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Sent: Friday, March 14, 2008 4:51 PM
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Cc: Adam Teitzman; fself@lawfla.com; greg.follensbee@att.com; j.carver@att.com; rebecca.ballesteros@intrado.com
Subject: Docket No. 080089-TP - Verizon Florida LLC's Motion to Dismiss and Response to Intrado's Petition for Declaratory Statement
Attachments: 080089 VZ FL MTD-Response to Petition 3-14-08.pdf



The attached filing is submitted in Docket No. 080089-TP on behalf of Verizon Florida LLC by

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The attached document consists of a total of 13 pages (cover letter-1 page, Motion to Dismiss-11 pages, and Certificate of Service-1 page).

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March 14, 2008 – **VIA ELECTRONIC MAIL**

Ann Cole, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 080089-TP
Petition for declaratory statement regarding local exchange telecommunications
network emergency 911 service, by Intrado Communications Inc.

Dear Ms. Cole:

Enclosed for filing in the above-referenced matter is Verizon Florida LLC's Motion to Dismiss and Response to Intrado's Petition for Declaratory Statement. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this filing, please contact me at (678) 259-1449.

Sincerely,

s/ Dulaney L. O'Roark III

Dulaney L. O'Roark III

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Enclosures

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement regarding) Docket No. 080089-TP
local exchange telecommunications network) Filed: March 14, 2008
emergency 911 service, by Intrado)
Communications Inc.)
-----)

**VERIZON'S MOTION TO DISMISS AND RESPONSE TO
INTRADO'S PETITION FOR DECLARATORY STATEMENT**

Verizon Florida LLC ("Verizon") moves to dismiss the Petition for Declaratory Statement ("Petition") filed by Intrado Communications Inc. ("Intrado") in this docket because the Petition fails to make several of the showings necessary before the merits of a requested declaratory statement may be considered. Verizon also submits its response to the Petition. If the Commission reaches the merits of the Petition despite its many deficiencies, it should deny the Petition because the declaratory statement Intrado requests is factually and legally wrong.¹

I. INTRADO'S ALLEGATIONS

Intrado alleges that it is offering to Public Safety Answering Points ("PSAPs") in Florida an E911 service in competition with incumbent local exchange carriers ("ILECs").² Intrado acknowledges that before it can provide E911 service to PSAPs it must interconnect and exchange local traffic with ILECs.³ Intrado states that it is currently negotiating interconnection agreements with ILECs and that it has filed arbitration petitions arising from those negotiations.⁴ Intrado does not point to any interconnection agreements it has executed, nor does it assert that it is providing E911 service to any

¹ Verizon generally agrees with and adopts the arguments made by AT&T Florida in its Motion to Dismiss and Response to Intrado's Petition for Declaratory Statement. Verizon files this motion and response to highlight additional points that may be helpful to the Commission.

² Petition ¶ 6.

³ *Id.* ¶ 7.

⁴ *Id.*

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Florida PSAPs. Intrado alleges that it has been in negotiations with PSAPs for the provision of E911 service,⁵ but not that it has reached an agreement with any of them.

Intrado contends that if a PSAP chooses Intrado to provide E911 services, “neither Intrado nor the PSAP will be a customer or subscriber of the applicable ILEC’s 911 services.”⁶ Intrado further asserts that once it becomes the PSAP’s service provider, the ILEC should not be able to charge Intrado or the PSAP for any of its tariffed 911 services.⁷ Intrado does not claim to be uncertain or in doubt about this conclusion or to need guidance to direct its course of action. Instead, Intrado complains that an unidentified PSAP terminated negotiations with Intrado after the PSAP purported to be uncertain as to whether it would continue to be charged by the ILEC if it selected Intrado to provide E911 services.⁸ More broadly, although Intrado does not allege that any ILEC has attempted to charge tariffed rates for 911 services it does not provide, Intrado claims that doing so has “a chilling effect on competition” and that ILECs’ potential actions create “regulatory uncertainty.”⁹

Intrado lists several ILEC tariff sections, three statutory provisions and one administrative rule as to which it seeks a declaratory statement.¹⁰ Intrado does not specify what language from these sources is at issue here, nor or how such language might be applied to the factual circumstances it describes. Intrado proceeds to request a declaratory statement:

- a. Establishing that an ILEC may not charge Intrado and/or the PSAP for any tariffed 911 local exchange telecommunications network services previously provided to the PSAP unless Intrado or the customer specifically orders such services.

⁵ *Id.* ¶ 9.

⁶ *Id.* ¶ 8.

⁷ *Id.* ¶ 17.

⁸ *Id.* ¶ 10.

⁹ *Id.* ¶¶ 19, 20.

¹⁰ *Id.* ¶ 21.

