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 ORDER NO. PSC-09-0156-FOF-TP ISSUED: March 16, 2009

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

FINAL ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

I. Case Background

On December 21, 2007, Intrado Communications, Inc. (Intrado Comm) filed its Petition for Arbitration of certain rates, terms, and conditions for interconnection and related arrangements with BellSouth Telecommunications, Inc. d/b/a AT&T Florida (AT&T), pursuant to Section 252(b) of the Communications Act of 1934, as amended[1] (Act), and Section 364.162, Florida Statutes (F.S.). An evidentiary hearing was held July 10, 2008.

On December 3, 2008, the Florida Public Service Commission (Commission) issued its Final Order in this matter, Order No. PSC-08-0798-FOF-TP. On December 18, 2008, Intrado Comm filed a Motion for Reconsideration (Motion) and a Request for Oral Argument on the Motion for Reconsideration (Request). On December 24, 2008, AT&T filed its Response in Opposition to the Intrado Comm pleadings (Response).

We are vested with jurisdiction over these matters pursuant to the provisions of Chapters 364 and 120, Florida Statutes.

[1] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151, et seq. (1996)).

II. Analysis

A. Intrado Comm's Request for Oral Argument

Rule 25-22.0022(3), Florida Administrative Code (F.A.C.), states that granting or denying a request for oral argument is within the sole discretion of the Commission or the Prehearing Officer, whichever presides over the matter to be argued. The respective arguments are summarized below.

Intrado Comm believes the Commission "overlooked or misunderstood" various points of law and fact. Intrado Comm claims that we have not heard argument on the "threshold issue,[2]" nor have heard argument relating to its obligation to arbitrate the parties' disputes pursuant to state law. Although its brief contains some information on the "threshold issue," Intrado Comm states that the pre-imposed page limit for the brief hampered its ability to provide a full discourse on this critical legal issue. Intrado Comm seeks the opportunity to "enhance the Commission's understanding of the issues at hand."

AT&T asserts that parties are not entitled to oral argument as a right, and notes that Rule 25-22.0022, F.A.C., squarely addresses whether oral argument is granted or not. AT&T states

> 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.

AT&T claims that Intrado Comm is inappropriately attempting to bolster a post-hearing record, and had opportunities that it did not take advantage of to more fully explain the arguments it presents in its Request. In short, Intrado Comm had the same opportunity as AT&T did to develop its case during the hearing. AT&T believes Intrado Comm's failure in that regard "is not an appropriate basis for oral argument."

In pertinent part, Rule 25-22.0022(1), F.A.C., sets forth the rationale for granting a request for oral argument: The moving party should

> state with particularity why oral argument would aid the Commissioners . . . in understanding and evaluating the issues to be decided, and the amount of time requested for oral argument.

We are not swayed by the notion that additional argument "would aid the Commissioners" in considering the matters that were fleshed out in the hearing and the briefs, and memorialized in Order No. PSC-08-0798-FOF-TP. We agree with AT&T on this point.

Consequently, we hereby deny Intrado Comm's Request for Oral Argument.

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[2]The "threshold issue" considered whether Intrado Comm's service offering met the definition of 'telephone exchange service' as defined in 47 U.S.C. § 153(47), and if AT&T was required to provide interconnection pursuant to §§251(a) or 251(c).

B. Intrado Comm's Motion for Reconsideration

Intrado Comm asserts that this Commission

- entirely overlooks Intrado Comm's request for arbitration under Florida law;
- entirely overlooks half of the relevant definition from 47 U.S.C. § 153(47)(A);
- runs afoul of FCC precedent in interpreting 47 U.S.C. § 153(47)(B); and
- misunderstood the record evidence, which resulted in an "erroneous decision."

(Motion at 3-4) In addition, Intrado Comm claims new factual information has come to light that supports its Motion for Reconsideration.[3] Intrado Comm has entered into three contracts to provide 911/E-911 services in Florida. The Company states that it "cannot" provide service to these or any other customers in Florida without a section 251(c) interconnection agreement. Intrado Comm believes we erred in its conclusion that "the parties may negotiate a commercial agreement pursuant to §251(a)."

Arbitration pursuant to Florida Law

Intrado Comm believes we simply failed to consider state law in our Order. In doing so, it "missed the opportunity . . . to ensure that Florida citizens receive the benefits of a competitive 911/E911 services industry." The Company states that its original pleading (to request arbitration) was clear in that it sought relief pursuant to state and federal law. However, in rendering our decision, we relied upon portions of 47 U.S.C. § 153(47) that are not found in Florida law. In pertinent part, Section 364.161(1) states that "parties . . . may petition the commission to arbitrate the dispute *and the commission **shall** make a determination within 120 days*." Intrado Comm states a three-part litmus test must be met before either party can engage the arbitration procedures pursuant to Florida law:

- First, a Florida-certified local exchange company must have received a request to unbundle "all of its network features, functions, and capabilities, including access to signaling databases, systems and routing processes;"
- Second, the above-described request must have come from any other telecommunications provider; and
- Third, the parties must demonstrate that they have been unable to reach a resolution within 60 days.

