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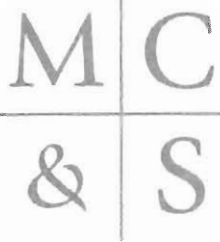
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The Docket No. is 070699-TP, In re: In the Matter of the Petition of Intrado Communications Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended, and Section 364.162, Florida Statutes, to Establish an Interconnection Agreement with Embarq Florida, Inc.

This is being filed on behalf of Intrado Communications Inc.

Total Number of Pages is 34 (including this page)

Intrado Communications Inc.'s Opposition to Motion to Dismiss and separate Request for Oral Argument



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December 24, 2007

VIA ELECTRONIC FILING

Ms. Ann Cole, Director
Commission Clerk and Administrative Services
Room 110, Easley Building
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Re: Docket No. 070699-TP

Dear Ms. Cole:

Enclosed for filing on behalf of Intrado Communications Inc. is an electronic version of Intrado Communications Inc.'s Opposition to Motion to Dismiss and Request for Oral Argument in the above referenced docket.

Thank you for your assistance with this filing.

Sincerely yours,

A handwritten signature in black ink, appearing to be 'Floyd R. Self', written over a horizontal line that extends to the right. The signature is enclosed in a large, loopy oval shape.

Floyd R. Self

FRS/amb
Enclosure

cc: Rebecca Ballesteros, Esq.
Parties of Record

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Electronic Mail and U.S. Mail this 24th day of December, 2007.

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Floyd R. Self

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

_____))
In the Matter of the Petition))
of Intrado Communications Inc. 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))
Embarq Florida, Inc.))
_____)

Docket No. 070699-TP

Filed: December 24, 2007

OPPOSITION TO MOTION TO DISMISS

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

)	
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of Intrado Communications Inc. for Arbitration)	Docket No. 070699-TP
Pursuant to Section 252(b) of the Communications Act)	
of 1934, as amended, and Section 364.162, Florida)	Filed: December 24, 2007
Statutes to Establish an Interconnection Agreement with)	
Embarq Florida, Inc.)	
)	

OPPOSITION TO MOTION TO DISMISS

Intrado Communications Inc. (“Intrado”), through its attorneys and pursuant to Rule 28-106.204, Florida Administrative Code, hereby files this Opposition to the Motion to Dismiss filed by Embarq Florida, Inc. (“Embarq”) in which Embarq requests that the Florida Public Service Commission (“Commission”) dismiss the Petition for Arbitration (“Petition”) filed by Intrado in the above-captioned proceeding. As set forth herein, Embarq has failed to demonstrate as a matter of law why its Motion should be granted. Intrado is a competitive local exchange carrier entitled to interconnection and arbitration under sections 251 and 252 of the Communications Act of 1934, as amended (“Act”) and Florida law. The Commission should therefore deny Embarq’s Motion and proceed to resolve the issues identified in the Petition for Arbitration to ensure Florida consumers and public safety agencies can receive the benefits of Intrado’s competitive service offerings as contemplated by the Act and Florida law.

INTRODUCTION AND OVERVIEW

As this Commission has said in connection with a motion to dismiss:

Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause

of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When “determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side.” Id.

Order No. PSC-04-1204-FOF-TP, issued December 3, 2004. In the arguments presented, Embarq’s Motion fails to demonstrate as a matter of law any basis for dismissing Intrado’s Petition.

Embarq cannot have it both ways. During the Parties’ five month negotiating period, Embarq entertained Intrado’s Section 251(c) interconnection request, provided a template interconnection agreement for negotiation purposes, acknowledged Intrado’s proposed revisions to the interconnection agreement, and asked to extend the arbitration deadline, but never raised the issue of whether Intrado was in fact eligible for interconnection under Section 251(c) until November 9, 2007. Once Embarq fully confirmed its position to Intrado on November 9, 2007, Intrado realized further “negotiations” without Commission involvement would likely prove to be futile. Intrado had no choice but to file for arbitration in order to secure its rights under the Act and Florida law to secure interconnection arrangements with Embarq that mutually benefit both Parties as co-carriers and their Florida customers.

