

ATTACHMENT C

**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'
REPLY TO AT&T'S RESPONSE
TO DEFENDANTS' MOTIONS
FOR SUMMARY JUDGMENT
(Fed. R.Civ.P. 56(c)(1)(c);
Local Rules 7.1(f)(1); Scheduling
Order (Doc. 26)

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES ii

ARGUMENT 2

 I. FACTUAL QUESTIONS ARE REVIEWED UNDER THE
 SUBSTANTIAL EVIDENCE TEST 2

 II. INTRADO’S SERVICES MEET BOTH OF THE ALTERNATE
 DEFINITIONS OF “TELEPHONE EXCHANGE SERVICES”
 IN 47 U.S.C. 21 153(47)(A) AND (B), BUT ONLY NEED
 TO MEET ONE OR THE OTHER 2

 III. AT&T’S ARGUMENTS GIVE AN INCOMPLETE SUMMARY
 OF THE NCUC’S ANALYSIS OF “INTERCOMMUNICATION”
 AND AN INACCURATE CHARACTERIZATION OF WHAT
 THE FCC HAS FOUND THE TERM MEANS 4

 IV. AT&T’S ARGUMENTS ABOUT THE CALL ORIGINATION
 REQUIREMENT DO NOT ACCURATELY STATE WHAT IS
 REQUIRED 6

CONCLUSION 9

CERTIFICATE OF SERVICE

TABLE OF CASES AND AUTHORITIES

FEDERAL CASES

GTE South, Inc. V. Morrison, 199 F.3d 733 (4th Cir. 1999) 2

North Carolina Utility Commission v. FCC, 552 F.2d 1036
(4th Cir. 1976), *cert. denied*, 434 U.S. 874(1977) 7

STATUTES

47 U.S.C. § 153(16) 8

47 U.S.C. § 153(47) 2,3

47 U.S.C. 21 153(47)(B) 7

47 U.S.C. § 153(48) 8

ADMINISTRATIVE REPORTS

*In the Matter of Deployment of Wireline Services Offering
Advanced Telecommunications Capability*, 15 F.C.C.R. 385
(1999) 3, 5-8

*Provision of Directory Listing Information under the Telecommunications
Act of 1934, As Amended*, 16 F.C.C.R. 2736 (2001) 4, 7

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Edward S. Finley, Jr., Chairman,)	(Fed. R.Civ.P. 56(c)(1)(c);
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William T. Culpepper, III, Commissioner,)	Order (Doc. 26)
in their official capacities and not as individuals,)	
)	
and)	
)	
Intrado Communications, Inc.,)	
)	
Defendants.)	

Now come Defendants Edward S. Finley, Jr., Lorinzo L. Joyner, and William Culpepper, III, named in their official capacities as Commissioners of the North Carolina Utilities Commission, (“the Commissioners” of the “NCUC”), and file the following reply to the response to the motion for summary judgment of plaintiff BellSouth Telecommunications, Inc., d/b/a AT&T North Carolina, (“AT&T”). Commissioners request that the Court deny AT&T’s motion for summary judgment and grant the motion of Defendant Commissioners so affirming the NCUC orders challenged in this action.

ARGUMENT

Defendant Commissioners refer the Court to their arguments in the Memorandum of Law filed 26 April 2010 and the Response filed 28 May 2010 and address only four points in this Reply. First, AT&T has misstated the standard of review that applies for factual matters. Second, AT&T has mixed up the components of the alternate statutory definitions of “telephone exchange service” under subsections (A) and (B) of 47 U.S.C. § 153(47). Third, AT&T has made inaccurate characterizations about the meaning of “intercommunication.” Fourth, AT&T has made inaccurate characterizations about the significance of “call origination” in the statutory definitions.

I. FACTUAL QUESTIONS ARE REVIEWED UNDER THE SUBSTANTIAL EVIDENCE TEST.

AT&T argues that the NCUC’s determinations may be reversed if they are “arbitrary and capricious.” The proper standard of review as to a state commission’s findings of fact is the substantial evidence test. *GTE South, Inc. V. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999). If a decision has substantial support in the record as a whole it must be supported even if the court might have decided differently as an original matter. *Id.* The Fourth Circuit has found that there is not a meaningful difference in the arbitrary and capricious standard as applied to facts; nonetheless, of the two, the proper standard is substantial evidence. 199 F.3d at 745 n. 5.

