

# ATTACHMENT C

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

|  |   |                           |
|--|---|---------------------------|
| BellSouth Telecommunications, Inc.                   | ) |                           |
| d/b/a AT&T North Carolina,                           | ) |                           |
|  | ) | Case No. 5:09-cv-00517-BR |
| Plaintiff,   | ) |                           |
|  | ) |                           |
| v.   | ) |                           |
|  | ) |                           |
| Edward S. Finley, Jr., Chairman,                     | ) | Judge W. Earl Britt       |
| Lorinzo L. Joyner, Commissioner, and                 | ) |                           |
| William T. Culpepper, III, Commissioner,             | ) |                           |
| in their official capacities and not as individuals, | ) |                           |
|  | ) |                           |
| and  | ) |                           |
|  | ) |                           |
| Intrado Communications Inc.,                         | ) |                           |
|  | ) |                           |
| Defendants.  | ) |                           |

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**AT&T NORTH CAROLINA'S RESPONSE TO  
DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT  
AND IN SUPPORT OF AT&T NORTH CAROLINA'S  
MOTION FOR SUMMARY JUDGMENT**

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**TABLE OF CONTENTS**

|  | <b>Page</b> |
|--|-------------|
| INTRODUCTION .....   | 1           |
| ARGUMENT .....   | 2           |
| I. THE NCUC’S DETERMINATION THAT INTRADO’S SERVICE QUALIFIES<br>AS “TELEPHONE EXCHANGE SERVICE” VIOLATES FEDERAL LAW<br>AND IS ARBITRARY AND CAPRICIOUS..... | 2           |
| A. Intrado’s Service Does Not Provide Call Origination .....   | 5           |
| B. Intrado’s Service Does Not Provide Intercommunication .....   | 12          |
| C. Intrado’s Service Does Not Meet the Exchange-Area Requirements.....   | 18          |
| D. Intrado’s Service Is Not Comparable to Any Service the FCC Has Held<br>Meets the Definition of “Telephone Exchange Service” .....                         | 19          |
| II. THE THRESHOLD ISSUE IS NOT PENDING BEFORE THE FCC .....  | 22          |
| CONCLUSION.....  | 22          |

BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina (“AT&T”) respectfully submits its response brief on the merits in its challenge to the decision of the North Carolina Utilities Commission (“NCUC”) 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”).<sup>1</sup> The NCUC’s decision rests on a threshold legal error, and it therefore should be reversed and vacated.

### INTRODUCTION

The issue here concerns whether Intrado can compel interconnection to AT&T’s network under Section 251(c)(2) of the 1996 Act, 47 U.S.C. § 251(c)(2), for Intrado’s provision of 911 service to Public Safety Answering Point customers (“PSAPs”). Intrado can do so only if its 911 service is a “telephone exchange service,” as that term is defined in 47 U.S.C. § 153(47) and the FCC’s *Advanced Services Order*<sup>2</sup> and *Directory Listing Order*<sup>3</sup> interpreting that statute. As AT&T showed in its opening brief, the NCUC’s determination that Intrado’s service qualifies as “telephone exchange service” is contrary to established federal law in that it misinterprets and misapplies the “intercommunication” and call “originat[ion]” components of the definition of a “telephone exchange service.”

In response, the NCUC and Intrado offer little defense of these legal errors. Most strikingly, they offer nothing to show that the NCUC’s determination is consistent with FCC precedent or supported by the record. Instead, they continue to rely on the conclusions of the

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<sup>1</sup> The Recommended Arbitration Order (“RAO”) is Exhibit A to AT&T’s Complaint and found at Record Index No. 56. The Commission’s Order Ruling on Objections and Requiring the Filing of a Composite Agreement (“Order”) is Exhibit B to the Complaint and found at Record Index No. 67. They also were provided as Attachments 1 and 2 to AT&T’s initial brief.

<sup>2</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385 (1999) (“*Advanced Services Order*”).

<sup>3</sup> *Provision of Directory Listing Information Under the Telecommunications Act of 1934, as Amended*, 16 FCC Rcd. 2736 (2001) (“*Directory Listing Order*”).

Ohio public utilities commission (which AT&T demonstrated are contrary to the law and are currently under review), and on policy arguments that Intrado's service will provide competition in the area of 911 service (which has nothing to do with the only question here, which is the legal question of whether Intrado's service meets the definition of "telephone exchange service"). It is the task of the federal courts to enforce the 1996 Act and require state commissions to act consistently with it. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378-79 n.6 (1999). Accordingly, the Court should reverse and vacate the NCUC's decision.

### ARGUMENT

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

As AT&T showed in its opening brief, Intrado's service does not qualify as "telephone exchange service" under 47 U.S.C. § 153(47) because, among other things, it does not allow Intrado's only customers ("PSAPs") to originate calls or intercommunicate.

Intrado's tariff<sup>4</sup> explicitly states that Intrado "is not responsible for the provision of local exchange service to its Customers" (AT&T Br., Att. 9(a), Ohio Tariff, § 1, Original Page 5), and that its 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" (AT&T Br., Att. 8, Florida Tariff, § 5.2.3, Original Sheet 49 (Record Index No. 23); AT&T Br., Att. 9(b), Ohio Tariff, § 5.2.3, 1<sup>st</sup> Revised Page 8<sup>5</sup>). A PSAP cannot even obtain Intrado's service unless it agrees to place *all outgoing calls* using service provided by another carrier: "The Customer must furnish [Intrado]

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<sup>4</sup>Intrado's Florida Tariff is Exhibit PHP-1 to the Rebuttal Testimony of AT&T witness Patricia Pellerin (Record Index No. 23), and Attachment 8 to AT&T's Initial Brief. Intrado's Ohio Tariffs are Attachments 9(a) and 9(b) to AT&T's Initial Brief. See AT&T Br. at n. 9 & 10. The court can take judicial notice of publicly filed documents, like tariffs. *In re PEC Solutions, Inc. Securities Litigation*, 418 F.3d 379, nn.7 & 10 (4th Cir. 2005).

<sup>5</sup>The Ohio Tariff contains the same language as the Florida tariff except that it uses the phrase "as a total replacement for" instead of "to replace."

its agreement to . . . subscribe to local exchange service at the PSAP location for administrative purposes, for placing outgoing calls, and for receiving other calls.” AT&T Br., Att. 8, Florida Tariff, § 5.2.9.D, Original Sheet 50 (Record Index No. 23); AT&T Br., Att. 9(b), Ohio Tariff, § 5.2.9.D, Section 5, 1<sup>st</sup> Revised Page 9. Intrado’s tariff makes clear that Intrado’s service only permits PSAPs to *receive* and *transfer* incoming 911 calls<sup>6</sup> – not make calls or engage in “intercommunication” (which by definition requires the ability to “make calls” to “all subscribers,” *i.e.*, “any other subscriber” on the network<sup>7</sup>). *See* AT&T Br. at 5-7. Consistent with the tariff, Intrado’s witness testified that its service will only “accept, route, transmit, transport, and/or aggregate 911 calls.” Tr. Vol. 1 at 23 (Record Index No. 39). *See also* Tr. Vol. 1 at 37 (Record Index No. 39).