- b. Establishing that the ILEC may not charge Intrado and/or the PSAP for any terminated 911 services through new tariffed or non-tariffed rates.
- c. Establishing that the ILEC may not bundle its services in such a manner as to require Intrado and/or the PSAP to pay for any terminated 911 services or otherwise for any 911 services not actually requested or consumed.¹¹

Based on the allegations Intrado makes, and fails to make, its request should be dismissed or, alternatively, denied.

II. MOTION TO DISMISS

Intrado's Petition fails to comply with several requirements that must be met to sustain a request for declaratory statement. The Petition should be dismissed because it: (i) fails to state in sufficient detail a particular set of circumstances as to which Intrado seeks an opinion or to specify the tariff provisions Intrado believes might apply; (ii) fails to allege that Intrado faces any uncertainty that would warrant a declaratory statement; (iii) does not allege there is an actual, present and practical need for a declaratory statement; (iv) improperly seeks to determine the conduct of third parties; and (v) improperly seeks a determination of issues it has asserted in the arbitration petition it filed against Verizon.

A. THE PETITION FAILS TO STATE IN SUFFICIENT DETAIL INTRADO'S PARTICULAR SET OF CIRCUMSTANCES AS TO WHICH IT SEEKS AN OPINION OR TO SPECIFY THE TARIFF PROVISIONS IT BELIEVES MAY APPLY TO THOSE CIRCUMSTANCES

Section 120.565, Florida Statutes, which establishes when a party may obtain a declaratory statement, provides in pertinent part as follows:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, *as it applies to the petitioner's particular set of circumstances.*

¹¹ *Id.* ¶ 24.

(2) *The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.*¹²

Similarly, Florida Rule 28-105.001 provides that “[a] petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner’s particular circumstances.” The petitioner bears the burden of identifying any statutory provisions, rules, or orders upon which the declaratory statement is sought.¹³

Intrado fails to identify the particular set of circumstances as to which it requests an opinion. The Petition rests on the conclusory allegation that once a PSAP selects Intrado to provide E911 service, the ILEC is not providing tariffed 911 services to either the PSAP or Intrado. Intrado fails to provide factual support for this conclusion. For example, Intrado does not describe the network architecture it intends to use, how it intends to interconnect and exchange traffic with the ILECs, what E911 services it would provide to PSAPs, what 911 services ILECs would need to provide when Intrado serves a PSAP, or how the ILECs would be compensated for those services. Without this information, it is impossible to judge the extent to which Intrado’s services would displace those of the ILECs and thus whether the declaratory statement requested by Intrado could be factually or legally correct.

Likewise, Intrado fails to satisfy its burden of specifying the tariff provisions as to which it seeks a declaratory statement. Intrado cites voluminous tariffs without calling the Commission’s attention to the specific provisions dealing with the particular 911 ser-

¹² Emphasis added.

¹³ *In re: Petition by Board of County Commissioners of Broward County for declaratory statement regarding applicability of BellSouth Telecommunications, Inc. Tariff provision to rent and relocation obligations associated with BellSouth switching equipment building (“Maxihut”) located at Fort Lauderdale-Hollywood International Airport on property leased by BellSouth from Broward County’s Aviation Department, Docket*

VICES for which Intrado contends it and PSAPs should not have to pay. Because Intrado did not cite these provisions in its Petition, it avoided addressing how they would apply to the factual circumstances Intrado described (to the extent they were described at all). The Commission cannot issue a declaratory statement when the requesting party omits such critical information.

B. THE PETITION FAILS TO ALLEGE THAT INTRADO FACES ANY UNCERTAINTY THAT WOULD WARRANT A DECLARATORY STATEMENT

To be entitled to a declaratory statement, the petitioner must demonstrate that it faces doubt or uncertainty and therefore needs the Commission's guidance before choosing a course of action. As the Commission has stated, "a basic requirement for a declaratory statement is that there is uncertainty on the part of the petitioner about a provision of [a] statute, rule or order of the agency, or that a declaratory statement will resolve a controversy."¹⁴ The Commission went on to state that "the purpose of a declaratory statement is to resolve an ambiguity in the law, to enable the petitioner to select a proper course of action in advance, thus avoiding costly administrative litigation."¹⁵ Intrado fails to meet this test.

Intrado does not allege that it is uncertain about the interpretation of any of the tariffs or the statutory or administrative rule provisions that it cites or that it intends to change its course of action depending on how the Commission resolves the Petition.¹⁶ To the contrary, Intrado submits only one interpretation of the authorities it cites and expresses no doubt about its conclusion. Intrado does not point to any language in those

No. 060049-TL, Order No. PSC-06-0306-DS-TL, pp. 12-13 (April 16, 2006) ("*Broward County*").

