

ATTACHMENT F

**UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION**

Civil Action 5:09-cv-00517-BR

BellSouth Telecommunications, Inc.,)
d/b/a AT&T North Carolina,)
)
Plaintiff,)
)
v.)
)
Edward S. Finley, Jr., Chairman,)
Lorinzo L. Joyner, Commissioner, and)
William T. Culpepper, III, Commissioner,)
in their official capacities and not as individuals,)
)
and)
)
Intrado Communications, Inc.,)
)
Defendants.)

**DEFENDANT COMMISSIONERS'
MOTION FOR
SUMMARY JUDGMENT
(Fed. R. Civ. P. 56;
Local Rule 7.1)**

Defendants Edward S. Finley, Jr., Lorinzo L. Joyner, and William T. Culpepper, named in their official capacities as Commissioners of the North Carolina Utilities Commission, (“the Commissioners”), by undersigned counsel, hereby submit this Motion for Summary Judgment in the above-captioned matter. The Commissioners move for summary judgment in favor of the Commissioners on all claims in the Complaint filed by Plaintiff BellSouth Telecommunications, Inc., d/b/a/ AT&T North Carolina, which seek declaratory and injunctive relief from final orders of the North Carolina Utilities Commission (NCUC) entered in the arbitration proceeding brought by Defendant Intrado Communications, Inc., pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 and North Carolina General Statute 62-110(f1). There is no genuine issue of material fact, and the Commissioners are entitled to judgment as a matter of law,

because the NCUC decisions were consistent with the Telecommunications Act and rules promulgated thereunder by the Federal Communications Commission. A Memorandum in Support of Summary Judgment has been filed along with this Motion.

Respectfully submitted, this 26th day of April, 2010.

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Jr., Lorinzo L. Joyner, and William T. Culpepper, III

CERTIFICATE OF SERVICE

I hereby certify that on this day, 26 April 2010, I electronically filed the foregoing DEFENDANT COMMISSIONERS' MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel: Eric H. Cottrell, attorney for Plaintiff and Angela F. Collins, Attorney for Defendant Intrado Communications Inc.

I hereby certify that I have mailed the document to the following non CM/ECF participants:
none.

This the 26th day of April, 2010.

/s/ Margaret A. Force
Margaret A. Force
Assistant Attorney General

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**DEFENDANT COMMISSIONERS'
MEMORANDUM IN SUPPORT OF
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Defendants Edward S. Finley, Jr., Lorinzo L. Joyner, and William T. Culpepper, named in their official capacities as Commissioners of the North Carolina Utilities Commission, (“the Commissioners”), respectfully submit this memorandum of law in support of their motion for summary judgment.

INTRODUCTION AND SUMMARY OF THE CASE

Plaintiff BellSouth Telecommunications, Inc., d/b/a AT&T North Carolina (“AT&T”) filed this action for declaratory and injunctive relief from the recommended and final orders of the North Carolina Utilities Commission (“NCUC” or “Commission”) entered in an arbitration proceeding at the NCUC after Defendant Intrado Communications Inc. (“Intrado”) filed a petition pursuant to

sections 251 and 252 of the Telecommunications Act of 1996 (“the Telecommunications Act” or “the Act.”) Intrado plans to provide emergency 911 and E911 telecommunications services to public safety answering points (called “PSAPs” or “911 Answering Points”) and other public safety agencies in North Carolina as a competitive alternative to similar services that are offered by AT&T. Intrado petitioned the NCUC to compel interconnection with AT&T under section 251(c)(2) of the Act and to arbitrate an interconnection agreement pursuant to section 252(b). As an incumbent local exchange carrier (“incumbent ILEC”), *see* 47 U.S.C. § 251(h), AT&T has a statutory duty pursuant to section 251(c)(2) to interconnect with other telecommunications carriers upon request. AT&T contends that the duty does not apply in this case because the services Intrado plans to provide do not qualify as “telephone exchange services” under section 251(c)(2)(A). Upon review, the NCUC disagreed with AT&T and found that the services Intrado seeks to provide *are* “telephone exchange services.” Therefore AT&T was ordered to provide interconnection as required by section 251(c).

By this action, AT&T seeks review of the NCUC determination based on the closed administrative record from the NCUC. In addition to Intrado, AT&T names three Commissioners of the NCUC as defendants in their official capacities under the doctrine established in *Ex parte Young*, 209 U.S. 123 (1908). *Verizon Md. Inc. v. Public Serv. Comm’n*, 535 U.S. 635, 645 (2002).

