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Subject: 070736-TP AT&T Florida's Response In Opposition to Intrado's Motion for Reconsideration and Request for Oral Argument

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B. Docket No. 070736-TP In Re: Petition by Intrado Communications, Inc. for arbitration of certain rates, terms and conditions for interconnection and related arrangements with BellSouth Telecommunications, Inc. d/b/a AT&T Florida, pursuant to Section 252(b) of the Communications Act of 1934, as amended, and Sections 120.80(13), 120.57(1), 364.15, 364.16, 364.161, and 364.162, F.S., and Rule 28-106.201, F.A.C.

C. BellSouth Telecommunications, Inc. d/b/a AT&T Florida on behalf of John Tyler

D. 10 pages total (includes pleading and certificate of service)

E. BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Response in Opposition to Intrado's Motion for Reconsideration and Request for Oral Argument

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Intrado Communications, Inc. For arbitration of certain rates, terms, and Conditions for interconnection and related Arrangements with BellSouth Telecommunications, Inc. d/b/a AT&T Florida, Pursuant to Section 252(b) of the Communications Act of 1934, as amended, and Sections 120.80(13), 120.57(1), 364.15, 364.16, 364.161, and 364.162, F.S., and Rule 28-106.201, F.A.C.	Docket No: 070736-TP Filed: December 24, 2008

AT&T FLORIDA'S RESPONSE IN OPPOSITION TO INTRADO'S MOTION FOR RECONSIDERATION AND REQUEST FOR ORAL ARGUMENT

BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T") files this Response in Opposition to the Motion for Reconsideration and Request for Oral Argument ("Motion") filed by Intrado Communications, Inc. ("Intrado") on December 18, 2008. For the reasons discussed below, the Florida Public Service Commission ("Commission") should deny Intrado's Motion.

INTRODUCTION AND ARGUMENT

In its Motion, Intrado makes spurious claims that "the Commission has overlooked, misunderstood, and inaccurately interpreted the governing federal law and relevant facts on the threshold legal issue[;]" that the Commission "has a wooden, incorrect understanding of section 153(47)[;]" that the Commission "created an arcane definitional barrier that prevented it from coming to grips with the reality of what needs to be done[;]" and that "one new and important fact has emerged since the Commission's decision." (Motion at 3, 4, 5). However, Intrado does not provide satisfactory support for its claims of the Commission's inadequacy. There is none. Likewise, Intrado's claim that the Commission did not consider Intrado's request that it exercise jurisdiction over the matter pursuant to Florida Statute sections 364.16, 364.161, and 364.162, is

equally unsubstantiated. Id. at 3. Furthermore, even if the "new fact" that Intrado seeks to call to the Commission's attention had any relevance to the Commission's Order—which it does not—it constitutes a new argument which, as a matter of law, cannot be properly considered within a motion for reconsideration.

In fact, absent the invectives, Intrado's Motion amounts to little more than a regurgitation of the arguments it made previously in its various filings and at hearing in this Docket—arguments that the Commission considered and rejected in reaching its well-founded decision. Moreover, the "new fact" upon which Intrado mistakenly relies in insisting that the Commission execute an abrupt about face (that Intrado has purportedly "entered into three contracts with public safety answering point customers to provide 911/E911 services in Florida")[1] is completely inconsequential. If true, the fact that Intrado has entered into such contracts has absolutely no bearing on the Commission's dispositive finding that the service Intrado seeks to provide does not meet the definition of "telephone exchange service," that AT&T Florida is not required to provide interconnection pursuant to §251(c); and that Intrado can offer its services by obtaining what it claims to need from AT&T via a commercial agreement or tariffs.[2] (Order No. PSC-08-0798-FOF-TP). Additionally, Intrado's attempt to raise this insignificant new argument, within a motion for reconsideration, is improper as a matter of law.

Finally, Intrado's Request for Oral Argument is misplaced. As is demonstrated herein, the Commission can readily dispose of Intrado's Motion without the expenditure of time and

[1] Motion at 5.