¹⁴ *In re: Petition for declaratory statement concerning urgent need for electrical substation in North Key Largo by Florida Keys Electric Cooperative Association, Inc.*, pursuant to section 366.04, Florida Statutes, Docket No. 020829-EC, Order No. PSC-02-1459-DS-EC, p. 5 (Oct. 23, 2002) ("*Florida Keys*").

¹⁵ *Id.*

¹⁶ Obviously, Intrado's allegations about a PSAP's uncertainty as to whether it would be required to pay an ILEC's tariffed rates (see Petition ¶ 10) or general "regulatory uncertainty" (see Petition ¶ 20) fail to

authorities that it claims to be ambiguous, confusing or susceptible to differing interpretations. Further, Intrado alleges that it is moving forward with efforts to obtain interconnection agreements with the ILECs and to negotiate E911 service agreements with PSAPs, and does not suggest that its plans hinge on how the Commission will resolve this case. Intrado's allegations thus belie its entitlement to the relief it requests.

C. THE PETITION DOES NOT ALLEGE THERE IS AN ACTUAL, PRESENT AND PRACTICAL NEED FOR A DECLARATORY STATEMENT

The Commission has held that "an entity seeking a declaratory statement must show that there is an 'actual, present and practical need for the declaration', and that the declaration addresses a 'present controversy.'"¹⁷ Further, as the Florida Supreme Court has stated, "Florida courts¹⁸ will not render, in the form of a declaratory judgment, what amounts to an advisory opinion at the instance of parties who show merely the *possibility* of legal injury on the basis of a hypothetical 'state of facts which have not arisen' and are only 'contingent, uncertain, [and] rest in the future.'"¹⁹ Intrado fails to meet this requirement because it fails to allege, for example, that: (i) it has an interconnection agreement in place that would enable it to offer E911 service; (ii) it has installed facilities that would enable it to provide E911 service; (iii) it currently provides E911 service to any PSAP in Florida; (iv) it has an E911 services agreement with any PSAP in Florida; or (v) it or a PSAP has a current dispute with any ILEC concerning the ILEC's

make the showing that *Intrado* is uncertain and in need of guidance.

¹⁷ *In re: Request for declaratory statement by Tampa Electric Company regarding territorial dispute with City of Bartow in Polk County*, Docket No. 031017, Order No. PSC-04-0063-FOF-EU, p. 9 (Jan. 22, 2004)(quoting *Sutton v. Department of Environmental Protection*, 654 So. 2d 1047, 1048 (Fla. 5th DCA 1995)).

¹⁸ The Commission has noted that "[w]hen determining the availability of a declaratory statement in administrative proceedings, courts may be guided by the law on declaratory judgments in civil proceedings." *Id.* at 9.

¹⁹ *Santa Rosa County v. Administration Commission*, 661 So. 2d 1190, 1193 (Fla. 1995)(emphasis in original, citing *La Bella v. Food Fair, Inc.* 406 So. 2d 1216, 1217 (Fla. 3d DCA 1981) quoting *Williams v. Howard*, 329 So. 2d 277, 283 (Fla. 1976)).

provision of 911 service. Rather than seeking to resolve a current controversy, Intrado is asking for an advisory opinion to address a hypothetical dispute that may arise in the future. This is exactly the situation in which a request for a declaratory statement is not allowed. The Commission should decline Intrado's invitation to grant an advisory opinion.

D. THE PETITION IMPROPERLY SEEKS TO DETERMINE THE CONDUCT OF THIRD PARTIES

Rule 28-105.001 provides that “[a] declaratory statement is not the appropriate means for determining the conduct of another person.” Intrado violates that requirement here by requesting a declaratory statement concerning the amounts ILECs may charge, and that PSAPs may be required to pay, under the ILECs’ tariffs. Intrado thus asks for the Commission’s opinion on the legal rights of *two sets of third parties between each other*. More specifically, Intrado points to negotiations between itself and an unidentified, prospective PSAP customer that Intrado claims broke off E911 service negotiations because of purported uncertainty about whether it still would have to pay the ILEC’s 911 tariff charges if it used Intrado’s services. If nothing else, these allegations demonstrate that there is no live issue as far as that PSAP is concerned because negotiations have been terminated. Moreover, Intrado does not allege that any other PSAPs have expressed similar concerns or that the questions Intrado seeks to address are the subject of any current negotiations. Even if Intrado could make such an allegation, however, at most it would suggest that third parties were uncertain of their rights, which would not be a showing that meets the Commission’s declaratory statement requirements.