Intrado has fully complied with the requirements of the Act governing negotiation and arbitration of interconnection agreements. Embarq’s claims that Intrado has not negotiated in good faith, that its Petition is procedurally deficient under federal and state law, and that Intrado is not entitled to Section 251(c) interconnection are merely a continuation of Embarq’s efforts to shield from competition its entrenched monopoly over the provision of local exchange services in its Florida service territory. Intrado cannot be held hostage to Embarq’s unwillingness to

effectively negotiate, which ultimately dictates the ability of Intrado to deploy its services in Florida. Intrado is poised to offer competitive local exchange services in Florida that include an alternative, IP-based technology that will “enable the public safety community to focus on future needs rather than requiring more from legacy systems, offer more redundancy and flexibility, and contribute greatly to improving compatibility between public safety systems that operate using different proprietary standards.”^{1/} Accordingly, Embarq’s Motion should be denied.

I. INTRADO’S PETITION COMPLIES WITH FEDERAL AND STATE ARBITRATION REQUIREMENTS

Embarq’s attempt to evade its interconnection obligations by claiming Intrado’s Petition is deficient should be rejected.^{2/} Intrado’s conduct during its negotiations with Embarq and its Petition fully complied with the process envisioned by Congress as outlined in the Act and with the requirements of Florida law. Intrado negotiated with Embarq in good faith, and when Embarq indicated it was unwilling to enter into a Section 251(c) interconnection agreement with Intrado, Intrado elected to exercise its right under the law to file for arbitration. There is nothing premature or flawed about Intrado’s Petition, and Intrado’s approach to the arbitration is precisely what Congress envisioned the process would be when it established by the Act. Embarq is not prejudiced by the Petition or Intrado’s proposed interconnection agreement because Embarq has ample opportunity to respond to each of the issues raised by the Petition. Accordingly, Embarq’s Motion should be rejected.

^{1/} *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, 22 FCC Red 10541, ¶¶ 74-75, 80-82 (2007).

^{2/} Embarq Motion at 2.

A. The Section 251/252 Process Was Developed to Address the Uneven Bargaining Power between Incumbents and New Entrants

When Congress amended the Act in 1996 to open local exchange markets to competition,^{3/} it established the Section 251/252 negotiation and arbitration process. Recognizing that incumbent local exchange carriers (“ILECs”), such as Embarq, would have the incentive to thwart competition, Congress, the Federal Communications Commission (“FCC”), and this Commission conferred upon competitive carriers not only a right to interconnect with the incumbent, but the right to do so on fair and pro-competitive terms. Interconnection regulations have thus been developed to compensate for the uneven bargaining power that exists between competitors and incumbents, such as Intrado and Embarq. Congress has established varying categories of rights and obligations for different types of carriers and made a deliberate decision in crafting Section 251 to impose certain requirements only on incumbent carriers in order to facilitate the entry of competitors.^{4/} The Act requires Embarq, as an ILEC, to negotiate in good faith the terms and conditions of interconnection agreements with competitive carriers to fulfill Embarq’s obligations under the Act.^{5/}

Section 252 of the Act provides additional benefits to competitors. Recognizing that commercial negotiations would be difficult because the new entrant would have “nothing that the

^{3/} Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151, *et seq.* (1996)).

^{4/} *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.’s Petition for Arbitration with Ameritech Illinois before the Illinois Commerce Commission; et al.*, 13 FCC Rcd 1755, ¶ 3 (1997). For example, “telecommunications carriers” are required to interconnect directly or indirectly under Section 251(a), 47 U.S.C. § 251(a), while only “local exchange carriers” are obligated to provide certain services under Section 251(b). 47 U.S.C. § 251(b). Similarly, Section 251(c) imposes additional obligations on “incumbent local exchange carriers.” 47 U.S.C. § 251(c).

^{5/} 47 U.S.C. § 251(c)(1). Those obligations include the duty: (1) to provide interconnection; (2) to make available access to unbundled network elements; (3) to offer retail services for resale at wholesale rates; and (4) to provide for the collocation of facilities. 47 U.S.C. §§ 251(c)(2)-(4), (6).

incumbent needs” and so “has little to offer the incumbent in a negotiation,”^{6/} Congress also established a procedure for arbitration of any disputes arising from the negotiations between the ILEC and the competitor.^{7/} The statutory framework was designed to protect competitive local exchange carriers from experiencing unreasonable delays in entering the marketplace formerly controlled exclusively by the incumbent.^{8/} Congress’s intent in providing for arbitration was to give competitors more leverage in the negotiation process.^{9/} Unlike commercial negotiations where both parties may have an incentive to reach agreement, ILECs have generally demonstrated a reluctance to abide by the law, and thus, arbitration is necessary to ensure that competitors without bargaining power have their rights protected. The language and design of Section 252 thus seeks to address the very unequal bargaining power manifest in negotiations between ILECs and competitors in order to advance Congress’s goals of increased competition.^{10/}

It is within this framework that Intrado requested interconnection negotiations and later filed its Petition with the Commission within the statutory window when it became clear that the

^{6/} *Implementation of the Local Competition Provisions in the Telecommunications Act 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶ 134 (1996) (“*Local Competition Order*”) (intervening history omitted), *aff’d by AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

^{7/} 47 U.S.C. §§ 251, 252.

