

# ATTACHMENT B

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

**No. 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 INTRADO  
COMMUNICATIONS INC.’S  
REPLY IN FURTHER SUPPORT OF  
ITS MOTION FOR SUMMARY  
JUDGMENT**

**Fed. R. Civ. P. 56; Local Rule 7.1**

**INTRODUCTION**

The fundamental flaws in AT&T’s position are not – and could not have been – corrected in its Opposition. *See generally 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* (“AT&T Opp.”). AT&T reads requirements and limitations into statutes and legal precedent that do not exist, mixes legal concepts, presents incomplete facts, and essentially argues that, unless a carrier provides traditional telephone service, it is not providing “telephone exchange services.” The law, as opposed to AT&T’s skewed perception of it, does not support its claims, but supports the North Carolina Utilities Commission’s (“NCUC”) arbitration result.

For the reasons given below and those stated fully in Defendant Intrado Communications Inc.’s Motion for Summary Judgment (“Intrado Comm Motion”) and Defendant Intrado Communications Inc.’s Opposition to AT&T North Carolina’s Motion for Summary Judgment

(“Intrado Comm Opp.”), the Court should deny AT&T North Carolina’s Motion for Summary Judgment (“AT&T Motion”) and grant the motions of Intrado Communications Inc. (“Intrado Comm”) and the NCUC.

## ARGUMENT

### **I. TELEPHONE EXCHANGE SERVICE UNDER § 153(47)(A)**

AT&T’s reading of subsection (A) is overly narrow and unsupported either by precedent or by the language of the statute itself. In its attempts to exclude Intrado Comm’s services from the definition of “telephone exchange service,” AT&T is forced to read requirements into the definition that are not there. Subsection (A) does not require that Intrado Comm’s service either support origination or an unlimited ability by Intrado Comm’s customers to call anyone on the public switched telephone network.

#### **A. Intercommunication**

AT&T defines “intercommunication” to equal origination. AT&T Opp. at 12-17. AT&T’s unsupported reading disregards both the language of the statute itself and contrary Federal Communications Commission (“FCC”) precedent.

##### *1. Statutory Interpretation*

Section 153 contains two *alternative* definitions of “telephone exchange service.” 47 U.S.C. §§ 153(47)(A) and (B). The second of these definitions explicitly includes the need to “originate and terminate a telecommunications service.” 47 U.S.C. § 153(47)(B). The other definition explicitly omits the term “origination,” although it requires “intercommunication.” 47 U.S.C. § 153(47)(A). AT&T equates intercommunication with origination. AT&T Op. at 13.

It is a basic and long-established tenet of statutory interpretation that every word in a statute must be given effect and meaning. *Scott v. U.S.*, 328 F.3d 132, 139 (4th Cir. 2003) (“Where possible, we must give effect to every provision and word in a statute and avoid any interpretation that may render statutory terms meaningless or superfluous.”). AT&T would strip of significance the omission of the term “origination” from Subsection (A). By including

“origination” in Subsection (B), Congress made clear that it knew how to use the term. If it had intended to include the term in Subsection (A) as well, it would have done so. By seeking to collapse the term “intercommunication” into a synonym for “origination and termination,” AT&T violates the fundamental principle of interpreting a statute in a manner that gives meaning to all of its terms. *Id.* at 139. Notably, the FCC has interpreted the term “comparable service” in (B) to refer to “intercommunication.” *Advanced Services Order* at ¶ 30.<sup>1</sup> But if “intercommunication” meant “origination and termination,” the term “comparable service” in Subsection (B) becomes devoid of meaning, a problem for which AT&T does not and cannot offer a solution. As such, AT&T’s construction of “intercommunication” in Subsection (A) violates the law.

## 2. *Origination is Not Required*

AT&T’s interpretation is also unsupported by precedent. AT&T asserts that “FCC precedent” defines “intercommunication” as being able to originate calls to all subscribers and cites to the *Directory Listing Order*.<sup>2</sup> AT&T Opp. at 13. That decision, however, does not support AT&T’s claim.

In the *Directory Listing Order*, the FCC concluded that a service similar in fundamental ways to the service to be offered by Intrado Comm here was a telephone exchange service under Subsection (A) because, among other things, it supported intercommunication. *Directory Listing Order* at ¶¶ 15, 19. Directory assistance involves providing callers with the ability to dial a universal number to connect them with a service that has the ability to provide information and, in some instances, call completion. *Id.* at ¶¶ 20, 23. The FCC held that “call completion offered by such DA providers constitutes intercommunication” under § 153(47)(A). *Id.* at ¶ 19. In doing so, the FCC expressly rejected AT&T’s claim here that dial tone origination is required. *Id.* at ¶ 20. In fact, the FCC makes no mention at all of origination before concluding the

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<sup>1</sup> *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 15 FCC Rcd 385 (1999) (“*Advanced Services Order*”).