[2] Intrado has not shown that the referenced contracts are new facts that could not have been identified and placed in the record in the proceeding. Even assuming *arguendo* that the contracts are new facts, Intrado has failed to file any motion to supplement the record in the instant proceeding. Moreover, the existence of contracts for Intrado to provide E911 services in Florida belies Intrado's assertion that it cannot provide such services without an interconnection agreement with AT&T.

resources on an unwarranted oral argument before the Commission. Consequently, as is further explained below, the Commission should deny Intrado's Motion and Request for Oral Argument.

I. INTRADO'S MOTION FAILS TO MEET THE STANDARD FOR RECONSIDERATION.

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering an order. See Diamond Cab Co. v. King, 146 So. 2d 889, 891 (Fla. 1962). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. See Sherwood v. State, 111 So. 2d 96, 97 (Fla. 3rd DCA 1959) (citing State ex. Rel. Jayatex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958)). Reconsideration is clearly not appropriate when, as here, the movant "only seeks a second hearing on the same contentions" and alleged errors "were major issues which were fully argued before the Commission..." Sentinel Star Express Company v. Florida Public Service Commission, 322 So2d 503, 505 (Fla. 1975). Moreover, a motion for reconsideration is not intended to be "a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment or the order." Diamond Cab Co., 394 So.2d at 891. Indeed, a motion for reconsideration "should not be granted based upon an arbitrary feeling that a mistake may have been made, but should be based on specific factual matters set forth in the record and susceptible to review." Steward Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315, 317 (Fla. 1974).

Further, it is well settled that it is inappropriate to raise new arguments in a motion for reconsideration. In re: Establish Nondiscriminatory Rates, Terms, and Conditions, Docket No. 950984-TP, Order No. PSC 96-1024-FOF-TP, Aug. 7, 1996, 1996 WL 470534 at *3 ("It is not appropriate, on reconsideration, to raise new arguments not mentioned earlier."); In re: Southern States Utilities, Inc., Docket No. 950495-WS, Order No. PSC-96-0347-FOF-WS, Mar. 11, 1996,

1996 WL 116438 at *3 ("Reconsideration is not an opportunity to raise new arguments."). Because Intrado fails to meet any of the legal requirements for granting reconsideration, the Commission should deny Intrado's Motion.

II. THE COMMISSION CONSIDERED AND REJECTED INTRADO'S ARGUMENTS.[3]

Intrado raises identical or analogous arguments on several different occasions in the Motion. For instance, Intrado essentially asserts the same grounds and cites to the same authority for the following arguments: (1) the Commission erred in concluding that Intrado's service is not a telephone exchange service under section 153(47) (Motion at 6-17); (2) Intrado must have a section 251(c) interconnection agreement--as apposed to a commercial agreement--to provide its service (Motion at 18-22). However, it is patently clear from the record and the four corners of the Commission's Order that the Commission did not fail to consider each of these arguments. The Commission did consider Intrado's arguments and rejected them.

In its Post-Hearing Brief, Intrado argued at length that it is entitled to section 251(c) interconnection, because, Intrado claims, it is offering telephone exchange service, exchange access, and telecommunications services. (See, Intrado Post-Hearing Brief ("Brief") at 18, 19, et. seq.). The flawed analysis that Intrado offered in its Brief is the same flawed analysis that it

