of "telephone exchange service," and the Order would have to be reversed. The PUCO recognizes (Br. 24-25; Rhg. Order at 7) that

¹⁰ *Telecommunications Relay Servs. and Speech-to-Speech Servs. for Individuals with Hearing and Speech Disabilities, et al.*, 18 FCC Rcd. 12379, ¶ 72 (2003) ("*TRS Order*") (emphasis added).

¹¹ Intrado also argues (at 16-17) that the PSAP transfers a call by "making a second call." Again, Intrado cites nothing in the tariff or the record to support that contention, but rather cites the *TRS Order* that has nothing to do with Intrado's IEN service or the "origination" component of "telephone exchange service."

“intercommunication” is a requirement under both parts of the definition of telephone exchange service,¹² and that “intercommunication” allows “a community of interconnected customers” to “make calls” to “all subscribers” (*i.e.*, “any other subscriber”) on the network.¹³ But even accepting the PUCO’s claim (at 25) that the “community of interconnected customers” could include just PSAPs, emergency service providers, and the public (which it cannot, AT&T Br. 9, 15-18), the Order did not find that Intrado’s service permits its PSAP customers to “make calls” to *all* members of that community. Rather, Intrado claims (and the orders found) only that Intrado’s PSAP customers can call other PSAPs (via hookflash), not that they can call the other members of the “community of interconnected customers,” *i.e.*, 911 callers and emergency service providers. Intrado concedes that they cannot. AT&T Br., Att. 7 at 124.¹⁴ Therefore, the “intercommunicating” requirement is not met.

Intrado (at 19) tries to sidestep the FCC’s determination that services, like private line service, which permit communication only between “specific, predetermined points” do not meet the definition of telephone exchange service, *Advanced Services Order*, ¶¶ 20, 23-26, n.61; *Directory Listing Order*, ¶¶ 17, 21-22, arguing that there is no pre-designated transmission path or facility set aside for the exclusive use of the 911 customer to reach the PSAP. That is irrelevant. *First*, the FCC’s focus was not on there being a pre-designated path or facility, but on

¹² *Advanced Services Order*, 15 FCC Rcd. 385, ¶ 30 (1999).

¹³ *Advanced Services Order*, ¶¶ 20, 23-24, n.61; *Directory Listing Order*, 16 FCC Rcd. 2736, ¶¶ 17, 21 (2001) (“intercommunicating” service must enable the subscriber to make calls to “all subscribers” (*i.e.*, “any other subscriber”) on the network). Intrado (at 17) and the PUCO (at 24) are wrong when they claim that the Order and Rehearing Order properly apply the FCC’s definition of intercommunication, and they make the same legal error as the orders, because they too confuse two-way “communication” with “intercommunication.” The two are not the same. And while Intrado’s service might permit two-way communication, it does not permit “intercommunication,” *i.e.*, the capability to “make calls” to “all subscribers” (*i.e.*, “any other subscriber”) on the network. Moreover, even if the Court accepted the determination that a PSAP can call another PSAP, that is not enough to meet the intercommunicating requirement. The PSAP must also be able to call the other members of the community, which everyone admits PSAPs cannot do with Intrado’s service. AT&T Br., Att. 7 at 124.

¹⁴ Q. “If a customer called 911 and went to an Intrado PSAP and then the call got disconnected, the PSAP could not use Intrado’s service to originate the call back to the 911 caller; is that right?” A. “Right, unless they subscribe to another dial-tone service provider. We’re pretty clear in our tariff on that.”

there being a connection only to a specific, predetermined point. *Second*, the issue is not what the 911 customer can do; it is what Intrado's PSAP customer can do. Intrado's PSAP customer can connect only to a specific, predetermined point – another PSAP to which it might transfer the 911 call – and the FCC held that was insufficient for “telephone exchange service.”¹⁵

Finally, the PUCO argues that the Order and Rehearing Order are consistent with the FCC's purportedly expansive view of “telephone exchange service,” and its determinations that xDSL services and directory assistance with call completion services meet the definition. The fact that the FCC found that those other services meet the definition of “telephone exchange service” does not mean that the definition should be read expansively – it just means that those services satisfied the elements of the definition. And the FCC made clear – including in the paragraphs cited by the PUCO– that the services in question met the definition of “telephone exchange service” because they allowed subscribers to “originate” or “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. Intrado's service does not. *See* AT&T Br. 10-13.