<sup>2</sup> Provision of Directory Listing Information under the Telecomms. Act of 1934, as Amended, 16 FCC Rcd 2736 (2001) (“*Directory Listing Order*”).

directory assistance call-completion service constitutes intercommunication under Subsection (47)(A). *Id.* at ¶¶ 19-21. Plainly, this is because origination is not required under subsection (A). Although, the FCC mentions “origination” later in that Order, it does so only in the context of its finding that the call completion service at issue *also* “qualifies as a telephone exchange service *under section 3(47)(B).*” *Directory Listing Order* at ¶ 22 (emphasis added).

The call completion service offered by directory assistance is analogous to the service offered by Intrado Comm in North Carolina. In both cases, the calling party calls a universal number, which connects it to the directory assistance platform or a PSAP. Then, in some circumstances – either at the caller’s request for call completion to a number obtained from directory assistance or, here, where the PSAP determines to connect the caller with a different PSAP or first responder – the service provider can route the call to another location. Neither the directory assistance provider nor Intrado Comm provides dial tone service. Based on the record in the *Directory Listing Order* and the record below, neither the directory assistance provider nor Intrado Comm can support outgoing calls other than to complete or transfer/bridge the call of the original caller as needed. Nonetheless, the FCC found that intercommunication occurs in the directory assistance scenario and the service is a telephone exchange service. *Id.* at ¶¶ 19, 21.<sup>3</sup> The NCUC was correct to do the same in the case of Intrado Comm’s service.

### 3. *The Community of Callers*

AT&T appears to argue that there is no intercommunication if the Intrado Comm customer cannot originate a call to *all* subscribers to telecommunications services. AT&T Opp. at 14-15. As already discussed, origination is not required under Subsection 47(A). *Supra.* at 3-5; *see also* Intrado Comm Opp. at 7-8. Consequently, AT&T is also incorrect that the PSAP

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<sup>3</sup> AT&T’s assertion that Intrado Comm is wrong when Intrado Comm argues that two-way communication is sufficient for intercommunication but that two-way traffic is not required, AT&T Opp. at 14-15, is another way for AT&T to argue that origination is required for intercommunication. AT&T adamantly insists that the ability for both parties to make calls to each other is necessary for intercommunication, but AT&T cites to **nothing** in support of its assertion. *Id.*

customer must be able “to call *all* members of the community of interconnected customers.”

AT&T Opp. at 13-14.

The *Advanced Services Order* on which AT&T relies for its claims that, unless the PSAP can make a call to *all* telecommunications service subscribers there is no intercommunication, does not support that assertion.<sup>4</sup> The *Order* states that “a service satisfies the ‘intercommunication’ requirements of section 3(47)(A) as long as it provides customers with the capability of intercommunicating with other subscribers.” *Advanced Services Order* at ¶ 23. In that *Order*, the FCC explicitly held that, even though the subscriber was able to establish connections only to a single third party and point, that limitation did not mean that intercommunication does not occur. *Id.* at ¶ 24. The *Advanced Services Order* does not require that every subscriber must be able to call every other subscriber in order for there to be intercommunication. *Id.* Indeed, the decision indicates that the subscribers can connect to Internet Service Providers (“ISPs”) rather than other subscribers using the DSL service. *Id.* at ¶¶ 24-25, n. 63. Further, there is no indication in the *Order* that the ISPs with whom DSL subscribers connect can initiate, originate or make “calls” to DSL subscribers.<sup>5</sup> Notably, Intrado Comm’s service would allow PSAP customers to complete calls to each other. AT&T’s interpretation inserts language and conclusions into that *Order* that simply are not there.

In this case, the entire community with telecommunications service can make calls to an Intrado Comm-served PSAP. Further, the NCUC found that an Intrado Comm-served PSAP has the ability to make connections to the community of local PSAPs and first responders. This

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<sup>4</sup> AT&T quotes language allegedly in the *Directory Listing Order* at ¶¶ 19 and 21: “‘intercommunicating’ service must enable the subscriber to make calls to ‘all subscribers’ (*i.e.* ‘any other subscriber’) on the network.” AT&T Opp. at 13 n.25. That quoted language appears nowhere in those cited paragraphs.