The *only* aspect of Intrado’s service that the NCUC found meets the call-origination requirement is the ability of an Intrado PSAP customer to transfer a 911 call or conference in another party on a 911 call, a capability referred to as “hookflash.” RAO at 13 (Record Index No. 56).<sup>8</sup> Intrado’s witness, however, testified on cross examination that hookflash is *not* the

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<sup>6</sup> The tariff states that IEN services “are telecommunications services that permit a Public Safety Answering Point (PSAP) to receive emergency calls placed by 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 carriers*] networks.” AT&T Br., Att. 8, Florida Tariff, § 5.1, 2<sup>nd</sup> Revised Sheet 42 (emphasis added) (Record Index No. 23); AT&T Br., Att. 9(b), Ohio Tariff, § 5.1, 1<sup>st</sup> Revised Page 1. The tariff defines Intrado’s PSAP customer as “[a] facility equipped and staffed to receive 9-1-1 calls from the basic emergency service provider.” AT&T Br., Att. 8, Florida Tariff, First Revised Sheet 15 (emphasis added) (Record Index No. 23); AT&T Br., Att. 9(b), Ohio Tariff, Definitions, Section 1, 1<sup>st</sup> Revised Page 6 (emphasis added). (In all instances where both the Ohio and Florida tariffs are referenced, the Ohio Tariff contains essentially the same language with only small variances that do not affect the meaning.)

<sup>7</sup> *Advanced Services Order*, ¶¶ 20, 23, 24, 25, n.61; *Directory Listing Order*, ¶¶ 17, 21-22.

<sup>8</sup> When the RAO claims that Intrado’s PSAP can “call another PSAP,” it is referring to the hookflash capability, which is the only capability of Intrado’s service that it claims meets the call-origination requirement. Indeed, Intrado admits that its PSAP customer cannot connect with another PSAP unless and until it first receives an incoming 911 call. Tr. Vol. 1 at 58-59, 61-62 (Record Index No. 39). So Intrado’s only claim was that its PSAP customer could “originate” a call to another PSAP in the conferencing capacity after first receiving an 911 call. Intrado Br. at 13-15; Intrado Comm Post-Hearing Br. at 14-15 (Record Index No. 46); RAO at 9 (“Intrado witness Spence-Lenss agreed that the service Intrado intends to provide is limited to aggregating emergency 911 calls at

origination of a new, second call, but rather is just a call transfer. Tr. Vol. 1 at 61-62 (Record Index No. 39). *See also id.* at 58-59. Intrado's tariff likewise makes clear that the Intrado-served PSAP does *not* originate a new call to the PSAP. Rather, it "transfer[s]" the "existing call" (*i.e.*, the "incoming 9-1-1 call") to a "secondary destination," *i.e.*, another PSAP.<sup>9</sup> Moreover, the NCUC ignored that even if the hookflash capability were the origination of a call (which it is not), the definition of "telephone exchange service" also requires that the PSAP be able to make calls to "all subscribers," *i.e.*, "any other subscriber" on the network.<sup>10</sup> Here, the transfer can only be made to a specific, pre-assigned point, *i.e.*, another PSAP, automatically determined by the 911 caller's originating location, not by the Intrado-served PSAP.<sup>11</sup> The transfer capability therefore does not meet the definition of "telephone exchange service."

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Intrado's selective router and then routing those calls to PSAPs, and it is not Intrado's intention to serve the end-users who place the 911 calls.") (Record Index No. 56).

<sup>9</sup> Hookflash ("Call Transfer or Call Bridging," as the tariff calls it) is defined as "[t]he act of adding an additional party to an *existing call*" and "the creation of another leg on an existing call to include an additional party." AT&T Br., Att. 9(a), Ohio Tariff, Definitions, Section 1, Original Page 1; AT&T Br., Att. 9(b), Ohio Tariff, Definitions, Section 1, 1<sup>st</sup> Revised Page 1. (All emphasis in quotes from tariffs in this brief are added). The tariff explains that Intrado's PSAP customer is the "call taker" that "transfer[s] an incoming 911 call" to a "secondary destination." AT&T Br., Att. 8, Florida Tariff, § 5.1.2.C, 2d Revised Sheet 45 (Record Index No. 23); AT&T Br., Att. 9(a), Ohio Tariff, § 5.1.2.C, Original Page 4; AT&T Br., Att. 9(b), Ohio Tariff, § 5.1.2.C, 1<sup>st</sup> Revised Page 4. In addition, the tariff describes the incoming 911 calls as "emergency calls originated by personal communications devices," *i.e.*, the telephones used by end-users subscribing to some *other carrier's* local service. AT&T Br., Att. 8, Florida Tariff, 5.1, 2<sup>nd</sup> Revised Sheet 42 (Record Index No. 23); AT&T Br., Att. 9(b), Ohio Tariff, 5.1, Section 5, 1<sup>st</sup> Revised Page 1.

<sup>10</sup> *Advanced Services Order*, ¶¶ 20, 23 (emphasis added); *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); *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).

<sup>11</sup> The tariff explains that the "secondary destination" is not chosen by the PSAP, but rather it is "determined by the caller's originating location as specified by the ESN." And the "PSAP call taker" transfers the call by dialing "a pre-assigned speed dial code or by use of a single button on an approved customer telephone system which dials the appropriate code." AT&T Br., Att. 8, Florida Tariff, § 5.1.2.C, 2<sup>nd</sup> Revised Sheet 45 (Record Index No. 23); AT&T Br., Att. 9(a), Ohio Tariff, § 5.1.2.C, Original Page 4; AT&T Br., Att. 9(b), Ohio Tariff, § 5.1.2.C, 1<sup>st</sup> Revised Page 4.

The NCUC and Intrado respond by (i) disavowing Intrado's tariff – which Intrado admitted accurately reflects its service in North Carolina,<sup>12</sup> (ii) mischaracterizing the record and the capabilities of Intrado's service, and (iii) misconstruing the controlling law. Those exercises in misdirection fail.