II. THE PUCO'S RULING ON THE POINT OF INTERCONNECTION EXCEEDED ITS AUTHORITY AND APPLIED THE WRONG LAW

Even if the Court finds that Intrado is entitled to compel interconnection to AT&T under Section 251(c), other aspects of the Order still violate the 1996 Act. The PUCO and Intrado admit that when a requesting carrier seeks to interconnect to an ILEC under Section 251(c)(2), it must place its point of interconnection (or “POI”) on the ILEC's network. Order at 21; Intrado Br. 25; 47 C.F.R. § 51.305; Ohio Adm. Code § 4901:1-7-06(A)(5). And it is undisputed that Intrado requested interconnection to AT&T, an ILEC, only under Section 251(c)(2). AT&T Br.,

¹⁵ Intrado's claim (at 19-22) that its service (which, at most, allows a connection between three points: the PSAP, 911 caller, and perhaps another PSAP) meets the exchange area requirements is directly contrary to the FCC's determination that a communication between two or more designated points does not constitute telephone exchange service. *Advanced Services Order*, ¶ 25; *Directory Listing Order*, ¶ 22. Intrado offers nothing to refute this.

Att. 9 at 17-18. Given this, Intrado's point of interconnection with AT&T must be on AT&T's network. The Order, however, ignored Section 251(c)(2). Instead, it relied on Section 251(a) of the Act and required AT&T to establish a point of interconnection on *Intrado's* network for 911 calls to PSAPs served by Intrado. Order at 34; Rhg. Order at 18-19.

As AT&T showed in its initial brief (at 21-32), this unprecedented requirement – which has been rejected by every other state to consider the issue – violates the 1996 Act because (i) Intrado did not request interconnection under Section 251(a), (ii) a competitive carrier's interconnection to an ILEC for telephone exchange service traffic is governed exclusively by Section 251(c)(2), and (iii) state commissions have no authority to implement Section 251(a) in arbitrations. In response, the PUCO and Intrado ignore the Act and conjure new rationales that the Order never relied on.

A. State Commissions Cannot Arbitrate Issues That Parties Do Not Ask to Have Arbitrated, and Intrado Never Requested Interconnection Under Section 251(a)

A state commission conducting an arbitration under the Act is “confined to the role that the Act delineates” and “must operate strictly within the confines of the statute.” *Pacific Bell v. Pac-West Telecomm., Inc.*, 325 F.3d 1114, 1126 (9th Cir. 2003); *GTE North, Inc. v. Strand*, 209 F.3d 909, 923 (6th Cir. 2000). One of these “confines” is that commissions must “limit [their] consideration . . . to the issues set forth in the petition and in the response.” 47 U.S.C. § 252(b)(4)(A). Neither Intrado's Petition nor AT&T's Response raised any issue regarding interconnection under Section 251(a). To the contrary, Intrado's Petition requested interconnection exclusively under Section 251(c). AT&T Br., Att. 9 at 17-18. Accordingly, when the PUCO imposed interconnection duties under Section 251(a), it unlawfully failed to “limit its consideration” to the issues raised in the petition and response.