II. INTRADO’S SERVICES MEET BOTH OF THE ALTERNATE DEFINITIONS OF “TELEPHONE EXCHANGE SERVICES” IN 47 U.S.C. 21 153(47)(A) AND (B), BUT ONLY NEED TO MEET ONE OR THE OTHER.

Subsections (A) and (B) of 47 U.S.C. § 153(47) set forth *alternate* definitions of “telephone exchange service,” and while the NCUC found that *both* subsections are met by the

services that Intrado Communications, Inc. (“Intrado”) plans to offer,¹ only one of the two subsections must be met. *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 F.C.C.R. 385, 392-93 (1999)(“*Advanced Capability Order*”)(“The 1996 Act provides two alternative definitions for the term “telephone exchange service.”). AT&T’s discussion scrambles the requirements of subsections (A) and (B) together and incorrectly claims that an “origination” requirement applies to both subsections although the reference to “originate” only appears in subsection (B). *See* 47 U.S.C. § 153(47). *See* Part IV for more discussion about problems with AT&T’s arguments about call origination.

The three components of the definition of “telephone exchange service” in subsection (A) are: (1) that it furnishes intercommunicating service (see discussion below and in Doc. 39 pp 11-12; Doc. 30 pp. 14-16), (2) in the same or connected exchanges (see discussion in Doc. 39 pp. 13-14; Doc. 30 pp. 16-17), and (3) is covered by the exchange service charge, (see discussion in Doc. 39 pp. 13-14; Doc. 30 p 17).²

The components of the definition of “telephone exchange service” in subsection (B) are (1) that it is a comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) (see discussion in Doc. 39 pp. 14-15; Doc. 30 pp. 14-15); (2) it originates and terminates a telecommunications service (see discussion

¹ Intrado plans to provide 911/E911 services that are designed for subscribers that are Public Safety Answering Points (“PSAPs” or “911 Answering Points”), i.e., agencies responsible for answering 911 emergency calls.

² Cites to “Doc. __ p. __” refer to the document and page numbers assigned by this Court at the bottom of each page when documents are electronically filed.

below and in Doc. 39 pp. 7-11; Doc. 30 p 18), and (3) it provides subscribers the ability to intercommunicate (see references in subsection (A)(1)).

III. AT&T'S ARGUMENTS GIVE AN INCOMPLETE SUMMARY OF THE NCUC'S ANALYSIS OF "INTERCOMMUNICATION" AND AN INACCURATE CHARACTERIZATION OF WHAT THE FCC HAS FOUND THE TERM MEANS.

AT&T's arguments provide an incomplete summary of the NCUC's analysis of the meaning of "intercommunication" and provide an inaccurate characterization of the FCC's analysis of the term. First, AT&T argues incorrectly that the NCUC relied on a dictionary definition of "intercommunication" that ignores the FCC's interpretation. The NCUC noted unhappiness with the FCC statement that used the word "intercommunicating" to define intercommunication, and provided a dictionary definition of intercommunication, but that is not all that the NCUC discussed in its analysis. (Doc. 25-62 pp 11-13) The NCUC summarized the positions advocated by AT&T and Intrado, referenced decisions in other states, described the FCC's discussion of intercommunication in the context of call-completion services offered by directory assistance providers, discussed federal policies promoting access to 911 databases and interconnection to 911 facilities, and cited with approval the reasoning adopted by the Ohio Public Utilities Commission. (Doc. 25-62 pp 11-13)

The NCUC conclusion that Intrado's services furnish an intercommunicating service is consistent with FCC statements about what intercommunication means. The FCC has used the term "intercommunication" interchangeably with "two-way communication." *Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended*, 16 F.C.C.R. 2736, 2746 n. 59 (2001) ("*Directory Listing Order*") ("Manifestly, the phrase

telephone exchange service is intended primarily to apply to a telephone or comparable service involving ‘intercommunication,’ i.e., a two-way communication”) (internal citation omitted); *Advanced Capability Order*, 15 F.C.C.R. at 396 n. 59. The FCC distinguishes intercommunication and one-way communication from “the one way transmission of signals which takes place with respect to CATV channel service.” *Advanced Capability Order*, 15 F.C.C.R. at 396 n. 59.