^{8/} *See Atlantic Alliance Telecommunications, Inc. v. Bell Atlantic*, 2000 U.S. Dist. LEXIS 19649, 99-CV-4915 (ARR) (E.D. Va 2000) (noting that “[t]he tight schedule set out in the Act manifests an intention of Congress to resolve disputes expeditiously,” that the strict timelines contained in the Telecommunications Act indicate Congress’ desire to open up local exchange markets to competition without undue delay”) (quoting *AT&T Communications Sys. v. Pacific Bell*, 203 F.3d 1183, 1186 (9th Cir. 2000)) and that “the legislative history explains that the purpose of the Act is ‘to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition’” (quoting H.R. Conf. Rep. No. 104-458, at 113 (1996) reprinted in 1996 U.S.C.C.A.N. 10, 124)).

^{9/} *Local Competition Order* ¶ 15 (the “statute addresses this problem [of the ILEC’s “superior bargaining power”] by creating an arbitration proceeding in which the new entrant may assert certain rights”).

^{10/} *Local Competition Order* ¶ 15 (the “statute addresses this problem [of the incumbent’s “superior bargaining power”] by creating an arbitration proceeding in which the new entrant may assert certain rights”); *see also id.* ¶ 134 (noting that because it is the new entrant’s objective to obtain services and access to facilities from the incumbent and thus “has little to offer the incumbent in a negotiation,” the Act creates an arbitration process to equalize this bargaining power).

Parties would be unable to reach a mutually beneficial negotiated agreement. Contrary to the structure established by Congress, Embarq argues the Commission should support an interconnection approach that would give Embarq ultimate control over the negotiation process.^{11/} Intrado cannot offer service without interconnecting to the public switched telephone network (“PSTN”) and Embarq is one of the dominant gatekeepers to that network. If Intrado were required to wait until Embarq engaged in effective, constructive negotiations of an agreement that is beneficial to both Parties prior to filing for arbitration, Intrado’s rollout likely would be delayed indefinitely. As discussed above, the Act was specifically designed to avoid the abuse of such power on the part of ILECs like Embarq and its Motion to Dismiss should be denied.

B. Intrado Has Acted in Good Faith

The facts reflect that Intrado has acted in good faith to negotiate an interconnection agreement with Embarq.^{12/} Under the Act and the FCC’s rules, both parties to a negotiation are required to negotiate in good faith.^{13/} The FCC determined that some minimum requirements of good faith negotiation are needed “to address the balance of the incentives between the bargaining parties” in order to “realize Congress’s goal of enabling swift market entry by new competitors.”^{14/} The decision whether a party has acted in good faith is made largely on a case-by-case basis in light of all of the facts and circumstances underlying the negotiations.^{15/} A carrier violates its duty to negotiate in good faith by, for example, obstructing negotiations,^{16/}

^{11/} Embarq Motion at 4.

^{12/} Embarq Motion at 2.

^{13/} 47 U.S.C. § 251(c)(1); 47 C.F.R. § 51.301.

^{14/} 47 C.F.R. § 51.301; *Local Competition Order* ¶ 141.

^{15/} *Local Competition Order* ¶¶ 142, 150.

^{16/} 47 C.F.R. § 51.301; *Local Competition Order* ¶ 148.

delaying negotiations,^{17/} refusing unreasonably to provide relevant information,^{18/} requesting that a competing carrier “attest that the agreement complies with all provisions of the 1996 Act, federal regulations, and state law,”^{19/} and by failing to comply with reasonable requests for cost data.^{20/}

Embarq has not demonstrated that Intrado engaged in such conduct. Rather, there is ample evidence indicating that Embarq has not acted in good faith by taking “actions that are deliberately intended to delay competitive entry, in contravention of the statute’s goals,” which the FCC has determined it “will not condone.”^{21/} The substance of Embarq’s Motion fails to support a claim of bad faith by Intrado.