The PUCO responds by asserting that “[t]he parties brought to the Ohio Commission a Section 251(a) issue” and that Intrado “argued at length” about Section 251(a) in briefs. PUCO Br. 17-18; *see* Intrado Br. 28. Those claims are demonstrably, patently false. *Nowhere* in the petition or response is there *any* mention of Section 251(a). Rather, Intrado sought arbitration and interconnection based on Section 251(c) alone.¹⁶ AT&T Br. Att. 9 at 17-18, Att. 11 at 36-39, Att. 12 at 17-22. Moreover, the Order found that “neither party has raised an issue related to interconnection under 251(a).” Order at 16. In that situation the PUCO’s task was to limit its consideration to the issues actually raised in the petition and response. It had no authority to “parlay its limited role” as arbitrator into authority to decide hypothetical issues under other statutory provisions. *See Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm’n*, 359 F.3d 493, 497 (7th Cir. 2004).

B. Competitive Carrier Interconnection to an ILEC for the Purpose of Providing Telephone Exchange Service Is Governed by Section 251(c)(2)

In the alternative, the PUCO and Intrado claim that it was permissible to impose duties based on Section 251(a) because state agencies can apply any “applicable law” in an arbitration. PUCO Br. 12-14; Intrado Br. 26, 28. That misses the mark for several reasons. Most importantly, Section 251(a) is not “applicable” here. When a requesting carrier seeks interconnection to an ILEC under Section 251(c)(2) for the purpose of providing “telephone exchange service” – which is what Intrado said it was doing and the PUCO held it was doing – the “applicable law” is Section 251(c)(2). 47 U.S.C. § 251(c)(2)(A). Indeed, the threshold issue in this case is a debate over whether Intrado is even eligible to seek interconnection under

¹⁶ Intrado (at 28) and the PUCO (at 18) note that AT&T mentioned Section 251(a) in its briefs below. That is true but irrelevant. Under Section 252(b)(4)(A) it is the petition and response that define the issues, not later briefs. Moreover, it is undisputed that AT&T never sought interconnection to Intrado, including under Section 251(a), and it mentioned Section 251(a) only because the PUCO had mentioned it in prior arbitration decisions and AT&T wanted to explain why those were wrong.

Section 251(c)(2) – *i.e.*, whether Section 251(c)(2) is the “applicable law” for Intrado’s interconnection request. If Intrado wins on that issue, then it must be treated exactly like any other carrier entitled to interconnecting under Section 251(c)(2), which means the point of interconnection must be on AT&T’s network. It makes no sense for the PUCO to hold that Intrado is entitled to interconnection under Section 251(c), but then turn around and say that Section 251(c)(2) is *not* the applicable law and that the details of Intrado’s interconnection are governed by Section 251(a). Moreover, in prior arbitrations with ILECs, Intrado argued not only that it was *not* seeking interconnection under Section 251(a), but also that, as a matter of law, Section 251(a) *could not even apply* to its interconnection with AT&T. AT&T Br. 27 & Atts. 15-16. Thus, in bypassing Section 251(c)(2) in favor of Section 251(a) the PUCO did not enforce the “applicable law” – it ignored it.¹⁷

The PUCO also contends that it was permissible to apply Section 251(a) because this case presented a “special situation” where, for technical reasons, it had to jettison the controlling federal law regarding interconnection to ILECs. PUCO Br. 13-17. Specifically, the PUCO contends that AT&T would need to get its customers’ 911 calls to Intrado for delivery to Intrado’s PSAP customers, and therefore must have a point of interconnection on Intrado’s network. *Id.* That theory has no legal or factual support.

First, nowhere in the Order or Rehearing Order does it say that the PUCO was imposing this requirement for technological reasons. The PUCO cannot rely on counsel’s *post hoc* rationalization to save a decision that did not actually rest on (or even mention) this ground. *Motor Vehicle Mfrs. Ass’n. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁷ The “applicable law” argument also fails because, as shown above, whatever law a state commission can apply, it cannot use it to address issues not raised by the petition or response. Also, as shown in AT&T’s brief (at 30-32), Congress did not give state commissions authority to implement Section 251(a) in any event.