The FCC indicates that a “service satisfies the ‘intercommunication’ requirement ... as long as it provides customers with the capability of intercommunicating with other subscribers.” *Id.* at 396. Intrado’s services satisfy the ‘intercommunication’, i.e., the two-way communication, requirement because they provide the capability for subscribing 911 Answering Points to communicate back and forth with 911 callers and to communicate back and forth with other 911 Answering Points.

The FCC has also referred to “intercommunication” as a service that “permits a community of interconnected customers to make calls to one another over a switched network.” *Advanced Capability Order*, 15 F.C.C.R. at 396. Contrary to AT&T’s argument, however, this statement does not constitute a mandate that subscribers must be able to “make” calls to “all subscribers” on the network. The FCC did not indicate the intention to limit telephone exchange service only to services that are used for placing rather than receiving two-way communications. *Id.* Indeed, elsewhere in the same Order, the FCC described DSL as a telephone exchange service “when [it is] used to permit communications among subscribers within an exchange or within a connected system of exchanges.” 15 F.C.C.R. at 394. To enable communications, and not

enabling the *making* of calls, is the focus of the FCC's analysis. In any event, even applying the statement used by AT&T in this case, the interconnection of Intrado's services *will* permit customers in the local community to make emergency calls to 911 Answering Points over the switched network. Further, Intrado's services will also permit 911 Answering Points to connect with other 911 Answering Points or public agencies in order to conference in or transfer such emergency calls. Thus, a community of callers will be able to converse and communicate - to interact back and forth with 911 Answering Points in two way communication.

IV AT&T'S ARGUMENTS ABOUT THE CALL ORIGINATION REQUIREMENT DO NOT ACCURATELY STATE WHAT IS REQUIRED.

AT&T's arguments about call origination are also flawed. First, AT&T claims incorrectly that "call origination" is a requirement that is implicit in subsection (A) and explicit in subsection (B). (Doc. 28 p 9) With regard to whether there is an implicit requirement in (A), AT&T claims that the "intercommunication" requirement includes a call-origination component, citing ¶ 30 of the *Advanced Services Order*. However, that paragraph concludes that "intercommunication" is a requirement of subsection (B), not that "call origination" is a requirement of subsection (A). 15 F.C.C.R. at 399.

As to subsection (B), AT&T's argument that there is an explicit "call origination" requirement which is not met is problematic for a number of reasons. First, subscribers to Intrado's services will be capable of originating calls as needed for their specialized purposes. See discussion in Doc. 39 pp 8-90.

Second, although AT&T focuses on "call origination," the statute refers to "originate and terminate" together and in conjunction with other words, i.e., "telephone exchange service"

means ... comparable service provided through a system of ... facilities ... by which a subscriber can *originate and terminate* a telecommunications service.” 47 U.S.C. § 153(47)(B). The FCC has found that the definition in subsection (B) is met in the case of a call completion service offered by directory assistance providers because “[e]ngaging in call completion allows a local caller *to connect* to another local telephone subscriber and, in that process, through a system of either owned or resold switches, enables the caller to *originate and terminate* a call.” 16 F.C.C.R. 2746 ¶ 20 (emphasis added). The emphasis is thus on the local connection, not on the qualification based on separate requirements for origination and termination. *Id.* Indeed, there is no indication that call completion service may be used by its subscribers to receive calls (i.e., for termination), underscoring the problem with AT&T’s suggestion that separate origination and termination requirements apply. For more discussion, see Doc. 39 pp 8-10.

Furthermore, the statutory reference to “originate” in subsection (B) must be considered in context. Historically, “telephone exchange service” has referred to *local* service. *See North Carolina Util. Comm’n v. FCC*, 552 F.2d 1036, 1045 (4th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977)(“The term “telephone exchange service” is a statutory term of art, and means service within a discrete local exchange system.”) Subsection (B) of section 153(47) was added as an alternate definition of “telephone exchange service” with passage of the 1996 Act. 16 F.C.C.R. at 2746 ¶ 21. It also relates to the “local” nature of a service by requiring that a “telephone exchange service” be provided through a system of switches, transmission equipment or other facilities “by which a subscriber can *originate and terminate* a telecommunications service” *Id.* Service that both originates *and* terminates *within* a telephone exchange (or a connected system

of telephone exchanges) is classified as a “telephone exchange service,” whereas a service that provides *access* to telephone exchange service or facilities for the purpose of originating *or* terminating communications that travel *outside* the exchange is defined as “telephone access.” 47 U.S.C. § 153(16); *see* 15 F.C.C.R. at 391 ¶ 15. Telephone service that is *between* stations in *different* exchange areas is defined as “telephone toll service.” 47 U.S.C. § 153(48). Thus, read in context, the reference to the ability to originate and terminate a call in an exchange relates to the local nature of the service.