The defendants are entitled to summary judgment because there are no disputed facts and the determination that Intrado’s 900/E911 service qualifies as “telephone exchange service” is consistent with federal law. The Court should affirm the NCUC orders in all respects and enter summary judgment in favor of defendants.

BACKGROUND

The issues in this case arise under the Telecommunications Act, an Act through which Congress sought “to promote competition and reduce regulation” of the local telecommunications industry. Pub.L.No. 104-104, 110 Stat. 56, 56. Congress “imposed a comprehensive regulatory scheme designed to ease the transition to competitive markets and to facilitate entry of other telecommunications carriers into the local markets” because it recognized that long-time regional monopoly providers (i.e., incumbent LECs) held “a prohibitive advantage based on their extensive facilities.” *AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc.*, 7 F.Supp. 2d 661 (E.D.N.C. 1998), *remanded on other grounds*, 229 F.3d 457 (4th Cir. 2000).

Interconnection agreements between telecommunications carriers are the “tools” by which the regulatory scheme is implemented and enforced under the Act. *Verizon Maryland, Inc. v. Global Naps, Inc.*, 377 F.3d 355, 363 (4th Cir. 2004)(quoting *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1278 (11th Cir. 23)(*en banc*)); *see* 47 U.S.C. § 252(b). They are “federally mandated agreements” that are used to implement duties, *id.*, including the duty of incumbent LECs such as AT&T to provide interconnection with their network on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. 47 U.S.C. § 251(c)(2).

PROCEEDINGS BEFORE THE NCUC

On December 21, 2007, Intrado filed a Petition with the NCUC for arbitration pursuant to Section 252(b) of the Act, as amended, to establish an interconnection agreement with AT&T. (Doc 25-2) Following several extensions of time allowed by the Commission, a procedural order was issued scheduling an evidentiary hearing and providing for discovery by the parties. (Doc 25-23) The Public Staff-North Carolina Utilities Commission participated in the proceedings at the request

of the NCUC. (Doc 25-23 p 2) ¹ Testimony was pre-filed by the parties and a matrix of the issues was presented. The evidentiary hearing was held on August 13, 2008 before a panel of three Commissioners (those named as defendants in this action). (Doc. 25-62 pp 1-4) The parties presented 36 issues and numerous sub-issues for resolution and prepared post-hearing briefs and proposed orders for the NCUC's consideration. (Doc 25-62 pp 4-8)

On April 24, 2009, the Recommended Arbitration Order ("RAO") was issued by the panel of Commissioners. *See* Documents 25-62 and 25-63. ² The sole issue challenged in this action is the NCUC's determination that the service Intrado intends to provide is a "telephone exchange service" as that term is defined in the Act, triggering AT&T's duty as an incumbent LEC to interconnect pursuant to section 251(c)(2). (Doc. 25-62 p 14) Intrado's proposed service is intended for subscribers that are 911 Answering Points, and would aggregate 911/E911 calls that are placed by the subscribers of other telecommunications carriers and route the calls to the appropriate local 911 Answering Points. (Docs. 25-62 p 11; 25-54 p 9) The proposed competitive 911/E911 service is similar to the "telephone exchange communications service" or "Business Exchange Service" offered to 911 Answering Points by AT&T in AT&T's retail tariff. (Doc 25-62 p 9) Intrado also intends to provide an "Intelligent Emergency Network" ("TEN") that will allow it to provide automatic retrieval and delivery of information directly to 911 Answering Points. *Id.* Intrado represented to the NCUC that its network was designed "to interoperate with existing legacy [911 Answering Point] equipment but allows for much more capability once the [911 Answering Point]

¹ The Public Staff is a State agency that participates in utilities matters pursuant to N.C.G.S. § 62-15.

² The RAO is contained in the Record in Documents 25-62 and 25-63. It is also an attachment to the Complaint in Document 1-2.

migrates to newer technologies.” *Id.* AT&T introduced evidence that Intrado’s 911 trunks that carry traffic will be one-way, and contended that calls will always flow in only one direction under Intrado’s arrangement, i.e., they will originate with 911 callers and terminate with the 911 Answering Point. *Id.* However, other evidence showed that the 911 caller and the recipient in the 911 Answering Point will communicate back and forth (Doc. 25-46 pp 117-18) and 911 Answering Points will be able to communicate with other 911 Answering Points. (Doc. 25-34 p 39) AT&T also introduced evidence that the boundaries of the 911 Answering Point service areas do not match up exactly with AT&T wire centers. (Doc. 25-62 p 10) Upon consideration of the evidence and examination of federal law, the NCUC found that Intrado’s 911/E911 services are “telephone exchange services” for which AT&T must provide interconnection pursuant to section 251(c)(2). Additional issues were determined in the RAO but are not been presented for review in this action. (Docs. 25-62 and 25-633)