Second, as a legal matter it makes no difference that 911 calls are involved here. Intrado argued that its 911 service is “telephone exchange service” and therefore entitled to interconnection under Section 251(c). If that is so, then the interconnection is subject to the same rules that apply to every other carrier that provides telephone exchange service, each of which interconnects on AT&T’s network. Indeed, every other state commission to have ruled on this issue (plus the Staff of the Illinois Commission) has held that if Intrado does qualify for interconnection under Section 251(c), it must interconnect at a point on the ILEC’s network, including for call to Intrado’s PSAP customers. *West Virginia Order*, 2008 W. Va. PUC LEXIS 3080, *32¹⁸; *Massachusetts Order* (AT&T Br., Att. 4 at 33-35); *North Carolina Order*, 2009 WL 2939811, at 16¹⁹; ICC Staff Br. (AT&T Br, Att. 14).²⁰ Likewise, Intrado itself has insisted that “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 [to a PSAP].” AT&T Br., Att. 16 at 4 (Intrado’s emphasis).

Third, as a factual matter it makes no difference that 911 calls are involved. Intrado’s own technical witness admitted that there is no need for a point of interconnection on Intrado’s network, since all 911 traffic to Intrado’s PSAP customers could be exchanged at the point of interconnection on AT&T’s network. AT&T Br., Att. 7 at 46-47, Att. 13 at 40, 44. Moreover,

¹⁸ Arbitration Award, *Intrado Comms., Inc. and Verizon West Virginia Inc. Petition for Arbitration*, 2008 W. Va. PUC LEXIS 3080 (Pub. Serv. Comm’n of W. Va., Nov. 14, 2008).

¹⁹ *Petition of Intrado Comms. for Arbitration*, 2009 WL 2939811 (N.C. Utils. Comm’n, Sept. 10, 2009).

²⁰ The PUCO and Intrado also rely on the FCC’s *King County* decision to argue that all carriers must interconnect on the network of the carrier providing 911 service to a PSAP. PUCO Br. 15; Intrado Br. 24. This is another instance of ignoring the applicable law – Section 251(c)(2) – to rely on something else. The *King County* case does not apply to interconnection to an ILEC under Section 251(c) of the 1996 Act. Rather, it addressed allocation of costs when wireless carriers send 911 calls to a PSAP, and the FCC acted under its authority pursuant to 47 C.F.R. § 20.18(d), not Section 251(c). *Revision of the Commission’s Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems*, 17 FCC Rcd. 14789, ¶¶ 1, 4 (2002) (“*King County*”). AT&T Ohio is not a wireless carrier. It is an ILEC governed by Section 251(c) of the 1996 Act and the well-established law under that provision. Intrado filed a petition for arbitration under Sections 251(c) and 252 to take advantage of that framework, which gives a requesting carrier many benefits. Having done so, Intrado (and thus the PUCO) had to abide by the law that governs interconnection under Section 251(c), and that law does not include the *King County* case.

there is nothing special about AT&T needing to get its customers' traffic to an interconnected carrier, because that is necessary *whenever* AT&T interconnects with a competitive carrier. "Interconnection" is defined as the linking of two carriers' networks for the "mutual exchange" of traffic between them. 47 C.F.R. § 51.5. And under Section 251(c)(2), every other competitive carrier exchanges traffic with AT&T at a point on AT&T's network. If it qualifies for Section 251(c) interconnection, Intrado should be no different.

C. State Commissions Have No Authority to Apply Section 251(a) in Arbitrations Under Sections 251(c) and 252

As noted above, state commissions conducting arbitrations under Section 252(b) of the Act are acting only on delegated authority. That authority does not include application of Section 251(a) to ILECs. Under the 1996 Act, an ILEC has the duty to negotiate an interconnection agreement regarding terms and conditions to implement duties set out in Sections 251(b) and (c) – but not 251(a). 47 U.S.C. § 251(c)(1); *CoServ. Ltd. Liability Corp. v. Southwestern Bell Tel.*, 350 F.3d 482, 485 (5th Cir. 2003) ("An ILEC's § 251(c)(1) duty to negotiate is limited in scope to 'the particular terms and conditions of agreements to fulfill the duties described in [§§ 251(b) and (c)].'"). If negotiation fails, either party can request arbitration of disputed terms in such an agreement. 47 U.S.C. § 252(b). However, because the ILEC only has to negotiate with respect to matters set out in Sections 251(b) and (c), a dispute by definition could arise only with respect to those matters, not with respect to the duties set out in Section 251(a) (which are not limited to ILECs). *Sprint Comms. Co., L.P. v. Public Util. Comm'n of Texas*, 2006 WL 4872346, at *5 & n.4 ("[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)"); *Petition of Level 3 Comms., LLC for Arbitration*, 2003 Colo. PUC