The rule against determining third parties’ conduct is particularly important in this case because Intrado is seeking to place the Commission’s imprimatur on a conclusion

derived from an incomplete and self-serving factual description. If the Commission were to issue a declaratory statement based on Intrado's version of the facts, the Commission's decision would not be controlling.²⁰ Such a decision could be harmful to PSAPs, however, because it is apparent from the Petition that Intrado wants to use a declaratory statement to help it market its services to them. A declaratory statement based on the facts Intrado presents would be incorrect and could be used to mislead PSAPs. The Commission should not allow itself to be used in that way.

E. THE PETITION IMPROPERLY SEEKS A DETERMINATION OF ISSUES THAT MAY BE ADDRESSED IN ARBITRATION PROCEEDINGS

The Commission has ruled that “[a] declaratory statement should not be issued where another proceeding is pending that addresses the same question or subject matter.”²¹ Intrado fails to heed this admonition because it is seeking a declaratory statement that would address matters Intrado has raised in the arbitration petition it filed against Verizon. The Petition seeks a declaratory statement to the effect that once a PSAP agrees to use Intrado for E911 services, Verizon may not charge Intrado for tariffed services that have been terminated by the PSAP. Intrado's arbitration petition states that the parties dispute the rates that Verizon may charge for its 911 and E911 services, and notes Intrado's objection to being required to pay tariffed rates for those services.²² Intrado's attempt to obtain declaratory statement in this docket concerning an issue that is disputed in another docket is impermissible.

²⁰ *Broward County*, *supra* note 13, at 9.

²¹ *Florida Keys*, *supra* note 14, at 6.

²² Docket No. 080134-TP, Petition for Arbitration, pp. 64-65 (March 5, 2008).

III. RESPONSE TO PETITION

If the Commission does not dismiss the Petition despite its many deficiencies, it should deny Intrado's request to issue the requested declaratory statement. As a preliminary matter, the Commission should reject Intrado's position that the Commission must take its version of the facts at face value. To the contrary, the Commission should evaluate Intrado's factual representations in light of information presented by Verizon and other intervenors, and apply its own judgment, to ensure that the Commission makes a sound decision. Once the Commission has made an independent assessment of the facts, it should decline to make the requested declaratory statement because it is deeply flawed both factually and legally.

A. THE COMMISSION SHOULD NOT IGNORE THE RELEVANT FACTS

Intrado has asserted that intervenors may not challenge Intrado's factual representations.²³ Intrado is wrong. Although Rule 28-105.003 provides that the Commission "*may* rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts,"²⁴ that does not mean that the Commission *must* do so. If the Commission reaches the merits of Intrado's Petition rather than dismissing it, the Commission should not simply accept Intrado's representations. The Petition makes clear that it wants to use a declaratory statement as the basis for representations to PSAPs concerning what they may be obligated to pay under ILECs' tariffs.²⁵ If the Commission were to adopt the "garbage-in, garbage-out" approach proposed by Intrado, the Commission could become an unwitting party to the distribution of incorrect

²³ See Intrado's Response to Verizon Florida LLC's Petition for Leave to Intervene, and Motion for More Definite Statement, p. 3; Intrado's Response to AT&T Florida's Petition for Leave to Intervene, pp. 2-3.

²⁴ Emphasis added.

²⁵ See Petition ¶ 10.

information about PSAPs' E911 tariff obligations. The Commission therefore should reject Intrado's invitation to turn a blind eye to the facts.

B. THE RELEVANT FACTS DEMONSTRATE THAT THE PETITION SHOULD BE DENIED

The central allegation of Intrado's petition is that once a PSAP selects Intrado to provide E911 services, the ILEC provides no tariffed 911 services to the PSAP or Intrado. As already discussed, it is impossible at this stage to assess this allegation completely because Intrado provides so little information about how it will provide service and what ILEC services it contends will be displaced. As AT&T Florida demonstrates in its Motion and Response, however, ILECs inevitably will provide some 911 services after a PSAP elects to receive E911 services from an alternative provider such as Intrado. In Verizon's case, such continuing services could include, for example, dedicated transport (with ANI transmission capability), selective routing and database management services. Exactly which services would need to be provided in a given situation would depend on the circumstances. Because Intrado has not described a specific set of circumstances, Verizon does not know exactly which services Intrado or the PSAP may still be using from Verizon's tariffs. What is clear, however, is that Verizon will provide *some* services and when it does it will be entitled to be compensated for them. Intrado's proposed declaratory statement, which suggests either that Verizon (and other ILECs) would be entitled to no compensation for these services, or to compensation on terms proposed by Intrado (and disputed by Verizon) in another proceeding, cannot withstand analysis. Accordingly, Intrado's request should be denied.

For the foregoing reasons, Verizon requests that Intrado's Petition be dismissed or in the alternative denied.

Respectfully submitted on March 14, 2008.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via electronic mail and U. S. mail on March 14, 2008 to:

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