**A. Intrado's Service Does Not Provide Call Origination**

Call origination is a requirement under Part A and Part B of the definition of “telephone exchange service.” AT&T Br., Part I.A; AT&T Br., Att. 4, *Florida Order*, 2008 WL 5381467, at \*5. While Intrado strives to convince the Court that the NCUC “reviewed ... Intrado Comm's 911 service” and the “available information,” and “undertook . . . analysis” of this requirement, the NCUC plainly did not. The NCUC simply adopted – without *any* independent analysis of the law or facts – the Ohio commission's erroneous determination (which is currently under review) that Intrado's hookflash capability is the origination of a call from the Intrado-served PSAP to another PSAP. The NCUC also ignored the evidence in this case – including Intrado's tariff, Intrado's witnesses' testimony, and AT&T's witnesses' testimony – all of which shows that Intrado's hookflash capability is not the origination of a call. The NCUC decision is therefore contrary to the law and arbitrary and capricious.

Since Intrado's testimony provided little, if any, explanation of the capabilities of its service to PSAPs,<sup>13</sup> and Intrado was not required to file a tariff for the service in North Carolina,

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<sup>12</sup> AT&T Br., Att. 7 at n.12 (Record Index No. 23); Tr. Vol. 1 at 34-35 (Record Index No. 39).

<sup>13</sup> See Tr. Vol. 1 at 22-26 (Spence-Lenss Direct Testimony) and Tr. Vol. 1 at 34-44 (Spence-Lenss Rebuttal Testimony) (Record Index No. 39). Nothing in Ms. Spence-Lenss's Direct Testimony claimed that Intrado's service provides call origination. Quite the contrary, she stated that Intrado's service will just “accept, route, transmit, transport, and/or aggregate 911 calls.” Tr. Vol. 1 at 23 (Record Index 39). Ms. Spence-Lenss's Rebuttal Testimony likewise admitted that Intrado's service provides PSAPs only “selective routing, transport and automatic location information (‘ALI’) services.” Tr. Vol. 1 at 37 (Record Index No. 39). And while Ms. Spence-Lenss's Rebuttal Testimony (Tr. Vol. 1 at 40) (Record Index 39) makes one vague reference to “originat[ing] a bridged call” and “originating a call in a conferencing capacity,” as explained later in the text, she clarified on cross examination that this was not the origination of a second call (Tr. Vol. 1 at 61-62) (Record Index 39).

Intrado's tariffs in other states served as the primary source for understanding the capabilities of Intrado's service. Intrado admitted that its Florida tariff "contains the telephone exchange services Intrado Comm plans to provide to PSAPs and other governmental entities" (Tr. Vol. 1 at 34) (Record Index No. 39));<sup>14</sup> and likewise never denied that its Ohio tariff (which is virtually identical to the Florida tariff) accurately reflects its service offering in North Carolina (AT&T Br., Att. 7 at n.12 (Record Index No. 23)).

Intrado's tariffs explain that "hookflash" is *not* the origination of a call, but rather is the transfer of an existing call originated by the 911 caller (which is not Intrado's PSAP customer) to a second destination. Specifically, the tariffs describe the incoming 911 calls as "emergency calls originated by personal communications devices," *i.e.*, the telephones used by end-users subscribing to some *other carrier's* local service. Att. 8, Florida Tariff, § 5.1, 2<sup>nd</sup> Revised Sheet 42 (Record Index No. 23); Att. 9(a), Ohio Tariff, § 5.1, Section 5, Original Page 1; Att. 9(b), Ohio Tariff, § 5.1, Section 5, 1<sup>st</sup> Revised Page 1. And when it comes to the capability to transfer calls or hookflash, Intrado uses the term "Call Transfer or Call Bridging," which it defines as "[t]he act of adding an additional party to an *existing call*" and "*the creation of another leg on an existing call to include an additional party.*" Att. 9(a), Ohio Tariff, Definitions, Section 1, Original Page 1; Att. 9(b), Ohio Tariff, Definitions, Section 1, 1<sup>st</sup> Revised Page 1.

Intrado claims (Br. at 13, 15) that this description of hookflash means that the Intrado-served PSAP makes a second call to another PSAP and then adds the original 911 caller to that

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<sup>14</sup> Notably, the Florida commission considered Intrado's tariff – the very same one Intrado admits accurately reflects its service in North Carolina – and found that Intrado's service does not meet the definition of "telephone exchange service" and therefore denied its request for interconnection under Sections 251(c) and 252 of the 1996 Act. AT&T Br., Att. 4, *Florida Order*, 2008 WL 5381467, \*3-\*4. The Illinois commission reached the same conclusion. AT&T Br., Att. 3, *Illinois Order*, 2009 WL 2589163, \*5-\*11, \*14-\*16.

call.<sup>15</sup> But it is clear that the “additional party” is the other PSAP, not the 911 caller, because when describing the transfer capability the tariffs refer to Intrado’s PSAP customer as the “*call taker*” that “*transfer[s] an incoming 911 call*” “*to a secondary destination* (possibly another PSAP).” AT&T Br., Att. 8, Florida Tariff, § 5.1.2.C, 2<sup>nd</sup> Revised Sheet 45 (Record Index No. 23); AT&T Br., Att. 9(a), Ohio Tariff, § 5.1.2.C, Original Page 4; Att. 9(b), Ohio Tariff, § 5.1.2.C, Revised Page 4.

Moreover, with respect to call origination, the FCC 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. Here, however, the PSAP does not make any choices about where the call will be transferred. Rather, the tariffs explain that the “transfer destination is determined by the caller’s originating location” – *not* by the PSAP – and that the destination is reached by the PSAP dialing a “pre-assigned speed dial code” or by depressing “a single button on an approved Customer telephone system that dials the appropriate code.” AT&T Br., Att. 8, Florida Tariff, § 5.1.2.C, 2<sup>nd</sup> Revised Sheet 45 (Record Index No. 23); AT&T Br., Att. 9(b), Ohio Tariff, § 5.1.2.C, 1<sup>st</sup> Revised Page 4.

Intrado’s own tariff therefore defeats any claim that Intrado’s service provides call origination – which is why Intrado argues (at 14) that the NCUC was correct to ignore its tariff.<sup>16</sup>

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<sup>15</sup> Specifically, Intrado (at 13) claims that hookflash is the means by which Intrado’s PSAP customers “obtain a dial tone and originate a call to a third party” (another PSAP) “to either transfer the originating 911 caller to the third party or create a three-way conference call.” As explained in the text, that claim is defeated by the plain language of the tariff, which states that the Intrado-served PSAP “*transfer[s] an incoming 911 call*” “*to a secondary destination* (possibly another PSAP).”