First, Embarq wrongly claims that Intrado delayed the negotiation process after Embarq sent Intrado its “standard terms and conditions for CLEC interconnection.”^{22/} After receiving Embarq’s template agreement, Intrado contacted Embarq on numerous occasions to schedule a “meet and greet” call between the Parties prior to Intrado providing a mark-up of the Embarq template agreement.^{23/} Embarq’s “standard” agreement did not represent a logical starting place for Intrado. As a facilities-based carrier, Intrado requires a specific network interconnection arrangement resulting in a cost-effective and efficient network that will allow Florida consumers to reap the benefits of competition. Thus, Intrado sought to discuss its interconnection needs with Embarq first rather than provide a redlined agreement without the underlying rationale as to why Intrado’s proposed revisions were made. After numerous email exchanges, Embarq finally

^{17/} 47 C.F.R. § 51.301; *Local Competition Order* ¶ 149.

^{18/} 47 C.F.R. § 51.301; *Local Competition Order* ¶ 149.

^{19/} 47 C.F.R. § 51.301; *Local Competition Order* ¶ 152.

^{20/} 47 C.F.R. § 51.301; *Local Competition Order* ¶ 155.

^{21/} *Local Competition Order* ¶ 154.

^{22/} Embarq Motion at 2, 4.

^{23/} Intrado Petition at 12.

agreed to hold an initial call on September 18.^{24/} Within *three business days* after the call, Intrado provided its initial mark-up to Embarq reflecting the Parties' discussions on the call.^{25/} Embarq's "delay" claims are simply without merit.^{26/}

Second, Embarq attempts to condemn Intrado by claiming that Embarq acted in good faith by responding to the issues raised by Intrado during the negotiation stage.^{27/} This claim is untrue. Embarq's so-called "responses" to Intrado's proposed language are more appropriately characterized as delay tactics rather than a response: "We are still discussing internally" (October 3, 2007);^{28/} "We are working on a response to you" (October 24);^{29/} ". . . your request for interconnection . . . [is] not subject to the interconnection obligations of §251(c)(2) of the Act" (November 1, 2007).^{30/} These types of delay tactics do not demonstrate Embarq's good faith.^{31/}

Third, Intrado's inclusion of issues for the first time in its Petition does not represent a lack of good faith as suggested by Embarq.^{32/} As discussed above, such an approach is consistent with the framework established by the Act and Embarq has the opportunity to respond to Intrado's issues in its response to the Petition. Moreover, Intrado specifically contacted Embarq *after the Petition was filed* to determine whether additional negotiations might be useful

^{24/} Intrado Petition at 12.

^{25/} Intrado Petition at 12.

^{26/} *Cf. Local Competition Order* ¶ 149 (stating "parties seeking to avoid a legitimate accusation of breach of the duty of good faith in negotiation will work to provide their negotiating adversary all relevant information").

^{27/} Embarq Motion at 3-4.

^{28/} Attachment 7 to Intrado Petition (attached hereto as Attachment 1).

^{29/} Attachment 10 to Intrado Petition (attached hereto as Attachment 2).

^{30/} Attachment 11 to Intrado Petition (attached hereto as Attachment 3).

^{31/} *Cf. Local Competition Order* ¶ 148 (stating that "intentionally obstructing negotiations also would constitute a failure to negotiate in good faith, because it reflects a party's unwillingness to reach agreement").

^{32/} Embarq Motion at 4.

to reduce the number of issues for which Embarq would be required to respond.^{33/} As the Commission is well aware from prior arbitrations, it is fairly typical that as the arbitration process plays out that the parties continue to negotiate and resolve issues, which is what Intrado has tried to do and will continue, In response, however, Embarq refused to engage in additional negotiations unless Intrado withdrew its Petition or agreed to hold the arbitration proceeding in abeyance.^{34/} Thus, while Embarq argues that issues raised in Intrado’s Petition could have been “voluntarily resolved,”^{35/} Embarq rejected Intrado’s attempts to do just that. Such arrogance is counter-productive to the entire negotiation and arbitration process.

Further, inclusion of issues for the first time in a petition for arbitration is not unique to the instant arbitration. Carriers filing petitions for arbitration are required to identify all issues raised by the interconnection agreement to be arbitrated by the state commission, or lose their right to such arbitration.^{36/} As a practical matter, some issues are not put on the table during the negotiation process because they are less critical to the proposed interconnection arrangement or the negotiating parties simply do not have enough time to address them before the arbitration deadline. In this case, however, many of the issues identified by Intrado in its Petition could have been discussed with Embarq prior to the filing of the Petition if Embarq had indicated it was willing to negotiate with Intrado or otherwise responded to Intrado’s initial mark-up. Under Embarq’s approach, competitors like Intrado would be at the mercy of the ILEC to determine which issues should be identified and negotiated before an arbitration petition is filed.