The Parties filed comments and objections regarding the RAO and, on September 10, 2009, the NCUC issued an Order Ruling on Objections and Requiring the Filing of a Composite [Interconnection] Agreement addressing the arbitration determinations. (Doc 25-74) The NCUC reaffirmed the recommended conclusion that Intrado’s 911/E911 services qualify as “telephone exchange services” and that AT&T has a duty to provide interconnection pursuant to section 251(c)(2). *Id.*

Composite Agreements were submitted and approved by the NCUC in an order issued November 2, 2009, and executed copies were subsequently filed, (Doc 25-85 through 25-87)

PROCEEDINGS BEFORE THIS COURT

AT&T filed this suit on December 2, 2009 seeking injunctive and declaratory relief from the NCUC orders in the arbitration proceedings. AT&T disputes the NCUC's finding that Intrado's Intelligent Emergency Network service qualifies as a "telephone exchange service" and asserts therefore that Intrado is not entitled to interconnection under section 251(c). (Doc. 1) Defendant Intrado and the Defendant Commissioners filed Answers to the Complaint on February 5, 2010.

The parties agree that this suit should be addressed through summary judgment based on the closed administrative record of the NCUC. (Docs. 24 and 26)

ARGUMENT

Standard of Review

Summary judgments should be granted in those cases where it is clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. *Miller v. F.D.I.C.*, 906 F.2d 972, 973-74 (4th Cir. 1999). Federal courts in this Circuit apply a *de novo* standard of review to state utility commission interpretations of federal law under the Act. *GTE South, Inc. v. Morrison*, 199 F.3d 733,745 (4th Cir. 1999). However, the Act "does not transform the Court into a "super public utilities commission." *Verizon Md. Inc. v. RCN Telecom. Servs.* 248 F.Supp.2d 468, 483 (D.Md.2003), *rev'd and remanded in part on other grounds*, *Verizon Md. Inc. v. Global Naps*, 377 F.3d 355 (4th Cir. 2004)(quoting *GTE South, Inc. v. Morrison*, 199 F.3d 745). In light of the experience and expertise of State commissions in applying the Act, their determinations "should not be taken lightly." *BellSouth Telecoms. Inc. v. Sanford*, 494 F.3d 439 (4th Cir. 2007).

Review of a state commission's findings of fact is under the substantial evidence test. *GTE South, Inc. v. Morrison*, 199 F.3d at 745. Under the substantial evidence test "a court is not to free to substitute its judgment for the agency's ...; it must uphold a decision that has substantial support in the record as a whole even if it might have decided differently as an original matter." *Id* at 746 (quoting *AT&T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 430 (4th Cir. 1998)).

I. THE COMPETITIVE 911/E911 SERVICES THAT INTRADO SEEKS TO PROVIDE TO 911 ANSWERING POINTS AND OTHER PUBLIC SAFETY AGENCIES ARE "TELEPHONE EXCHANGE SERVICES" FOR WHICH AT&T IS REQUIRED TO OFFER INTERCONNECTION PURSUANT TO SECTION 251(c).

AT&T contends that it has no duty as an incumbent LEC to interconnect with requesting telecommunications carriers pursuant to section 251(c) of the Telecommunications Act because the services that Intrado will provide do not qualify as "telephone exchange services" for which interconnection is required.³ *See* 47 U.S.C. § 251(c)(2)(A). (Doc 1 p 2) However, the NCUC's determination that Intrado will provide "telephone exchange service" is consistent with the guiding principle of the Act that competitive local services should be encouraged, not discouraged. Further, the NCUC's determination meets the requirements of the definition of "telephone exchange service" set forth in section 153(47) of the Act as interpreted in Federal Communications Commission ("FCC") orders. Therefore the NCUC correctly concluded that the competitive 911/E911 services that Intrado will offer are "telephone exchange services", and that AT&T must enter into an interconnection agreement consistent with the resolution of the arbitration. (Doc. 25-62 pp 9-14,

³ AT&T calls Intrado's services its "Intelligent Emergency Network" or "IEN" service but does not define IEN or draw a distinction from the "911/E911" or "Emergency" services described by the NCUC orders. The terms appear to be used interchangeably by AT&T. (Doc. 1; Doc. 25-62 pp 8-14; Doc. 25-74 pp 9-10).