<sup>16</sup> Intrado tries to have it both ways. It argues that the NCUC was correct to rely on the Ohio commission’s decision relating to Intrado’s service, but argues that the Ohio tariff at the forefront of that proceeding is irrelevant. And while Intrado would like to ignore its own tariff (which defines the only service at issue in this proceeding), it seems to think that AT&T’s E911 tariff (which defines a service that is *not* at issue here) is somehow relevant. Intrado is wrong on both counts.

But, tellingly, Intrado *does not* claim that the tariff should be ignored because it does not accurately reflect its service in North Carolina. Quite the contrary, Intrado admits that the Florida and Ohio tariffs accurately reflect the terms and conditions of its service to PSAPs in North Carolina. AT&T Br., Att. 7 at n.12 (Record Index No. 23); Tr. Vol. 1 at 34-35 (Record Index No. 39). Instead, Intrado argues (at 15) that the NCUC was right to ignore the tariffs because tariffs “can be revised, changed, and modified at any time, and do not necessarily reflect all of a company’s services for all time.” That is irrelevant. Intrado is not entitled to interconnection under Sections 251(c) and 252 of the Act because, at some time in the future, it potentially could revise its tariff to include services that qualify as “telephone exchange service.” Rather, the service Intrado *currently* intends to offer must meet the definition of “telephone exchange service.”

The *only* portion of the record Intrado cites as purportedly supporting its claim that its service provides call origination is page 14 of its post-hearing brief (Record Index No. 46), which cited two sentences of Ms. Spence-Lenss’s Rebuttal Testimony, stating: “While 911 trunks are generally one-way trunks, they are capable of originating a call in a conferencing capacity, and may be used for two-way traffic purposes. For example, once a 911 call is delivered over the one-way trunks to the PSAP, the PSAP may then ‘hookflash’ to obtain dial tone to originate a bridged call to a third party.” While Ms. Spence-Lenss uses the buzzwords “originate” and “dial tone,” there is nothing in the record to suggest that depressing the hookflash button (or “add button” as Intrado’s tariff calls it<sup>17</sup>) for a “bridged call” or a “call in a conferencing capability” is actually the origination of a *new, second* call. Nor is there anything

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<sup>17</sup> AT&T Br., Att. 8, Florida Tariff, § 5.1.2.C, 2d Revised Sheet 45 (Record Index No. 23); AT&T Br., Att. 9(a) Ohio Tariff, § 5.1.2.C, Original Page 4; AT&T Br., Att. 9(b), Ohio Tariff, 5.1.2.c, 1<sup>st</sup> Revised Page 4.

in the record (and Intrado does not cite anything) to support the notion that the tone one hears when transferring a call indicates that a new, second call is being initiated.<sup>18</sup>

Several Intrado admissions confirm that its service does not provide origination of a new, second call. Intrado's vague reference to the origination of a call appeared for the first time in Intrado's Rebuttal Testimony, and therefore AT&T did not have an opportunity to respond in pre-filed testimony. AT&T therefore asked Ms. Spence-Lenss about it during cross-examination, and she clarified that hookflash is *not* the origination of a new, second call (Tr. Vol. 1 at 61-62) (Record Index No. 39):

Q. . . . The service that will actually be provided to PSAPs, that is this aggregation of calls and delivering it to PSAP. Now isn't it true that that service can be used to transfer a call, but it can't be used to originate a call?

A. That's correct for all 911 services.

Q. . . . When the [911] customer calls the PSAP, the PSAP operator can transfer the call to another PSAP; correct?

A. Correct.

Q. But if the 911 customer doesn't call in, the PSAP can't use that service to call the [911] customer; correct?

A. That is correct. They do not use the 911 trunks to originate a call.

A. So they couldn't call the customer? They couldn't call another PSAP? They couldn't call anyone?

A. No, sir.

Ms. Spence-Lenss further testified (Tr. Vol. 1 at 58-59) (Record Index No. 39):

A. Our service provides – allows 911 centers to answer emergency calls with location information, have it routed to the 911 center. If a 911 center needs to place a call – as in our tariff and all its common practice across the country in the tariffs – we specifically say we do not provide that type [of] local exchange

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<sup>18</sup> Intrado claims (Br. at 13-14) that hookflash is "little different from call transfers in a typical office environment" or "three-way calling," but there is nothing in the record (and Intrado does not cite anything) to suggest that such transfers or three-way calling are the origination of a second call.

service within that tariff. And they would have to subscribe to those administrative lines separately.”

Ms. Spence-Lenss’s clarification is consistent with her own Direct Testimony, where she stated that Intrado’s service will only “accept, route, transmit, transport, and/or aggregate 911 calls” and “route those calls to the appropriate PSAP without change in the form or content of the information as sent or received” (Tr. Vol. 1 at 23) (Record Index No. 39), and with her Rebuttal Testimony, where she stated that Intrado will provide PSAPs only the “selective routing, transport and automatic location information (‘ALI’) services” (Tr. Vol. 1 at 37) (Record Index No. 39). Her clarification is also consistent with Intrado’s tariff, including the portions stating that the Intrado-served PSAP merely “transfer[s]” the “existing call” (*i.e.*, the “incoming 9-1-1 call”) to a “secondary destination,” *i.e.*, another PSAP.<sup>19</sup> Ms. Spence Lenss’s clarification also is consistent with AT&T witness Ms. Pellerin’s testimony, which explained as follows:

[W]hen a caller dials 911, the call is routed through the E911 network to the proper PSAP so that emergency services can be dispatched to assist. The call comes into the PSAP via a dedicated one-way terminating arrangement that cannot support call origination. Tr. Vol. 2 at 29 (Record Index No. 40).

When a PSAP receives an emergency call, the dispatcher taking that call cannot use the 911 service to initiate a call. He may be able to *transfer* the call, but that is not the same as originating a new call – he cannot place a call. So, for example, if the 911 caller is disconnected, the dispatcher must use another line that’s not part of the 911 network – a telephone exchange service line – to call the 911 caller back. Tr. Vol. 2 at 93 (Record Index No. 40).

The [911] call comes into the PSAP via a dedicated one-way terminating arrangement that cannot support call origination. In other words, if the PSAP dispatcher need to originate a telephone call (*e.g.*, if the caller is disconnected and the dispatcher needs to call the party back), that call must be placed via a *different* line that is *not* part of the E911 network – a line that is equipped for basic telephone service. Regular telephone calls cannot be dialed by the PSAP dispatcher via the E911 network. Tr. Vol. 2 at 29-30 (Record Index No. 40).