^{33/} Email correspondence from Thomas Hicks, Intrado, to Various Intrado Personnel (Dec. 13, 2007) (indicating that a message had been left for Embarq regarding ongoing negotiations to reduce the outstanding issues raised in the arbitration filing) (attached as Attachment 4).

^{34/} Email correspondence from Kathryn Feeney, Embarq, to Thomas Hicks, Intrado (Dec. 14, 2007) (attached as Attachment 5).

^{35/} Embarq Motion at 4.

^{36/} 47 U.S.C. § 252(b)(1).

In addition, the FCC utilizes a similar arbitration method when it assumes the jurisdiction of a state commission pursuant to Section 252(e)(5) of the Act.^{37/} Specifically, the FCC has embraced a “best final offer” process as the preferred method for arbitration of interconnection agreements.^{38/} Under this style of arbitration, also known as “baseball arbitration,” each party presents to the arbitrator its preferred language to be implemented in the interconnection agreement and the arbitrator makes its ruling based on the each party’s proposals and hearings and briefs in support. The FCC has recognized that final offer arbitration fosters a situation where “each party has incentives to propose an arrangement that the arbitrator could determine to be fair and equitable.”^{39/} The FCC also has acknowledged that “parties are more likely to present terms and conditions that approximate the economically efficient outcome, because proposing extreme terms and conditions may result in an unfavorable finding by the arbitrator” under the final offer method.^{40/} Accordingly, there is no justification for Embarq’s claim that Intrado acted in bad faith by submitting its proposed interconnection agreement language with its Petition.

C. Intrado’s Petition Meets the Requirements of Section 252(b)

Intrado’s Petition fully complies with the requirements of Section 252(b).^{41/} Intrado has set forth the issues presented by Embarq’s template interconnection agreement and has explained its position on each issue in detail providing both the operational and legal justification for its proposed language changes. Intrado also provided the precise language needed in the

^{37/} 47 U.S.C. § 252(e)(5). This section allows the FCC to step in the shoes of a state commission that has failed to act in response to a petition for arbitration.

^{38/} 47 C.F.R. § 51.807(d).

^{39/} *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 14172, ¶ 268 (1996) (“*Local Competition NPRM*”).

^{40/} *Local Competition NPRM* ¶ 268. The FCC observed that open-ended arbitration is slower and more difficult to administer than final offer arbitration. *See Local Competition NPRM* ¶ 268.

^{41/} *Cf.* Embarq Motion at 5.

interconnection agreement to effectuate the interconnection arrangement proposed by Intrado. Embarq's refusal to respond to Intrado's proposed revisions to the interconnection agreement language and its continued refusal to negotiate with Intrado made it impossible to describe Embarq's position in detail on each of the unresolved issues. Embarq's argument is also disingenuous given that Embarq has the opportunity to set forth its own position on each of the issues in its own words and raise any additional issues it deems necessary as contemplated by the Act.^{42/} And once Embarq's response is filed, Intrado expects that the Commission will schedule the customary issues identification conference at which the Parties will very specifically define the issues in the case, so there will be no doubt about the matters to be resolved by the Commission. Intrado has complied with the requirements and purpose of Section 252(b), which is to set forth the disputed issues that the Commission is called upon to resolve. Therefore, Embarq's procedural deficiency arguments should be rejected.

D. Intrado's Petition Meets the Requirements of Florida Law

Embarq's state law arguments are equally without merit. At the outset, Embarq completely ignores the provisions in Section 364.15, Florida Statutes, which authorizes this Commission to make such orders as to require such repairs, improvements, changes, additions, or extensions as are reasonably necessary to promote "the security or convenience of the public . . . in order to secure adequate service or facilities for telecommunications services." This statute alone provides sufficient authority for the Commission to consider Intrado's interconnection requirements in order to advance the availability of 911 and E911 services to the benefit of Florida customers. Moreover, while the Florida statutory provisions that authorized the introduction of competitive local exchange carriers predate the Act by nearly a year, the Act did

^{42/} 47 U.S.C. § 252(b)(3).

not preempt state law. There is nothing inconsistent between the operation of the negotiation and arbitration process under state versus federal law, and certainly nothing mutually exclusive in their implementation.