Intrado Comm believes it has satisfied these requirements and that "Florida law [has] triggered the Commission's unmitigated duty to arbitrate the parties' disputes." In its Motion, Intrado

[3] In Order No. PSC-97-0637-FOF-TL, issued on June 3, 1997, in Docket No. 961153-TL, Intrado Comm asserts that we granted a similar motion based on "substantial pertinent information that was not in the record originally."

Comm states that in other cases, we have asserted its state-law authority over interconnection matters.

Consideration of 47 U.S.C. § 153(47)

Order No. PSC-08-0798-FOF-TP states that Intrado Comm is not entitled to arbitration under Section 251(c) of the Act since it will not be providing "local exchange service." Intrado Comm believes that when we considered the definition in 47 U.S.C. § 153(47), it only considered a portion of the full definition stated below:

> **SEC. 3. [47 U.S.C. 153] DEFINITIONS.**
> (47) TELEPHONE EXCHANGE SERVICE.--The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

Intrado Comm believes the word "or" means that it is only required to satisfy one of the "parts" from this definition. Intrado Comm contends that we "misconstrued section 153(47)(B) and altogether failed to consider the definition of telephone exchange service under section 153(47)(A)." Intrado Comm believes we erred and contends that it satisfies both parts of the definition.

Regarding section 153(47)(A), Intrado Comm believes its service provides subscribers the ability to intercommunicate, and our Order is silent on this matter. Intrado Comm contends that we restricted its analysis to the "B-part," wherein its Order stated that "Intrado Comm's service is incapable of originating calls and is therefore not a telephone exchange service." However, Intrado Comm argues that we failed to acknowledge that PSAP served by Intrado Comm could "hookflash" to obtain a dial tone in order to originate a bridged call to a third party – essentially connecting the originating caller to the 3rd party by using more modern technology than what other providers currently offer.

Intrado Comm notes that its service compares favorably with a scenario the FCC faced in 2001. In its *Provision of Directory Listing information under the Telecommunications Act of 1934, as Amended,* 16 FCC Rcd 2736 (DA Call Completion Order), the FCC examined the service directory assistance providers offered – specifically whether call completion services were providing a "telephone exchange service" pursuant to 47 U.S.C. § 153(47). Intrado Comm states:

> The FCC held that the call-completion service 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.' It was irrelevant that the originated call did not start with an ordinary telephone call.

> The same should be said of the fact that Intrado Comm does not originate calls in the form of an ordinary telephone call.

In addition, Intrado Comm argues that we failed to consider what the FCC's Advanced Services Order said regarding "telephone exchange service." Intrado Comm claims that we erred because it took such a narrow posture in considering 47 U.S.C. § 153(47), whereas the Advanced Services Order advocates a broader view. Intrado Comm states "nothing in 153(47)(B) supports the conclusion that the meaning of 'originate a call' was locked in and keyed to the ways in which older technologies have operated." Intrado Comm states that its product offering "bridges the gap between the inferior, antiquated telephone exchange services of the past and those of the future." Intrado Comm contends that the decision rendered in Order No. PSC-08-0798-FOF-TP hampers it in providing safe and accurate 911/E911 service to the citizens of Florida.

The Commission misunderstood evidence

Intrado Comm believes we erred in its understanding that a Commercial Agreement under §251(a) is a viable alternative for Intrado Comm. Intrado Comm claims its witness Hicks addressed this, and Intrado Comm's brief did as well. Intrado Comm believes it needs to negotiate pursuant to §251(c) in order to obtain interconnection with AT&T that is "at least equal in quality to that provided to itself, an affiliate, or [to] other carriers." According to Intrado Comm, testimony that explained this viewpoint was not adequately considered by us.

AT&T's Response in Opposition

According to AT&T, the information Intrado Comm presents in its Motion for Reconsideration is "little more than a regurgitation of the [prior] arguments . . .." AT&T states Intrado Comm raises identical or analogous arguments throughout its Motion. AT&T believes the claims Intrado Comm makes are "spurious" and "unsubstantiated." AT&T believes

- 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 . . . [argument];"
- Intrado Comm offers no proof that we failed to afford witness Hick's testimony the weight it deemed appropriate;
- the "new fact" that Intrado Comm presents has no relevance to Order No. PSC-08-0798-FOF-TP, and even if it did, it would constitute "new argument," which cannot be properly considered within a motion for reconsideration; and
- the "state law" argument is a red herring because Intrado Comm cannot point to anything demonstrating that we failed to consider this request.

AT&T states that the Diamond Cab Co. v. King[4] case is one we have examined before in considering the standard of review for this type of motion. Diamond Cab Co. v. King is the first of several cases that AT&T references in arguing that Intrado Comm fails to meet the standard for granting reconsideration:

- In Sherwood v. State, 111 So. 2d 96, 97 (Fla. 3rd DCA 1959)(citing State ex. Rel. Jaytex Realty Co v. Green, 105 So. 2d. 817 (Fla. 1st DCA 1958), the courts found that it is not appropriate to reargue matters that have already been considered;

- Sentinel Star Express Company v. Florida Public Service Commission, 322 So. 2d 503, 505 (Fla. 1975), states that reconsideration is not appropriate when the moving party "only seeks a second hearing on the same contentions" and alleged errors "were major issues which were fully argued before the Commission . . .;"

- Diamond Cab Co., 394 So. 2d at 891 adds that 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;" and

- the Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974) case states that a motion for reconsideration "should not be granted upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review."