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<sup>19</sup> AT&T Br., Att. 9(a), Ohio Tariff, Definitions, Section 1, Original Page 1; AT&T Br., Att. 9(b), Ohio Tariff, Definitions, Section 1, 1<sup>st</sup> Revised Page 1; AT&T Br., Att. 8, Florida Tariff, § 5.1.2.C, 2<sup>nd</sup> Revised Sheet 45 (Record Index No. 23); AT&T Br., Att. 9(a) Ohio Tariff, § 5.1.2.C, Original Page 4 and Att. 9(b), Ohio Tariff, 5.1.2.C, 1<sup>st</sup> Revised Page 4.

The record therefore does not contain a scintilla – much less substantial evidence<sup>20</sup> – to support the NCUC’s conclusion that hookflash is the origination of a second call. To the contrary, all the evidence supports the conclusion that it is not the origination of a call.

Instead of relying on anything in the record (because there was nothing), 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 addressed a “three-way calling” *feature* that “offers parties to a telephone call a way to *add* a third party to the call,”<sup>21</sup> and the decision in no way suggested that this feature is like Intrado’s service or that it satisfied the “origination” component of a “telephone exchange service.” Intrado never relied on or cited this FCC decision below, and neither did the NCUC, which is unsurprising given that it has no relevance here.

The NCUC likewise did not rely on any record evidence, but relied solely on the Ohio commission’s determination that hookflash is the origination of a call. The Ohio commission’s decision, however, is contrary to federal law and arbitrary and capricious. The Ohio commission ignored the terms of Intrado’s tariff (which plainly state that hookflash is the “transfer” of an “existing call” (*i.e.*, the “incoming 9-1-1 call”) to a “secondary destination,” *i.e.*, another PSAP<sup>22</sup>), and ignored all the testimony (including Intrado’s admissions) that hookflash is not the origination of a second call. The Ohio commission cited no authority and provided no

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<sup>20</sup> Substantial evidence is more than a scintilla; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Smithfield Packing Co., v. N.L.R.B.*, 510 F.3d 507, 516 (4th Cir. 2007). Agency findings are not to be mechanically accepted; courts are not to stand aside and rubber stamp agency determinations. *Coronet Foods, Inc., v. N.L.R.B.*, 158 F.3d 782, 789 (4th Cir. 1998).

<sup>21</sup> *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).

<sup>22</sup> *Supra*, p. 6 & n. 9. AT&T Br., Att. 9(a), Ohio Tariff, Definitions, Section 1, Original Page 1; AT&T Br., Att. 9(b), Ohio Tariff, Definitions, Section 1, 1<sup>st</sup> Revised Page 1; AT&T Br., Att. 8, Florida Tariff, § 5.1.2.C, 2d Revised Sheet 45 (Record Index No. 23); AT&T Br., Att. 9(a) Ohio Tariff, § 5.1.2.C, Original Page 4, Att. 9(b), Ohio Tariff, 5.1.2.c, 1<sup>st</sup> Revised Page 4.

explanation for its conclusion that call transfers and conferencing somehow involve call origination. Instead, the Ohio commission claimed 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. *Ohio Arb. Award* at \*13 (Exhibit 7 to Intrado’s Brief). But how Intrado may “regard” its service obviously has nothing to do with whether the service actually falls within a federal definition. The term “originate” plainly means to initiate or make a call, and the transfer of a 911 call that was already originated by the 911 caller is not origination, as other states have recognized. AT&T Br., Att. 4, *Florida Order*, 2008 WL 5381467, \*3-\*4; AT&T Br., Att. 3, *Illinois Order*, 2009 WL 2589163, \*5-\*6; AT&T Br., Att. 10, *Texas Arbitrators’ Order* at 18-19.<sup>23</sup> See also AT&T Br. at 11-14 (explaining that Intrado’s service does not meet the call origination requirement).

**B. Intrado’s Service Does Not Provide Intercommunication**

Even if the Order were correct that hookflash is the origination of a call from the Intrado-served PSAP to another PSAP, Intrado’s service still would not meet the definition of “telephone exchange service,” and the Order would have to be reversed, because the “intercommunication” requirement is not met.<sup>24</sup>

Here again Intrado claims (at 15-16) that the NCUC “undertook a thoughtful examination of FCC precedent,” and that its decision “reflect[s] the appropriate reading of federal law.” But once again that plainly is not true. The most glaring legal error is that the NCUC failed to apply

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<sup>23</sup> Notably, AT&T challenged the Ohio commission’s determination in an application for rehearing, and the NCUC’s Entry on Rehearing (Exhibit 8 to Intrado’s Brief) shows that the Ohio commission completely misunderstood AT&T’s position. The Entry on Rehearing states (at p. 4; ¶ 7): “AT&T does not contest whether PSAPs can originate calls to other PSAPs.” But that is exactly what AT&T argued in that case and this one.

<sup>24</sup> Intrado (Br. at 15-16) and the NCUC (Br. at 10, 14; RAO at 11) agree – as they must – that the “intercommunication” requirement must be met under both parts of the definition of “telephone exchange service.” So if Intrado’s service does not provide “intercommunication,” it is not entitled to interconnection under Sections 251(c) and 252. *Advanced Services Order*, ¶ 30.

the proper definition of “intercommunication” – *i.e.*, the one adopted by the FCC, the agency charged with interpreting and implementing the 1996 Act in the first instance, in cases directly interpreting the federal definition of “telephone exchange service.” Instead, as Intrado points out (Br. at 16), the NCUC ignored the FCC’s interpretation and, instead, relied on the “plain-language definition[] of intercommunication” in Webster’s New World Dictionary (which is “to communicate with or to each other or one another”). Webster’s, of course, is not a telecommunications-law source, and Congress gave authority to interpret and implement the 1996 Act to the FCC, not Webster’s. The NCUC then concluded that the intercommunicating requirement is met where “one person delivers a message to another even if the other person does not or cannot reply.” RAO at 11-12 (Record Index No. 56). FCC precedent, in stark contrast, defines an intercommunicating service as having two components: subscribers (here Intrado’s PSAP customers) must be able to (1) originate, *i.e.*, “make calls”, and (2) they must be able to make such calls to “all subscribers” (*i.e.*, “any other subscriber”) on the network.<sup>25</sup> As explained in Part I.A, Intrado’s PSAP subscribers cannot “make calls” to anyone, so Intrado’s service fails the first requirement.<sup>26</sup>

It also fails the second requirement. Intercommunicating requires a “community of interconnected customers” to be able to “make calls” to “all” (*i.e.*, “any”) other customers in the

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<sup>25</sup> *Advanced Services Order*, ¶¶ 20, 23-24, n.61; *Directory Listing Order*, ¶¶ 17, 21 (2001) (“intercommunicating” service must enable the subscriber to make calls to “all subscribers” (*i.e.*, “any other subscriber”) on the network).