[3] Intrado's purported "new fact" that "Intrado Comm has entered into three contracts with public safety answering point customers to provide 911/E911 services in Florida" is of no consequence. (Motion at 5). That "fact" is wholly irrelevant and has no bearing on the Commission's legally sound finding that the service Intrado seeks to provide does not meet the definition of "telephone exchange service," that AT&T Florida is not required to provide interconnection pursuant to §251(c) in a §252 interconnection agreement; and that Intrado can offer its services by obtaining what it claims to need from AT&T via a commercial agreement or tariffs. (Order No. PSC-08-0798-FOF-TP at 7, 9, 10). Furthermore, Intrado's attempt to raise a "new fact" is nothing short of an entirely improper attempt to raise a new argument—that whether Intrado has a contract with a PSAP or not is dispositive of its standing to obtain §251(c) interconnection. It is well-settled that "[i]t is not appropriate, on reconsideration, to raise new arguments not mentioned earlier." In re: Establish Nondiscriminatory Rates, Terms, and Conditions, Docket No. 950984-TP, Order No. PSC 96-1024-FOF-TP, Aug. 7, 1996, 1996 WL 470534 at *3; In re: Southern States Utilities, Inc., Docket No. 950495-WS, Order No. PSC-96-0347-FOF-WS, Mar. 11, 1996, 1996 WL 116438 at *3 ("Reconsideration is not an opportunity to raise new arguments.").

regurgitates at length in its Motion. (See, Motion at 18, 21, et. seq.) (simply reasserting ad nauseam the previously rejected claim that Intrado's service is telephone exchange service). There is certainly nothing eye-opening within Intrado's restatement. There is no point of fact or law which the Commission overlooked to be found.

Likewise, Intrado's recitation of testimony from the record regarding the issue of whether Intrado can provide its services by entering into a commercial agreement or through AT&T's tariffs, belies Intrado's claim that the Commission failed to consider all relevant points of fact and law in reaching its decision. Specifically, after correctly stating that the Commission considered evidence placed in the record, including the testimony of Intrado's witness, Mr. Hicks, Intrado complains that the Commission wrongly decided the issue. (Motion at 18-22).

However, far from citing to some relevant point of fact or law that the Commission missed, Intrado simply underscores the fact that Mr. Hicks stated that he agreed that Intrado could have requested everything it requested in the arbitration through a commercial agreement, but he *doubts* it would be delivered. (Motion at 22) (citing Tr. at 183). The Commission was not bound to find Mr. Hicks' doubt persuasive or dispositive of the issue of whether Intrado could offer its service without §251(c) interconnection with AT&T. Certainly Intrado offers no proof, because there is none, that the Commission failed to afford Mr. Hicks' testimony whatever weight the Commission deemed appropriate in reaching the decision that Intrado "has the ability to offer the services it wants without a §251(c) interconnection agreement through the use of a commercial agreement or AT&T's tariffs." (Order No. PSC-08-0798-FOF-TP at 7).

Astonishingly, Intrado suggests that the Commission did not consider relevant facts and law on what Intrado of course agrees is "the threshold legal issue." (Motion at 3) ("...the Commission has overlooked, misunderstood, and inaccurately interpreted the governing federal

law and relevant facts on *the* threshold legal issue....") Id. (Emphasis added). However, rather than direct the Commission to a bona fide relevant point of fact or law that the Commission erroneously failed to consider, Intrado merely reargues its position—a position the Commission considered and properly rejected. Clearly the issues that Intrado raises in its Motion "were major issues which were fully argued before the Commission" and Intrado's attempt to bite at the apple a second time should be rejected.[4] Intrado's re-argument is entirely inappropriate--it does not form the proper basis for a motion for reconsideration and therefore Intrado's Motion should be denied.

III. INTRADO'S ARGUMENT THAT THE COMMISSION FAILED TO CONSIDER EXERCISING JURISDICTION UNDER STATE LAW IS UNSUBSTANTIATED AND INCONSEQUENTIAL.

Intrado claims that "the Commission has failed to consider [its] separate request that the Commission exercise its exclusive jurisdiction to arbitrate this matter under sections 354.16, 364.161, and 364.162, Florida Statutes." (Motion at 3). However, this argument is a red herring. Intrado does not, and cannot point to anything in the record demonstrating that the Commission failed to consider this request. On the contrary, it is unimaginable that the Commission did not realize and consider this request given the fact that Intrado styled its very pleading as a request for arbitration: "Pursuant to Section 252(b) of the Communications Act of 1934, as amended, *and Section 364.162, Florida Statutes*, to Establish an Interconnection Agreement with BellSouth Telecommunications, Inc. d/b/a AT&T Florida." (Emphasis added). Because the Order does not expressly mention resolution of this issue does not mean that the Commission failed to consider the matter.