Another problem with AT&T’s call origination argument is that it ascribes a narrow meaning to “origination” that excludes consideration of the capability to transfer or add callers using Intrado’s service simply because that is not a traditional means of “originating” a call. The FCC has not limited “telephone exchange service” to traditional telephone services or technologies. *See* 15 F.C.C.R. at 394-95 ¶¶ 20-21. Contrary to the inference in AT&T’s argument, Intrado’s service is not merely an intermediate point between carriers. The FCC has traditionally rejected attempts to “divide communications at any intermediate points of switching or exchanges between carriers” when it defines the nature of communications and whether they are “telephone exchange service” or “exchange access.” *See* 15 F.C.C.R. at 391-92 ¶ 16. However, Intrado’s service furnishes the connection between 911 callers and 911 Answering Points, allowing those parties to converse, *and* adds the ability of Intrado’s subscriber to connect with a third party 911 Answering Point or state agency so that all three may converse or for transfer of the call. Those circumstances are distinguishable from the treatment of a simple switching point or exchange at an intermediate point between carriers.

AT&T's argument is also problematic in its description of Intrado's services based on tariffs filed in Ohio and Florida. The NCUC found that Intrado's services are sufficient for purposes of meeting the origination and termination requirement based on the ability of callers to communicate with 911 Answering Points and the capability of 911 Answering Points to connect to other 911 Answering Points. (Doc. 25-62 pp 9, 13) AT&T attempts to add factual claims for this Court's consideration about Intrado's services that are not well supported. For example, AT&T claims that a transfer by an Intrado subscriber "can only be made to a specific, pre-assigned point, *i.e.*, another [911 Answer Point], automatically determined by the 911 caller's originating location, not by the Intrado-served [911 Answering Point]," and provides details and cites references to tariff provisions in a footnote. (Doc. 38 p 6 n 11) However, the referenced language from Florida and Ohio tariffs does not indicate that the transfer capability is as limited as AT&T claims. Indeed, the tariff references that AT&T relies upon indicate that Intrado's subscribers are capable of manually dialing appropriate seven or 10-digit numbers in order to transfer calls. *See* Doc. 28-11 p 48, Doc. 28-12 p 46, and Doc. 28-13 p 46. AT&T's assertions based on the tariffs used in other states are not helpful. Moreover, the assertions are not necessary or material to this Court's determination of the consistency of the NCUC's orders with federal law.

CONCLUSION

In sum, AT&T's arguments do not establish that the NCUC orders conflict with federal requirements and, for the foregoing reasons and reasons argued in the Commissioners' 26 April

2010 Memorandum of Law and 28 May 2010 Response, the Commissioners request that this Court deny the Plaintiff's motion for summary judgment.

Respectfully submitted, this 28th day of June, 2010.

ROY COOPER
Attorney General

s/Margaret A. Force
Assistant Attorney General
P.O. Box 629
Raleigh, NC 27602
Pforce@ncdoj.gov
(919) 716-6053
Fax (919) 716-6050
State Bar No. 15861

Attorney for the Defendants
Commissioners Edward S. Finley, Jr., Lorinzo L. Joyner,
and William T. Culpepper, III

CERTIFICATE OF SERVICE

I hereby certify that on 28 June 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 Barbara A. Miller, Charles E. Coble, Craig W. Donaldson, and Marcus William Trathen, attorneys for Defendant Intrado Communications Inc.

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

ROY COOPER
Attorney General

s/Margaret A. Force
Assistant Attorney General
P.O. Box 629
Raleigh, NC 27602
Pforce@ncdoj.gov
(919) 716-6053
Fax (919) 716-6050
State Bar No. 15861

Attorney for Defendants Commissioners Edward S. Finley,
Jr., Lorinzo L. Joyner, and William T. Culpepper, III