<sup>26</sup> The Ohio commission (and hence the NCUC) also misinterpreted the “intercommunicating” requirement by eliminating the “origination” component from it. The Ohio commission asserted that the intercommunicating requirement *does not mean* that “PSAPs must have the capability to call potential 911 callers,” and therefore concluded that “*even though a PSAP may not be positioned to initiate a call to an end user, a PSAP can intercommunicate with a caller after an end user initiates a call to the PSAP,*” and “that PSAPs can intercommunicate . . . with certain other PSAPs and emergency service providers.” *Ohio Entry on Rehearing* at p. 7, ¶ 10 (Exhibit 8 to Intrado’s Brief). Of course, the FCC has defined “intercommunication” as the ability to “make calls” to “all subscribers” (*i.e.*, “any other subscriber”) on the network. It therefore was legal error to find that the requirement can be met without call origination.

community.<sup>27</sup> According to the NCUC, the “community” at issue here consists of PSAPs, emergency service providers, and the public (*i.e.*, 911 callers).<sup>28</sup> Even if that were a sufficient “community of interconnected customers,” the NCUC did not find (and Intrado does not allege) that Intrado’s service permits its PSAP customers to “make calls” to “*all*” the members of that community. Rather, Intrado alleged (and the NCUC found) only that Intrado’s PSAP customers can call other PSAPs via hookflash (*i.e.*, they can “call” other PSAPs after, and only after, they receive an incoming 911 call).<sup>29</sup> Intrado did not claim and the NCUC did not find that Intrado’s PSAP customer can call the other members of the “community of interconnected customers,” *i.e.*, 911 callers or emergency service providers, or that they can call other PSAPs without first receiving an incoming 911 call. Without the ability to call *all* members of the community of interconnected customers, Intrado’s service does not meet the “intercommunicating” requirement, and the NCUC’s determination to the contrary is unlawful.

Intrado claims (at 17) that the “NCUC correctly found that Intrado Comm’s 911 service permits intercommunication by virtue of its being capable of two-way *communication*, even if it does not always carry two-way *traffic*,”<sup>30</sup> but that is not the relevant question when applying the

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<sup>27</sup> In other words, contrary to Intrado’s and the NCUC’s claims that “intercommunication” has not been “quantified” and that a certain amount of intercommunication is not required, the FCC plainly stated that *all* members of the interconnected community must be able to call all other members of that community.

<sup>28</sup> Intrado Br. at 19 (“PSAPs purposeful use of call origination is amongst a community of PSAPs, first responders, and emergency service agencies, per the 911 caller’s unique needs”); Ohio Entry on Rehearing at p. 7, ¶ 10 (“PSAPs are part and parcel of a community of PSAPs, local emergency services providers, and the public,” *i.e.*, 911 callers) (Exhibit 8 to Intrado’s Brief); RAO at 13 (Record Index No. 56); NCUC Br. at 11-12.

<sup>29</sup> Tr. Vol. 1 at 61-62 (Record Index No. 39); *id.* at 58-50; Intrado Br. at 13-15; Intrado Comm Post Hearing Br. at 14-15 (Record Index No. 46); RAO at 9, 13 (Record Index No. 56); NCUC Br. at 14; Ohio Entry on Rehearing, p. 4, ¶ 7 & p. 7, ¶ 10 (Exhibit 8 to Intrado’s Brief).

<sup>30</sup> Intrado, the NCUC, and the Ohio commission pay lip service to the FCC’s statement that “intercommunication” is a service that “permits a community of interconnected customers to make calls to one another over a switched network,” *i.e.*, to make calls to “all subscribers,” which means “any other subscriber” on the network. Intrado Br. at 16; NCUC Br. at 10; RAO at 12 (Record Index No. 56); Ohio Entry on Rehearing at p. 7, ¶ 10 (Exhibit 8 to Intrado’s Brief). But then they ignore it when claiming that the requirement can be met whenever parties engage in two-way communication. That conclusion is contrary to the law.

definition of “telephone exchange service.” The relevant question is whether the service provides “intercommunication.” Intrado and the NCUC’s argument equates two-way “communication” with “intercommunication,” but the two are not the same. Intrado’s service might permit two-way communication (*i.e.*, Intrado’s PSAP customer can talk to a 911 caller when, and only when, the 911 caller places a call to the PSAP), but it does not permit “intercommunication” as interpreted by the FCC, *i.e.*, the capability to “make calls” to “all subscribers” (*i.e.*, “any other subscriber”) on the network. The NCUC committed legal error in misinterpreting and misapplying the “intercommunication” requirement.

Intrado also misrepresents the law in claiming (at 17) that “federal precedent [ ] holds the existence of two-way communication – *not* two way traffic –paramount in establishing intercommunication,” citing the *Advanced Services Order*, ¶ 20, and *Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, 13 FCC Rcd 24011, ¶ 43 (1998). That plainly is not what the FCC held in those paragraphs.<sup>31</sup> In both paragraphs, the FCC was explaining that “telephone exchange service” is not limited to *voice* transmission provided over the *public circuit-switched network* (*i.e.*, plain old telephone service provided to residential and business customers), but rather could also include data transmissions. That statement is of no consequence here because there is no dispute over whether a non-voice transmission can qualify as “telephone exchange service” (and, in any event, Intrado’s service is a voice transmission). The dispute is over whether the “intercommunicating” requirement (which the FCC found applicable regardless of the type of transmission, *Advanced Services*

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<sup>31</sup> As previously explained, even if the Court accepted the determination that a PSAP can call another PSAP, as explained in the text, that is not enough to meet the intercommunicating requirement. The PSAP must also be able to call the other members of the community, *i.e.*, 911 callers and emergency personnel, which everyone admits PSAPs cannot do with Intrado’s service. *Supra*, pp. 8-11, n.8; Tr. Vol. 1 at 58-59, 61-62 (Record Index No. 39); Tr. Vol. 2 at 29-30 (Record Index No. 40).

*Order*, ¶¶ 23, 30; *Directory Listing Order*, ¶¶ 17-18) is met. And here, Intrado's service does not meet the "intercommunicating" requirement.