LEXIS 109, *22-23 (¶¶ 33-34) (Colo. Pub. Utils. Comm'n, Jan. 17, 2003) (“[A] state commission has no arbitration authority over § 251(a) matters”).²¹ Therefore, again by definition, an arbitration could only address disputes with respect to terms and conditions to implement the ILEC-specific duties set out in Sections 251(b) and (c). *Qwest Corp. v. Public Utils. Comm'n of Colo.*, 479 F.3d 1184, 1197 (10th Cir. 2007); *Southwestern Bell Tel. Co. v. Waller Creek Comm., Inc.*, 221 F.3d 812, 814 (5th Cir. 2000).

The PUCO and Intrado fail to respond to AT&T’s statutory analysis, because nothing in the 1996 Act explicitly or implicitly gives state commissions power to implement Section 251(a). Instead, they simply make blanket claims about state commissions’ authority to approve interconnection agreements *after* they are finalized or enforce them *after* they are approved. PUCO Br. 9, 11, 16; Intrado Br. 26-27. Those claims, however, have nothing to do with the scope of a state commission’s authority in an *arbitration*. The purpose of the negotiation and arbitration requirements of Section 251(c) and 252(a) and (b) of the Act is to create an agreement that implements an ILEC’s specific duties under Section 251(b) and (c) – not Section 251(a).²²

²¹ Intrado claims (at 26 n.40) that AT&T did not reflect the “context” of the Texas case. The context was that a carrier requested interconnection to a rural ILEC under Section 251(a) and demanded to arbitrate the issue, and the Texas Commission and federal district court held that the 1996 Act does not authorize state commissions to arbitrate issues under Section 251(a). Intrado (at nn.42-43) also cites decisions that allegedly support its idea that a state commission can arbitrate issues under Section 251(a). None of those decisions, of course, holds that a state commission can (i) apply Section 251(a) when no party raises an issue for arbitration under Section 251(a), (ii) apply Section 251(a) to determine the POI when a carrier seeks interconnection to an ILEC under Section 251(c)(2), or (iii) use Section 251(a) to require an ILEC to establish a POI on another carrier’s network. Yet the Order here did all of those things. Moreover, none of the cited decisions points to any text in the 1996 Act that delegates to state commissions the authority to arbitrate issues under Section 251(a), for there is none.

²² The Order’s ruling on the POI also dictated its decision on other arbitration issues, which concern the establishment of a POI on Intrado’s network. AT&T Br. 33 n.26; Am. Cmplt., Count Four. As the Rehearing Order acknowledged (at ¶ 23), if AT&T prevails on that issue, the rulings on those issues must likewise be reversed, since AT&T would no longer have to establish a POI on Intrado’s network. Intrado tries to argue around this (Br. at 33), but the PUCO does not dispute it, and it is the only logical result.

III. NEITHER THE PUCO NOR INTRADO OFFERS ANY LEGITIMATE DEFENSE OF THE RULING ON PSAP-TO-PSAP TRANSFERS

Relying on Section 251(a) of the Act, the Order required AT&T to establish special PSAP-to-PSAP call-transfer capability when a PSAP requests it and agrees to pay for it. As AT&T's brief explained (at 33), it has no problem in the abstract with establishing such a capability upon PSAP request, but opposes addressing it in an interconnection agreement because (i) PSAPs are not parties to the interconnection agreement, and (ii) the PUCO cannot rely on Section 251(a) to impose this duty, for Section 251(a) applies solely to interconnection, and the PUCO had previously found that PSAP-to-PSAP call-transfer capability "do[es] not involve interconnection of [Intrado's] network with an ILEC's network." Arbitration Award, No. 07-1216-TP-ARB, 2008 WL 4426582, *7 (PUCO, Sept. 24, 2008).²³