AT&T believes we should deny Intrado Comm's Motion for two reasons. First, the Motion fails to meet the standard of review, and second, it is an attempt to improperly raise new arguments.[5] AT&T believes that Order No. PSC-08-0798-FOF-TP should not be reconsidered. AT&T contends that we have considered and rejected Intrado Comm's arguments.

This Commission has looked on numerous occasions[6] to the Stewart Bonded Warehouse, Inc. v. Bevis and to the Diamond Cab Co. v. King cases for guidance in reviewing motions for reconsideration. Relevant portions of these cases are summarized below:

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[4] 146 So. 2d 889, 891 (Fla. 1962) (Response at 3)

[5] By Order No. PSC-96-1024-FOF-TP, issued on August 7, 1996, in Docket No. 950984-TP, *In re: Establish Nondiscriminatory Rates, Terms, and Conditions*, the Commission stated at 3, "it is not appropriate, on reconsideration, to raise new arguments not mentioned earlier."

[6] See In re: Notice of adoption of existing interconnection agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P., by Nextel South Corp. and Nextel West Corp., Order No. PSC-08-0817-FOF-TP, issued on December 18, 2008, in Docket No. 070369-TP, and In re: Complaint and request for emergency relief against Verizon Florida, L.L.C. for anticompetitive behavior in violation of Sections 364.01(4), 364.3381, and 364.10, F.S., and for failure to facilitate transfer of customers' numbers to Comcast Phone of Florida, L.L.C. d/b/a Comcast Digital Phone, Order No. PSC-08-0549-PCO-TP, issued on August 19, 2008, in Docket No. 080036-TP, and In re: Petition on behalf of Citizens of the State of Florida to require Progress Energy Florida, Inc. to refund customers $143 million, Order No. PSC-08-0136-FOF-EI, issued on March 3, 2008, in Docket No. 060658-EI.

- In Stewart Bonded Warehouse, Inc. v. Bevis, the primary consideration was "whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order." See, Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981).

- In the Diamond Cab case, the court stated, in part: "The purpose of a petition for rehearing is merely to bring . . . [out] some point which . . . [the Commission] overlooked or failed to consider when it rendered its order in the first instance . . . It is not intended as a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment or order . . .." (Diamond Cab, 146 So. 2d at 891.)

This Commission has also looked to State ex. rel. Jaytex Realty Co. v. Green (Jaytex) to consider the scope of its review for motions for reconsideration, and whether it is necessary for a respondent to answer every argument and fact raised by each party. In Jaytex, the court found

> the sole and only purpose of a petition for rehearing is to call to the attention of the court some fact, precedent or rule of law which the court has overlooked in rendering its decision . . . (Jaytex, 105 So. 2d at 818.)
>
> . . .
>
> 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. (Id. at 819)

In considering the standard of review for motions for reconsideration, we find the Intrado Comm Motion falls short. Specifically, we find the Motion fails because:

- The information in Intrado Comm's Motion was reargument of facts previously considered. Reargument in a Motion for Reconsideration is procedurally improper;

- Intrado Comm never made a demonstrative "state law argument" in the case it built through testimony and exhibits. In this proceeding, both parties cited more to "federal law" than to "state law" to support their respective positions. Although Order No. PSC-08-0798-FOF-TP relied upon federal law, we find it is erroneous to claim that this Commission "failed to consider" the state law. Because state law was not in conflict with any aspect of the federal law that we cited, a separate argument was not tendered. We find state law was fully considered in our Final Order, and a motion for reconsideration is not the proper avenue to pursue new arguments;

- A decision the Prehearing officer imposed (by setting the page limits for briefs) did not adversely impair Intrado Comm in briefing this case. The decision regarding page limits for briefs applied to both parties, and both adhered to it when post-hearing briefs were

filed. Either party could have sought timely relief in this regard, but did not. Intrado Comm's Motion is not the avenue to seek relief after the fact; and

- The recent contractual arrangements that Intrado Comm touts as "new" are immaterial to our finding in Order No. PSC-08-0798-FOF-TP. We do not find this Order addressed whether Intrado Comm could establish contracts to provide emergency services in Florida, nor was this Order predicated on the existence or lack of any such contracts.

III. Decision

Intrado Comm has not met the standard of review for its Motion. Therefore, we find it appropriate to deny Intrado Comm's Motion for Reconsideration.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Intrado Communications, Inc.'s Request for Oral Argument is hereby denied. It is further

ORDERED that Intrado Communications, Inc.'s Motion for Reconsideration of Order No. PSC-08-0798-FOF-TP is hereby denied. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 16th day of March, 2009.

ANN COLE
Commission Clerk

(SEAL)

TLT

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.