Intrado also claims (at 18) that its service to PSAPs is not limited to operating across specific predetermined points. Again, Intrado's tariff and testimony prove otherwise. Everyone agrees that the only thing Intrado's PSAP customer can do with its service is answer 911 calls and forward a pre-existing, incoming 911 call to another PSAP – and only to another PSAP – via hookflash.<sup>32</sup> The tariff likewise explains that hookflash is the "transfer" of an "existing call" (*i.e.*, the "incoming 9-1-1 call") to a "secondary destination," *i.e.*, another PSAP,<sup>33</sup> and that the "secondary destination" is not chosen by the PSAP, but rather is "determined by the caller's originating location as specified by the ESN" and that the "PSAP call taker" transfers the call by dialing "a pre-assigned speed dial code or by use of a single button on an approved customer telephone system which dials the appropriate code."<sup>34</sup> So regardless of whether one considers "hookflash" to be a separate call or just a transfer, there is only one pre-assigned, designated point to which the transfer can be made, *i.e.*, the PSAP "determined by the caller's originating location" and the "pre-assigned speed dial code." The FCC has held that such a connection

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<sup>32</sup> Indeed, everyone agrees that Intrado's PSAP customer cannot call back a 911 caller and cannot place a call to any other subscriber of local exchange service unless it does so using service provided by another carrier. *Supra*, pp. 8-11, n. 8; Tr. Vol. 1 at 58-59, 61-62 (Record Index No. 39); Tr. Vol. 2 at 29-30, 93 (Record Index No. 40). Everyone also agrees that Intrado's PSAP customer cannot connect to another PSAP unless it first receives an incoming 911 call (or if it uses telephone exchange service provided by someone other than Intrado). *Id.* And the incoming 911 caller – not Intrado's PSAP customer – determines where (*i.e.*, to which PSAP) the call is transferred. AT&T Br., Att. 8, Florida Tariff, § 5.1.2.C, 2<sup>nd</sup> Revised Sheet 45 (Record Index No. 23); AT&T Br., Att. 9(a), Ohio Tariff, § 5.1.2.C, Original Page 4; AT&T Br., Att. 9(b), Ohio Tariff, § 5.1.2.C, 1<sup>st</sup> Revised Page 4.

<sup>33</sup> AT&T Br., Att. 9(a), Ohio Tariff, Definitions, Section 1, Original Page 1; AT&T Br., Att. 9(b), Ohio Tariff, Definitions, Section 1, 1<sup>st</sup> Revised Page 1; AT&T Br., Att. 8, Florida Tariff, § 5.1.2.C, 2<sup>nd</sup> Revised Sheet 45 (Record Index No. 23); AT&T Br., Att. 9(a) Ohio Tariff, § 5.1.2.C, Original Page 4 and Att. 9(b), Ohio Tariff, 5.1.2.C, 1<sup>st</sup> Revised Page 4.

<sup>34</sup> AT&T Br., Att. 8, Florida Tariff, § 5.1.2.C, 2<sup>nd</sup> Revised Sheet 45 (Record Index No. 23); AT&T Br., Att. 9(a), Ohio Tariff, § 5.1.2.C, Original Page 4 and Att. 9(b), Ohio Tariff, § 5.1.2.C, 1<sup>st</sup> Revised Page 4.

between one or more pre-designated points is not sufficient to meet the intercommunicating requirement.<sup>35</sup>

Intrado (at 19) tries to distinguish its services from services, like private line service, that the FCC held permit communication only between “specific, predetermined points” and therefore do not meet the definition of “telephone exchange service,”<sup>36</sup> 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 for two reasons. First, the FCC’s focus was not on there being a pre-designated path or facility, but on there being a connection only to one or more specific, predetermined points. See AT&T Br. at 15-17; *Advanced Services Order*, ¶¶ 20, 23-26, n.61; *Directory Listing Order*, ¶¶ 17, 21-22; AT&T Br., Att. 3, *Illinois Order*, 2009 WL 2589163, \*9-10. Second, the issue here is not what the *911 caller* (who is not Intrado’s customer) can do; the issue is what Intrado’s PSAP customer can do. At most, Intrado’s PSAP customer can connect only to a specific, predetermined point, another PSAP, when (and only when) it receives an incoming 911 call. No one disputes this.<sup>37</sup> And, again, the FCC held that a connection to one or more such designated points was insufficient to qualify as “telephone exchange service.”

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<sup>35</sup> *Advanced Services Order*, ¶ 25; *Directory Listing Order*, ¶ 22. See also *Advanced Services Order*, ¶¶ 20, 23-24, 26, n.61; *Directory Listing Order*, ¶¶ 17, 21; AT&T Br., Att. 3, *Illinois Order*, 2009 WL 2589163, \*9-10.

<sup>36</sup> *Advanced Services Order*, ¶¶ 20, 23-26, n.61; *Directory Listing Order*, ¶¶ 17, 21-22.

<sup>37</sup> *Supra*, pp. 8-11, n. 8; Tr. Vol. 1 at 58-59, 61-62 (Record Index No. 39); Tr. Vol. 2 at 29-30, 93 (Record Index No. 40).

### C. Intrado's Service Does Not Meet the Exchange-Area Requirements<sup>38</sup>

The NCUC's determination that Intrado's 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. Neither Intrado nor the NCUC offer anything to refute this.

Instead, Intrado makes several misrepresentations. First, Intrado claims that the FCC determined in its 1998 *BellSouth Louisiana II Order*<sup>39</sup> that the definition of "telephone exchange service" "does not require a specific geographic boundary." Intrado Br. at 21. That is not true. What the FCC actually said was that "section 3(47)(A) does not require a specific geographic boundary *other than an area covered by an exchange service charge.*" *BellSouth Louisiana II Order*, ¶ 30 (emphasis added). Second, Intrado claims (at 20) that in the *Advanced Services Order* the FCC stated a local telephone exchange "is based on geography and regulation," not exchange boundaries. What the FCC really said was that "the concept of an exchange is based on geography and regulation, not equipment." *Advanced Services Order*, ¶ 22. Third, Intrado claims (at 21) that the FCC determined that wireless providers' geographic service areas, which differ from typical wireline exchange area boundaries, were considered to be within a telephone exchange or a connected system of telephone exchanges within the same exchange area for purposes of the definition of telephone exchange service. To the contrary, the FCC pointed out

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<sup>38</sup> 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.

<sup>39</sup> *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599, ¶ 30 (1998).

that “cellular telephone service may not be treated as telephone exchange service.” *BellSouth Louisiana II Order*, ¶ 27.

Intrado asserts that the NCUC was correct to reject AT&T’s argument that Intrado’s service was required to match ILEC exchange boundaries. But that is not what AT&T argued. Consistent with the definition of “telephone exchange service,” AT&T argued that Intrado’s service must operate within, and must permit intercommunication among all subscribers within, a local exchange area *or the equivalent of a local exchange area*. *Advanced Services Order*, ¶¶ 15, 27, 29 (emphasis added); *Directory Listing Order*, ¶¶ 17, 19. And while it may be true that the exchange area does not have to match the ILEC’s, in order to be the “equivalent” of the local exchange area, the purported “geographical area” must consist of more than three designated points (the 911 caller, the PSAP, and the first responder). Indeed, the FCC made clear that a connection between designated points is *not* equivalent to a local exchange area. *Advanced Services Order*, ¶¶ 15, 25, 27, 29; *Directory Listing Order*, ¶¶ 17, 19, 22.