<sup>5</sup> In light of the *Advanced Services Order*, the *Directory Listing Order* cannot reasonably be interpreted, as AT&T tries on pages 13-14 of its Opposition, to require Intrado Comm customers to originate calls to every potential caller in the community of interest that could place a 911 call to that PSAP customer.

capability qualifies the Intrado Comm service as providing intercommunication. *See generally, Directory Listing Order and Advanced Services Order.*

4. *A Single Point or Customer*

AT&T contends that Intrado Comm can connect 911 callers with only one, pre-designated point, defeating the NCUC finding of intercommunication. AT&T Opp. at 14-15. Factually, AT&T is wrong that there is a single, pre-designated point of connection. First of all, the 911 callers' calls are routed in an endlessly fluid way to a variety of PSAPs based on their location at the time of the call. For example, when a 911 caller uses a mobile phone, the PSAP with which the 911 caller will be connected changes as the 911 caller's location changes. *See* Intrado Comm Opp., Exh. 4 at 7-8. In addition, there is no single fixed connection when a different PSAP or first responder may need to be involved. *See* Intrado Comm Opp., Exh. 3 at 257, Exh. 8 at 10, 12; AT&T Mot., Attachment 9 (P.U.C.O. Tariff No. 1, Section 5.1.2 (Definitions of transfer options)). Depending on where the 911 caller is or what emergency resources may be needed or available, the PSAP or first responder with which the original PSAP may need to communicate and bridge may change. For example, in the Raleigh-Durham-Cary Combined Statistical Area, there are numerous emergency responders in a relatively concentrated area, meaning that multiple PSAPs are "local" to each PSAP. Thus, AT&T's starting premise is irretrievably flawed.

Even if, however, AT&T's factual premise were supportable, its argument still fails. As discussed in Intrado Comm's Opposition and above, the fact that a subscriber at any point in time is limited to a single route and point of communication does not in and of itself defeat a finding of intercommunication. Intrado Comm Opp. at 16-17; *Advanced Services Order* at ¶¶ 24-25 (fixed route of connection to a fixed third party and point satisfied the intercommunication prong).

## II. TELEPHONE EXCHANGE SERVICE UNDER SUBSECTION (B)

Unlike Subsection (A), Subsection (B) does require origination. AT&T spends much time and energy – but invokes little law or precedent – arguing that the NCUC erred by finding Intrado Comm’s service satisfies § 153(47)(B). AT&T Opp. at 5-12.

### A. NCUC Discretion

#### 1. *Agreement with the Ohio PUC*

AT&T objects to the NCUC’s agreement with the rationale and conclusions of the Public Utility Commission of Ohio (“Ohio PUC”) regarding origination, claiming that its reliance on the Ohio PUC decision was error and the NCUC’s “adoption” of it was arbitrary and capricious. AT&T Opp. at 5, 11-12. AT&T is confusing the concepts of agreement and adoption. State utility commissions and courts are undeniably permitted to, and often do, consider the prior decisions of other jurisdictions on similar or identical issues in their evaluation of cases. As both the NCUC Orders and Intrado Comm’s Opposition make clear, the NCUC independently examined the Ohio decision (among other decisions) and chose to agree with its rationale, explaining why in the process. Intrado Comm Opp. at 11-12; *RAO* at 11-14.<sup>6</sup> The fact that AT&T may wish the NCUC had not agreed with the Ohio PUC does not make the agency’s agreement impermissible, and AT&T points to nothing leading to a different conclusion. There is no basis to conclude, as AT&T argues, that the NCUC treated the Ohio decision as binding precedent.

#### 2. *Assessment of the Facts*

AT&T selectively relies on descriptions in Intrado Comm’s Ohio and Florida tariffs and North Carolina testimony to argue that Intrado Comm’s “hookflash” capability does not involve

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<sup>6</sup> Recommended Arbitration Order dated April 24, 2009, *In the Matter of Petition of Intrado Communications, Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, with BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina*, Docket No. P-1187, SUB 2 (“RAO”). Exh. 2 to Intrado Comm’s Motion for Summary Judgment [Dkt. Nos. 31, 32].

origination. AT&T Opp. at 5-12. The weight accorded such evidence, however, falls squarely within the NCUC's discretion and should not be overturned by this Court absent clear error – something which AT&T has not demonstrated.