First, while the correspondence between Intrado and Embarq invoked Sections 251 and 252 of the Act, there is no requirement in the Act to act exclusively under its provisions nor is there any corresponding exclusivity provision in the Florida statutes. As a practical matter, Intrado was seeking interconnection with Embarq in multiple jurisdictions, so it was reasonable and practical for Intrado to cite to the federal law as the basis for what would ultimately be a negotiated multi-state agreement.^{43/} However, as is well recognized by both the federal and Florida law, such petitions for arbitration are to be filed with the state utility commissions, and there is nothing inappropriate or inconsistent with citing and relying upon both the substantive and procedural processes of the applicable federal and state laws when petitioning for arbitration. The fact that Florida law has been “rarely” addressed or applied by the Commission does not serve to render the state statute moot, and even the rare reliance on state law certainly means that it has been used and that it has legal relevance and effect.^{44/}

Second, Embarq would have this Commission believe that the only opportunity to negotiate or petition for arbitration is within 60 days of the CLEC’s initial certification by this Commission. This position is based upon a very selective reading of the statutes which does not hold up when they are read in their entirety. The first sentence of Section 364.162 establishes a minimum period before which an initially certified CLEC must negotiate before it can petition

^{43/} See Attachment 2 to Intrado’s Petition for Arbitration which references negotiations with Embarq for interconnection in 18 different states, including Florida.

^{44/} See, e.g., Docket No. 030137-TP (ITC^DeltaCom Petition for Arbitration filed against BellSouth, on February 7, 2003); Docket No. 031047-TP (KMC Petition for Arbitration filed against Sprint-Florida, on November 12, 2003); and Docket No. (Joint Petition for Arbitration against BellSouth, filed February 11, 2004).

for arbitration. This provision is consistent with the language in Section 364.161 which similarly mandates a minimum 60 day negotiation period before petitioning for arbitration, but Section 364.161 is not limited to initially certificated CLECs. It is not unusual for new entrant CLECs to not immediately seek interconnection negotiations based upon the company's overall business plan, and the fact that Intrado did not do so until this year means that Intrado did not waste the time or resources of Embarq or this Commission for a negotiation or arbitration process that was not needed until this time. Intrado simply has not missed its legal opportunity to seek arbitration under Florida law.

Moreover, unlike the Act, which mandates a specific period of time in which a CLEC may petition the state commission for arbitration,^{45/} the Florida law only specifies a minimum period of time a CLEC must negotiate before filing a petition with this Commission. Thus, there is no petition "window," and so filing a petition under both the federal and state law more than 60 days after the start of negotiations but within the window established by the Act does not violate the spirit or intent of the Florida law. While Embarq complains that Intrado did not follow up within the 60-day negotiation window, as has already been discussed above, any failure to negotiate at any time in this process lies with Embarq and not Intrado.

Similarly, the 120-day period given by the statute to the Commission to arbitrate a Florida law request is also not an impediment to considering the Petition under both state and federal law. Embarq's fatalistic statement at page 7 of its Motion that "there is absolutely no way that the Commission could effectively rule on Intrado's petition in the 120-day period contemplated in the statute" if true, would mean that the entire process contemplated by the 1995

^{45/} Section 252(b)(1) of the Act provides: "arbitration.--During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues."

amendments to the Florida law are without effect. That is simply not true. But again, the Florida statute's 120-day process can be reconciled with the Act's 180-day process both by the operation of Section 120.80(13)(d), which authorizes the Commission to "employ procedures consistent with that act," and by a simple waiver of the 120-day Florida process by the petitioner. Of course, there is nothing to preclude this Commission from concluding the arbitration process within 120 days, which would be consistent with both the federal and state laws.

Based upon the foregoing, Embarq has failed to demonstrate as a matter of law any basis for dismissing the Petition based upon Intrado's reliance on state law. Accordingly, Embarq's Motion should be denied and the Commission should proceed with the arbitration by scheduling an initial meeting of the parties to address the necessary procedural requirements for proceeding with this matter.

II. INTRADO'S INTERCONNECTION REQUEST IS GOVERNED BY SECTION 251 AND THUS ITS ARBITRATION PETITION IS PROPER UNDER SECTION 252

There is no merit to Embarq's claim that Intrado's Petition raises issues that are not subject to arbitration under the Act.^{46/} While Embarq may seek to utilize commercial agreements and its tariffs for the types of arrangements sought by Intrado,^{47/} that does not preclude Intrado from exercising its rights to interconnect with Embarq pursuant to Section 251(c). The interconnection arrangements proposed by Intrado and the issues raised in its Petition are appropriately the subject of a Section 251(c) interconnection agreement and the Section 252(b) arbitration process.