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

Intrado claims that its service is comparable to other services that meet the definition of “telephone exchange service,” but Intrado does not even attempt to draw any comparisons between its service and services that actually have been found to meet the definition, *e.g.*, traditional voice service to residential customers, directory assistance with call completion, and certain xDSL advanced services. Nor could Intrado make such a comparison. As explained in AT&T’s opening brief, Intrado’s service is nothing like these telephone exchange services in that it does not allow its subscribers to originate calls or engage in intercommunication, as those terms are defined by the FCC. AT&T Br. at 19-21.

Instead, Intrado compares its service to AT&T's own E911 service. The problem is that AT&T's E911 service *has never been found to satisfy the definition of "telephone exchange service,"* AT&T has *never claimed* that its 911 service satisfies that definition (much less derived any benefit from such a claim), and *nothing* in AT&T's tariff purports in any way that AT&T's 911 service meets the federal definition of "telephone exchange service."<sup>40</sup> Thus, regardless of whether Intrado thinks its service is like AT&T's E911 service, it simply does not matter to the issue here. More importantly, there also is no evidence in the record to suggest that AT&T's E911 service is "comparable if not identical to telephone exchange service," as Intrado claims (though the relevant question here is whether *Intrado's* service is comparable, not whether AT&T's service is comparable). Simply put, because AT&T's E911 service has not been found to be "telephone exchange service," Intrado's claim that its service is similar to AT&T's service – even if it were true – is completely irrelevant, and the NCUC's reliance on that comparison was arbitrary and capricious.

It is equally irrelevant that AT&T has entered into an interconnection agreement with a one-way paging company. *See* Intrado Br. at 23-24. To begin, Intrado points to no finding anywhere that one-way paging service is or is not "telephone exchange service" under federal law. So any comparison between Intrado's service and one-way paging service says nothing about whether Intrado's service is "comparable" to other "telephone exchange services," as required by part B of the definition of "telephone exchange service."

Moreover, the letter submitting the interconnection agreement with that company to the NCUC for approval plainly states that that agreement was *negotiated* – not arbitrated. Pellerin

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<sup>40</sup> AT&T North Carolina's tariff refers to the service as "telephone exchange communication service," not "telephone exchange service" (*See* Public Staff Exhibit Pellerin CX-1, Record Index No. 45), because it is a communication service that is offered in an exchange. AT&T Br., Att. 7 at 14 (Record Index No. 23).

CX-3 (Record Index No. 45).<sup>41</sup> See also NCUC Approval Order.<sup>42</sup> It is well-established that *negotiated* rates, terms and conditions in ICAs can be whatever the parties agree to, subject only to the approval rules for negotiated ICAs, and do not have to comply with the requirements of Section 251(c) of the Act, including the requirement that the interconnecting carrier provide “telephone exchange service.” The 1996 Act puts the highest value and emphasis on voluntary negotiation,<sup>43</sup> and therefore gives carriers the right to privately negotiate an ICA “without regard” to the rights and duties set forth in Sections 251(b) and (c) of the 1996 Act,<sup>44</sup> which would include the requirement under Section 251(c)(2) that the requesting carrier’s service be used to provide “telephone exchange service” or “exchange access.”<sup>45</sup>

And even if AT&T’s interconnection agreement with the one-way paging company had been *arbitrated* under Sections 251(c) and 252, one-way paging service is different from Intrado’s service in that the subscribers are assigned telephone numbers, and can pick up the phone to dial a ten-digit number to reach *any other* paging device. Tr. Vol. 2 at 148 (Record Index No. 40). Intrado’s service only permits a transfer to a preselected PSAP determined by the caller’s originating location. Intrado’s allegation that the interconnection agreement treated one-way paging as “local traffic,” as that term was defined in the negotiated agreement, is also irrelevant. The agreement says nothing about whether paging service would qualify as

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<sup>41</sup> The full agreement is publicly available at : <http://ncuc.commerce.state.nc.us/cgi-bin/webview/senddoc.pgm?dispfmt=&itype=Q&authorization=&parm2=8BAAA60130B&parm3=000120187>

<sup>42</sup> <http://ncuc.commerce.state.nc.us/cgi-bin/webview/senddoc.pgm?dispfmt=&itype=Q&authorization=&parm2=9AAAA96130B&parm3=000120187>

<sup>43</sup> See, e.g., *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 405 (1999) (Thomas, J., concurring in part and dissenting in part) (“Section 252 sets up a preference for negotiated interconnection agreements”); *Verizon North, Inc. v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002) (“private negotiation . . . is the centerpiece of the Act”).

<sup>44</sup> 47 U.S.C. § 252(a)(1).

<sup>45</sup> *Verizon Communications, Inc., v. FCC, et al.* 535 U.S. 467, 492-93 (2002); *Qwest Corp. v. Public Utilities Comm’n of Colorado*, 479 F.3d 1184, 1188 (10th Cir. 2007) (explaining that “the ‘without regard’ clause indicates that the parties may make agreements that go beyond or contradict the specific statutory requirements that an incumbent must follow.”) (internal quotation marks and citation omitted).

“telephone exchange service” as defined by Congress, and nothing about whether Intrado’s service is anything like paging services.

## II. THE THRESHOLD ISSUE IS NOT PENDING BEFORE THE FCC

Intrado argues (at 25-26) 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 would have to stay enforcement of the NCUC’s decision and the parties’ interconnection agreement pending a final outcome. If Intrado wanted a primary jurisdiction referral to the FCC it could have and should have sought it long ago, and AT&T should not be penalized by any delay at the FCC, where this case would go to the back of a long line.

### CONCLUSION

For the reasons stated herein and in AT&T’s opening brief, the Court should grant judgment in favor of AT&T and, therefore, the entire NCUC decision should be vacated and reversed.

This 28<sup>th</sup> day of May, 2010.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing **AT&T NORTH CAROLINA'S RESPONSE TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND IN SUPPORT OF AT&T NORTH CAROLINA'S MOTION FOR SUMMARY JUDGMENT** using the CM/ECF system, which will send notification of the filing to all counsel of record who are registered on the CM/ECF system.

This 28<sup>th</sup> day of May, 2010.

/s/ Eric H. Cottrell  
Eric H. Cottrell