The NCUC determined the weight to be given and the relevance of the testimony and Intrado Comm's Ohio and Florida tariffs, as well as AT&T's own 911 tariff. *RAO* at 10-14. These types of issues involving the weighing of evidence, evaluation of credibility and assessment of facts are within the particular purview of the NCUC and should not be disturbed on appeal, even if this Court might have come to a different factual conclusion. *See AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 733 (4th Cir. 2009).

### **B Origination**

Intrado Comm's earlier briefs fully explained that the NCUC correctly found that Intrado Comm will sufficiently support origination functions to satisfy Subsection (B). Intrado Comm's Motion at 12-15; Intrado Comm Opp. at 20-23.<sup>7</sup> AT&T's persistent reliance on the Intrado Comm Ohio and Florida tariffs, AT&T Opp. at 5-12, to argue Intrado Comm's service will not originate traffic is misplaced. Intrado Comm Opp. at 8-11, 21-23. But, even assuming *arguendo* that the Ohio and Florida tariffs should be given more weight, its argument still fails. While AT&T asserts the functions described in the tariffs are limited to adding another party to an existing call and that the PSAP has no discretion or role in choosing the secondary location, AT&T Opp. at 6-7, that is not what the tariffs state.

Both the Florida and the Ohio tariffs are broader than AT&T allows and describe multiple ways in which the 911 calls may be "transferred." The "fixed transfer" feature "enables a PSAP call taker to transfer a 9-1-1 call to a secondary destination (*possibly another PSAP*) by dialing a pre-assigned speed dial code or by use of a single button on an approved customer

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<sup>7</sup> Were origination necessary to satisfy Subsection(A) – which it is not – the capabilities of Intrado Comm's service would satisfy that requirement as well.

telephone system which dials the appropriate code.”<sup>8</sup> AT&T Mot., Attachment 9, P.U.C.O. Tariff No. 1, Section 5.1.2 (emphasis added) & Attachment 8, Florida Tariff, Section 5.1.2 (emphasis added). The tariffs define a “selective call transfer” as “a feature enabling a PSAP call taker to transfer an incoming 9-1-1 call to another agency by dialing a pre-assigned speed dial code associated with police, fire or medical agencies or by use of a single button on an approved customer telephone system which dials the appropriate code. The specific transfer destination is determined by the caller’s originating location as specified by the ESN.” *Id.* Tellingly, the tariffs go on to describe a “manual transfer” as when a “PSAP call taker may transfer an incoming call manually by depressing the hook switch of the associated telephone or the ‘add’ button on an approved customer telephone system, and dialing either an appropriate seven or 10—digit telephone number.” *Id.*

Consequently, the PSAP does not have the mindless role that AT&T claims where all final connections are pre-determined. Depending on the nature of the call and the location of the incident being reported, the PSAP may actively choose whether to originate a call to a secondary location, and which location that will be, which may or may not be another PSAP. *Id.* For example, the transfer may be to police dispatch if a crime is in progress, to fire dispatch if fire first responders are required, or to Medical/EMS dispatchers if medical first responders are warranted. AT&T misunderstands the term “Fixed” in these tariffs. The only thing that is “fixed” is the location assigned to each button. At bottom, the PSAP is originating a call to another emergency services provider by dialing that provider in one of a number of different ways and choosing either to transfer the call completely or add a second location onto the line. Therefore, even were the Florida and Ohio tariffs to be given more weight, Intrado Comm’s

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<sup>8</sup> In other words, the “secondary destination” is chosen at the discretion of the 911 call taker, who has multiple buttons to select from to originate the call to the other entity. The number called from using any single button is “fixed,” but not the choice of destinations of the second call.

services include origination. The NCUC did not err in finding Intrado Comm's service met the requirements of Subsection (B).

### CONCLUSION

For the foregoing reasons and for those stated in Defendant Intrado Communications Inc.'s Motion for Summary Judgment and Defendant Intrado Communications Inc.'s Opposition to AT&T North Carolina's Motion for Summary Judgment, Intrado Comm's services constitute "telephone exchange service." Therefore, the Court should deny AT&T North Carolina's Motion for Summary Judgment, grant the motions of Intrado Communications Inc. and the NCUC, and affirm the decision of the NCUC.

### **INTRADO COMMUNICATIONS INC.**

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Edward S. Finley, Jr., <i>et al.</i> ,	)
	)
Defendants.	)

**CERTIFICATE OF SERVICE**

I hereby certify that on June 28, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record: Eric H. Cottrell, attorney for Plaintiff, and Margaret Force, attorney for Defendant North Carolina Utilities Commission.

Respectfully submitted,

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