Doc. 25-74 pp 9-10) Accordingly, summary judgment should be granted in favor of the defendants and the NCUC orders should be upheld.

An incumbent LEC has the duty to interconnect with a requesting telecommunications carrier pursuant to section 251(c)(2) “for the transmission and routing of telephone exchange service and exchange access .”⁴ 47 U.S.C. § 251(c)(2)(A). “Telephone exchange access” is defined in section 153 (47) of the Act:

The term "telephone exchange service" means (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.

47 U.S.C. § 153(47).

A. The FCC Has Interpreted the Term “Telephone Exchange Service” Broadly in Keeping with the Act’s Purpose of Expanding Competition in Local Services Offerings

The FCC and federal courts have not yet made a determination that addresses whether interconnection for the purpose of exchanging 911/E911 traffic constitutes “telephone exchange service” under this statute. However, the FCC’s construction of the term, generally, and in other specific applications, applies the term expansively in keeping with the Act’s guiding purpose of encouraging competition and opening opportunities for local telecommunications service offerings. The term is not limited to traditional voice service or switch-based local service territories. Order

⁴ The NCUC did not consider whether Intrado’s services qualify as “exchange access.” The term “exchange access means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.” 47 U.S.C. § 153(16).

on Remand, *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 F.C.C.R. 385, 394-95 (1999)(“*Advanced Capability Order*”).

The FCC has observed that “neither the statutory language nor the legislative history accompanying section 3(47) limits the term ‘telephone exchange service’ to the provision of voice services.” *Id.*

It reasoned,

in this era of converging technologies, limiting the telephone exchange service definition to voice-based communications would undermine a central goal of the 1996 Act – opening local markets to competition to all telecommunications services.

15 F.C.C.R. at 395. The FCC has also found that “the statutory language does not support a conclusion that only services that employ circuit-switching technology constitute telephone exchange service within the meaning of the Act.” *Id.* Although an “exchange” area “traditionally has been linked to the area served by a switch, or by an interconnected system of switches,” the FCC disagreed with arguments that the definition confines “telephone exchange service” to services that employ circuit-switching technology. *Id.* Rather, it found “the concept of an exchange is based on geography and regulation, not equipment.” *Id.*

Construing the definition in the context of digital subscriber line (xDSL) technologies, the FCC found that such service qualifies as “telephone exchange service” depending on the location of the end points involved in such service. 15 F.C.C.R. 391-92. For example, in the case of home applications, it is a “telephone exchange service,” but not when used for internet service provider applications, since that use provides access to distant web sites. *Id.* The FCC has also found that “telephone exchange service” includes call-completion services offered by competing directory assistance providers. *Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended*, 16 F.C.C.R. 2736, 2745 (2001)(“*Directory Listing Order*”). Although the

offer of call completion is not a “traditional provision of telephone exchange service through the provision of dial tone,” the FCC reasoned that it permits “intercommunication” “because it permits a community of interconnected customers to make calls to one another in the manner prescribed by the statute.” *Id.* Under the same reasoning, it is likely the FCC would adopt a broad construction of “telephone exchange service” in the context of competitively-offered 911/E911 services.

B. Intrado’s 911/E911 Service Meets the Statutory Definition of “Telephone Exchange Service” Set Forth in Section 153(47)(A).

The definition of “telephone exchange service” (*see* in full on page 8) is written in the disjunctive; i.e., a service satisfies the definition if either part (A) or part (B) is met. 47 U.S.C. § 153(47). The definition in section 153(47)(A) includes three prongs, the first of which is that the service furnish intercommunicating service.

1. The “intercommunication” requirement. “Intercommunicating” appears in the statutory definition but is not itself defined. The FCC has found that “a service satisfies the ‘intercommunication’ requirement ... as long as it provides customers with the capability of *intercommunicating* with other subscribers.” 15 FCCR 396. It noted, for example, that one-way transmission of signals such as takes place with respect to CATV channel service is *not* two-way and does not meet the intercommunication requirement of “telephone exchange service.” 15 FCCR 396 n 59.

The issues of what constitutes “telephone exchange service” generally, and “intercommunication,” in particular, have been addressed in recent decisions of state utility commissions, with differing results. *See e.g.* the “*Ohio Arbitration Order*”⁵ (Doc. 25-58); the

⁵ *In the Matter of the Petition of Intrado Communications Inc. For Arbitration Pursuant to Section 252(b) of the Communications Act of 1934 as amended, to Establish an Interconnection*

“*Florida Arbitration Order*”⁶ (Doc. 25-56); and the “*Kentucky Arbitration Order*”⁷ (Attachment 1).