The PUCO's response is telling. Although it claims (at 31) to have determined that PSAP-to-PSAP transfers do "involve interconnection under Section 251(a)," it does not even acknowledge, much less distinguish, its prior holding to the contrary. An unexplained 180-degree departure from a prior decision is arbitrary and capricious.²⁴ Intrado claims (at 30) that when the PUCO previously said such transfers "do not involve interconnection" it merely meant interconnection under Section 251(c), so Section 251(a) still could apply. That is not true. The physical act of "interconnection" is defined the same under Sections 251(c) and 251(a), so if something is not interconnection under Section 251(c), it is also not interconnection under Section 251(a). *Total Telecomms. Servs. v. AT&T Corp.*, 16 FCC Rcd. 5726, ¶¶ 24-25 (2001).

²³ Intrado also did not request that the PUCO impose this duty under Section 251(a), and Section 251(a) does not apply to interconnection with an ILEC in any event. *See supra* part II.

²⁴ *See Spitzer Great Lakes Ltd., Co. v. EPA*, 173 F.3d 412, 416 (6th Cir. 1999).

IV. REQUIRING AT&T TO CHARGE INTRADO THE LOWEST PRICE IT CHARGES ANY CARRIER IS CONTRARY TO THE LAW OF INTERCONNECTION AGREEMENTS

The Order provides (at 58) that if Intrado mistakenly orders and AT&T inadvertently provides a product or service not covered by the interconnection agreement, AT&T must charge Intrado the lowest price it charges any other carrier. As AT&T explained, that is contrary to the FCC's "All-or-Nothing Rule," 47 C.F.R. § 51.809(a), which requires a carrier seeking the beneficial terms of another carrier's interconnection agreement to adopt the entire agreement, not just isolated provisions. The reason for the rule is that every agreement is viewed as an overall bargain with the ILEC, so another carrier cannot adopt pieces of that bargain without taking the whole thing.²⁵ The Order, however, allows Intrado to effectively do just that.

The PUCO and Intrado claim there is no conflict with the FCC's rule because the requirement here addresses products and services not covered by the Intrado-AT&T interconnection agreement. PUCO Br. 29-30; Intrado Br. 32. That misses the point entirely. The point is that Intrado would be obtaining the benefit of an isolated price from *another carrier's* interconnection agreement with AT&T without adopting the entire agreement, which is exactly what the All-or-Nothing Rule exists to prevent. *All-or-Nothing Order*, ¶¶ 1, 12.²⁶

CONCLUSION

For the reasons stated herein, the Court should grant judgment in favor of AT&T Ohio.

²⁵ Second Report and Order, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd. 13494, ¶ 1 (2004) ("All-or-Nothing Order").

²⁶ Intrado also argues (at 34) that the Court could refer this case to the FCC under the doctrine of primary jurisdiction. Contrary to Intrado's claim, however, the threshold issue here (see part I above) is not pending "before the FCC." Rather, a similar issue is pending before the FCC's Wireline Competition Bureau, which is acting in the stead of the Virginia Commission. Any decision in that case, therefore, will be entitled to no more weight than a decision of another state commission. *See MPower Comms. Corp. v. Illinois Bell Tel. Co., Inc.*, 457 F.3d 625, 631 (7th Cir. 2006). Of course, if the Court were to refer the issue to the FCC, it should stay enforcement of the PUCO's decision or the parties' interconnection agreement pending a final outcome, since AT&T should not be penalized by any delay at the FCC, where this case would go to the back of the line.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Reply Brief on the Merits of AT&T Ohio was served, via the Court's electronic delivery system, on this 27th day of April, 2010 to the following:

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