^{46/} Embarq Motion at 8.

^{47/} Embarq Motion at 8.

A. Intrado Offers Telephone Exchange Service and Exchange Access Service

As discussed in detail in Intrado's Petition, Intrado's service offerings constitute telephone exchange service and exchange access service.^{48/} In 2000, claims similar to those raised by Embarq here were raised by AT&T (then SBC) in response to Intrado's (then known as SCC Communications) request for interconnection in California and Illinois. Both the California Public Utilities Commission and the Illinois Commerce Commission rejected AT&T's attempts to block competition with such claims and found Intrado was entitled to interconnection under Section 251(c) and arbitration under Section 252 because it was acting as a telecommunications carrier and provided telephone exchange service, exchange access, and telecommunications services.^{49/} The law continues to support the Commission making a similar finding here.

Intrado seeks to offer local exchange services like any other competitor operating in Florida. In addition, Intrado will offer 911 service to Public Safety Answering Points ("PSAPs") located in Florida similar to the product currently offered by Embarq. Interestingly, Embarq's Florida tariff specifically states that Embarq's 911 service

is a *telephone exchange communication service* whereby a Public Safety Answering Point (PSAP) designated by the customer may receive telephone calls to the telephone number 911 . . . [and] includes lines and equipment necessary for the answering, transferring, and dispatching of public emergency telephone calls originated by persons within the serving area who dial 911.^{50/}

^{48/} Intrado Petition at 20-24.

^{49/} See generally Docket No. 00-0769, *Petition of SCC Communications Corp. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with SBC Communications Inc.*, Arbitration Decision (I.C.C. Mar. 21, 2001) ("*Illinois Order*"); Decision No. 01-09-048, *Petition of SCC Communications Corp. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with SBC Communications Inc.*, Opinion Affirming Final Arbitrator's Report and Approving Interconnection Agreement (C.P.U.C. Sept. 20, 2001) ("*California Order*").

^{50/} Embarq Florida, Inc. General Exchange Tariff, Section A10, Third Revised Sheet 1 (effective Nov. 2, 2006) (emphasis added).

Embarq cannot credibly argue that Intrado's 911 service offering is not telephone exchange service when it classifies its own service as such.

Further, the distinction that Embarq seeks to make between the "voice network" and the "data or information network" portions of the wireline 911 network simply does not exist.^{51/} While Embarq recognizes that it is required to provide Intrado with access to 911 databases, Embarq attempts to separate 251 interconnection obligations from that requirement.^{52/} Interconnection for transmission of 911 traffic and access to 911 databases, however, are functions that are so intertwined that one would be useless without the other.^{53/} Indeed, segmenting the physical routing of 911 calls from the database that provides the routing information for such calls as Embarq suggests^{54/} would significantly diminish the viability and reliability of 911 services.

The interconnection and trunking facilities that Intrado seeks for the provision of its local exchange services and its competitive 911 services are no different than the interconnection Embarq provides to other competitors in Florida. Intrado is not asking for "unbundled access to the voice portion of the wireline E9-1-1 Network" as Embarq claims.^{55/} Rather, Intrado is merely seeking its rights, as recognized by the FCC, to "nondiscriminatory access to, and

^{51/} Embarq Motion at 8.

^{52/} Embarq Motion at 8-9.

^{53/} *E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, ¶ 15 (2005) ("*VoIP E911 Order*") (finding the Wireline E911 Network consists of the Selective Router, the trunk line(s) between the Selective Router and the PSAP, the ALI database, the SRDB, the trunk line(s) between the ALI database and the PSAP, and the MSAG).

^{54/} Embarq Motion at 9.

^{55/} Embarq Motion at 8.

interconnection with, [Embarq's] networks for the provision of 911 and E911 services to" end users.^{56/}

Embarq's claim that 911 interconnection is governed by Section 251(a)^{57/} is an inaccurate statement of the law. Specifically, the FCC decision cited by Embarq states:

the [FCC] currently requires [local exchange carriers] to provide access to 911 databases and *interconnection to 911 facilities* to all telecommunications carriers, pursuant to sections 251(a) *and (c)* and section 271(c)(2)(B)(vii) of the Act. We expect that this would include all the elements necessary for telecommunications carriers to provide 911/E911 solutions. . . .^{58/}

Thus, contrary to Embarq's assertions, Embarq is required by Section 251(c) to make "interconnection to 911 facilities" available to Intrado to the same extent it would provide such interconnection to itself or any other competitor operating in Florida.