The state commissions of Ohio and Kentucky determined, as the NCUC did, that interconnection is required pursuant to section 251(c)(2) for the exchange of 911/E911 service. Other state commissions, e.g., Florida, have not so found.

The Ohio decision in the arbitration proceeding between Intrado and AT&T, which was referenced by the NCUC with approval, (Doc. 25-62 p. 13) identified a number of indicia that Intrado’s 911 service furnishes intercommunication services to subscribers. (Doc. 25-58 p 18) The Ohio PUC found that Intrado’s 911 Answering Point customers are able to communicate with other Intrado 911 Answering Point customers and with AT&T’s 911 Answering Point customers. *Id.* Further, the service “allows the public to communicate with [911 Answering Points] and local emergency personnel.” *Id.* The Ohio PUC concluded,

Though somewhat limited in its ability, we find that there are more attributes than not that Intrado’s service provides intercommunication. AT&T would deny the existence of intercommunication based on limited calling choices inherent in the service. The statute, however, does not quantify intercommunication. It only requires the existence of intercommunication.

Agreement with the Ohio Bell Telephone Company dba AT&T Ohio, Public Utilities Commission of Ohio Docket No. 07-1280-TP-ARB (March 4, 2009).

⁶ *In re: Petition by Intrado Communications, Inc. For arbitration of certain rates, terms, and conditions for interconnection and related arrangements with BellSouth Telecommunications, Inc. d/b/a AT&T Florida, pursuant to Section 252 (b) of the Communications Act of 1934, as amended, and Sections 120.80(13, 120.57(1), 364.15, 364.16, 364.161, and 364.162, F.S., and Rule 28-106.21 F.A.C.*, Florida Public Service Commission Docket No. 070736-TP (December 3, 2008).

⁷ *Petition of Communications Venture Corporation D/B/A Indigital Telecom For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement with BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky Pursuant to the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Kentucky Public Service Commission Docket No. 2009-00438 (April 9, 2010).

Id; also see *Kentucky Arbitration Order* (Attachment 1 p 13). For the same reasons, the 911/E911 services proposed in North Carolina meet the intercommunications prong of section 153(47)(A).

2. The local telephone exchange requirement. The second prong of the definition of “telephone exchange service” in part (A) calls for the service to occur within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area. 47 U.S.C. § 153(47)(A). The FCC has explained that the concept of an “exchange” is based on geography and regulation, not necessarily the area served by the switch. 15 F.C.C.R. at 395. This does not require that the boundaries of the 911 Answering Points must be coterminous with the exchange boundaries of the incumbent LEC. As the *Ohio Arbitration Order* explains, 911 Answering Points must have a service that “takes into account the location of fire, police, and other emergency service providers” within the area served. (Doc 25-58 p 18) Thus, “[a]lthough the reach of a particular 911 service may not coincide with the boundaries of ILEC exchanges, the service does have geographical limitations that are generally consistent with a community of interest.” *Id* (cited with favor by the NCUC in Doc. 25-62 p 13); see also *Kentucky Arbitration Order*, Attachment 1 p 13.

The significance of the requirement in the second prong that service must occur within ‘a telephone exchange’ or a ‘connected system’ of such exchanges is that the service should be ‘local’ in character as distinct from ‘toll’ service. Providers of “telephone exchange services” are defined as “local exchange carriers.” See 47 U.S.C. § 153(26). Indeed, if an entity is certified as a competing local exchange carrier (“competing LEC”) by the state commission where service will be provided, it is presumptively held to be a competing provider of “telephone exchange service.” *Directory Listing Order*, 16 F.C.C.R. at 2744. Intrado has authority in North Carolina to operate as a competing local exchange carrier (“competing LEC”) (Doc. 25-44 p 15). By contrast, the

definition of “telephone toll service” – often called ‘long distance service’ – is defined as service between different exchange areas for which separate charges apply. *Id.* By statute and as reflected in FCC regulations, the interconnection duty under section 251(c)(2) applies to “telephone exchange service,” i.e., ‘local’ service, but does not apply where the purpose of interconnection is solely for origination and termination of toll or long distance service. *See* 47 U.S.C. § 251(c)(2)(A); 47 C.F.R. § 5.305(b).