[4] See, Sentinel Star Express Company v. Florida Public Service Commission, 322 So2d 503, 505 (Fla. 1975). (Reconsideration is clearly not appropriate when, as here, the movant "only seeks a second hearing on the same contentions" and alleged errors "were major issues which were fully argued before the Commission...").

On the contrary, the Commission is not obligated to explicitly respond to every argument and fact raised by each party in a dispute. See, State ex. Rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1959):

> An opinion should never be prepared merely to refute the arguments advanced by the unsuccessful litigant. For this reason it frequently occurs that an opinion will discuss some phases of a case, but will not mention others. Counsel should not from this fact draw the conclusion that the matters not discussed were not considered.[5]

In the present instance, the logical conclusion is that the Commission considered and rejected Intrado's request. Certainly, Intrado's bare allegation alone does not demonstrate that the Commission failed to consider or overlooked any relevant point of fact or law. In short, Intrado offers nothing to contradict the Commission's Order. There is nothing within Intrado's Motion that approaches the standard for granting a motion for reconsideration.

IV. THE COMMISSION SHOULD DENY INTRADO'S REQUEST FOR ORAL ARGUMENT.

Parties are not entitled to oral argument before the Commission as a matter of right; oral argument is granted solely at the discretion of the Commission. (Rule 25-22.0022, Florida Administrative Code). The Commission properly grants requests for oral argument when the Commission decides that to do so will be instrumental in resolving complex matters pending before the Commission. No such situation exists in this instance.

The essence of Intrado's support for its request for oral argument rests on two unfounded points: 1) oral argument has not been heard previously on the points raised in its Motion, and 2) the page limit imposed on the parties' briefs did not allow for a full presentation of Intrado's arguments. AT&T submits that neither point is adequate support for Intrado's request for oral argument. It was incumbent on Intrado to raise and fully explain all of its arguments in its brief

[5] Id. at 819.

based on issues identified and the evidence of record. To the extent that Intrado believes that any oral argument is essential to the resolution of its issues, Intrado should have availed itself of the opportunity to make an oral presentation in an opening statement or closing statement, or both, at the hearing. Intrado made no such request. To the extent that the page limits on the briefs were insufficient to fully explain its arguments, it was again incumbent on Intrado to request an expansion of the page limit. Intrado made no such request. Intrado's request for oral argument is simply another inappropriate post-hearing attempt to bolster a record that Intrado had ample opportunity to develop during the hearing in this proceeding. Intrado's purported failure to fully present its arguments previously is not an appropriate basis for oral argument.

In deciding matters that can readily be resolved on the pleadings, the Commission routinely deliberates on the parties' pleadings and enters final orders without resorting to oral argument, and in so doing properly conserves resources. In the present instance, Intrado's Motion can readily be disposed of upon review and comparison of the parties' Post-Hearing Briefs, Intrados' Motion and AT&T's Reply in Opposition--without the need for oral argument. Therefore, for the foregoing reasons, Intrado's Request for Oral Argument should be denied. However, should the Commission decide that oral argument on any of the issues raised by Intrado is appropriate, AT&T request an opportunity to argue in response.

CONCLUSION

For the foregoing reasons, AT&T respectfully requests that the Commission deny Intrado's Motion for Reconsideration and Request for Oral Argument.

Respectfully submitted this 24th day of December, 2008.

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CERTIFICATE OF SERVICE
Docket No. 070736-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U.S. Mail this 24th day of December, 2008 to the following:

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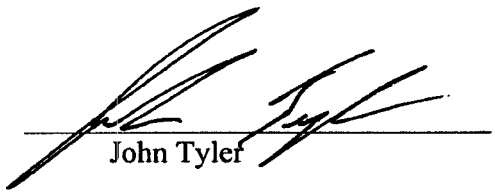

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