The NCUC correctly found that Intrado’s 911/E911 service is “local” in nature. The service routes emergency calls to 911 Answering Points where the Answering Points handle calls in order to respond to emergencies in their local area.

3. The requirement that a service be “covered by the exchange service charge.” The third prong of the definition of “telephone exchange service” in part (A) indicates that the service is a type covered by the exchange service charge. 47 U.S.C. § 153(47)(A). This prong also addresses the local nature of “telephone exchange service,” as distinguished from “toll service.” The FCC has provided the following construction of this requirement:

[W]e concur with AT&T that the “covered by the exchange service charge” clause comes into play *only for the purposes of distinguishing whether or not a service is a local (telephone exchange) service*, by virtue of being part of a “connected system of exchanges,” and not a “toll” service. Any other interpretation would confer upon LECs the ability to remove services at will from the definition of “telephone exchange services” simply by calling charges for these services something other than “exchange service charges” on their bills. We thus find that any charges that a LEC assesses for originating and terminating xDSL-based advanced services within the equivalent of an exchange area would be covered by the “exchange service charge.”

Advanced Capability Order 15 F.C.C.R. at 398 (emphasis added). Under the FCC’s construction of the requirement, Intrado’s 911/E911 services meet this qualification by charging for the telecommunications services.

C. Intrado's 911/E911 Service Meets the Statutory Definition of "Telephone Exchange Service" Set Forth in Section 153(47)(B).

Intrado's 911/E911 services also qualify under section 153(47)(B) ("part B") which requires that such services 1) must be comparable services provided through a system of switches, transmission equipment, or other facilities (or combination thereof); 2) by which a subscriber can originate and terminate a telecommunications service. *See* 47 U.S.C. § 153(47)(B). Part (B) broadens the services that may qualify as "telephone exchange services," as it was added "to ensure that the definition of "telephone exchange service" would not be limited to traditional voice telephony" and could include non-traditional means "within a local area." *Advanced Capability Order*, 15 F.C.C.R. at 393; *see Kentucky Arbitration Order* (Attachment 1) p. 16. A service is within the scope of part (B) if "it permits intercommunication within the equivalent of a local exchange area and is covered by the exchange service charge." 15 F.C.C.R. at 399. These qualifications were discussed in Part I.B. of the argument.

Subpart B also provides both that the service be comparable and that it "must originate and terminate a telecommunication service." Given that Intrado's subscribers will primarily be answering points for 911 calls, and will not often originate calls to other subscribers, AT&T argued to the NCUC that Intrado does not meet the "origination" requirement. However, the statute does not *quantify* what constitutes call origination, and does not require the use of particular technology in order to meet the definition. *See* 47 U.S.C. § 153(47)(B); *Ohio Arbitration Order* (Doc. 25-58 p 15); *RAO* (Doc. 25-62 p 13). Thus, the capability of 911 Answering Points to call other 911 Answering Points using Intrado's services, and to engage in two-way communications with 911 callers, provide sufficient indicia that the call origination requirement is met. *Id.* The NCUC's

determination on this point is consistent with the statutory definition and furthers the statutory purpose of encouraging competition.

D. AT&T's Argument that Intrado's Services Are Not "Telecommunications Services" is Not Consistent with AT&T's Classification of its Own 911/E911 Service Offerings.

Finally, Commissioners note that, although AT&T's complaint seeks a determination that Intrado's 911/E911 services do not qualify as "telephone communications services," AT&T's tariff for its own 911 service describes it as a "telephone communications service," a classification that is comparable to the definition for "telephone exchange service." (Doc 25-62 p 13) The NCUC found it telling that, prior to Intrado's proposal, AT&T itself treated 911/E911 service or services with similar characteristics as "telephone exchange services." (Doc.25-62 p 13)

In sum, Intrado's 911/E911 services qualify under either part (A) or part (B) of the definition of "telephone exchange services" pursuant to section 315(47). The NCUC's determinations to that effect are consistent with statutory requirements and FCC interpretations of the term. As such, the NCUC properly concluded that AT&T must interconnect with Intrado pursuant to section 251(c)(2)..

CONCLUSION

For the foregoing reasons, the Commissioners request that this Court grant summary judgment in favor of the defendants and uphold the opinions of the Commissioners below

Respectfully submitted, this 26th day of April, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Eric H. Cottrell, attorney for Plaintiff and Angela F. Collins, Attorney for Defendant Intrado Communications Inc.

I hereby certify that I have mailed the document to the following non CM/ECF participants:
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