B. The Items Included in Intrado's Proposed Interconnection Agreement Are within the Purview of Section 251(c)

Embarq wrongly claims that Intrado has "inappropriately" included items in its proposed interconnection agreement that are outside of Section 251(c).^{59/} Embarq, however, does not specify the items in Intrado's proposed interconnection agreement that it considers beyond the scope of Section 251(c). Intrado's proposed interconnection agreement was based on Embarq's template interconnection agreement provided to Intrado as the starting point for negotiations. The interconnection arrangements and language requested by Intrado in its Petition were based on the language provided by Embarq in its template agreement. In *Coserv*, the Fifth Circuit expressly held that

^{56/} *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Petition of City of Richardson, Texas*, 17 FCC Rcd 24282, ¶ 25 (2002).

^{57/} Embarq Motion at 8.

^{58/} *VoIP E911 Order* ¶ 38 (emphasis added).

^{59/} Embarq Motion at 10.

where the parties have voluntarily included in negotiations issues other than those duties required of an ILEC by § 251(b) and (c), those issues are subject to compulsory arbitration under § 252(b)(1). . . . Congress knew that these non-251 issues might be subject to compulsory arbitration if negotiations fail. That is, Congress contemplated that voluntary negotiations might include issues other than those listed in § 251(b) and (c) and still provided that any issue left open after unsuccessful negotiation would be subject to arbitration by the [state commission].^{60/}

Notwithstanding Embarq's argument to the contrary, Intrado has not forced Embarq to arbitrate issues that there were not included in the Parties' negotiation in contravention of *Coserv*.^{61/} Rather, each and every issue raised in Intrado's Petition flows from revisions to Embarq's own template interconnection agreement. Embarq alone decided which terms and arrangements would be included in the template interconnection agreement and which would not. Any provisions set forth in the Embarq template interconnection were therefore the subject of the Parties' negotiations, and as such, Embarq cannot now claim that the issues raised by Intrado with respect to those items are not subject to compulsory arbitration under Section 252.

^{60/} *Coserv Limited Liability Corporation v. Southwestern Bell Telephone Company*, 350 F.3d 482 (5th Cir. 2003) (emphasis in original).

^{61/} Embarq Motion at 10 (citing *Coserv Limited Liability Corporation v. Southwestern Bell Telephone Company*, 350 F.3d 482 (5th Cir. 2003)).

CONCLUSION

For the foregoing reasons, Intrado respectfully requests that the Commission reject the Motion to Dismiss filed by Sprint and move forward to arbitrate under federal and state law the unresolved issues identified in Intrado's Petition consistent with Intrado's proposed language set forth in Attachment 1 to the Petition.

Respectfully submitted,

INTRADO COMMUNICATIONS INC.



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Its Attorneys

Dated: December 24, 2007

LIST OF ATTACHMENTS

No.	BRIEF DESCRIPTION
1.	Attachment 7 to Intrado Petition - Email from Kathryn Feeney, Embarq, to Thomas Hicks, Intrado (Oct. 3, 2007)
2.	Attachment 10 to Intrado Petition - Email from Kathryn Feeney, Embarq, to Thomas Hicks, Intrado (Oct. 24, 2007); Email from Thomas Hicks, Intrado, to Kathryn Feeney, Embarq (Oct. 24, 2007)
3.	Attachment 11 to Intrado Petition - Email from Kathryn Feeney, Embarq, to Thomas Hicks, Intrado (Nov. 1, 2007); Email from Kathryn Feeney, Embarq, to Thomas Hicks, Intrado (Nov. 1, 2007)
4.	Email correspondence from Thomas Hicks, Intrado, to Various Intrado Personnel (Dec. 13, 2007)
5.	Email correspondence from Kathryn Feeney, Embarq, to Thomas Hicks, Intrado (Dec. 14, 2007)

From: Feeney, Kathryn L [EQ] [mailto:Kathryn.L.Feeney@Embarq.com]
Sent: Wednesday, October 03, 2007 3:05 PM
To: Hicks, Thomas
Subject: ICA

Tom - We are still discussing internally. Day 160 is 10/24/07. We would like to extend the window. I know we won't be ready to sign an agreement by then. Please let me know what you think about that.

Kathryn L. Feeney
Manager - Contract Management
9300 Metcalf
Overland Park, KS 66212
Mailstop: KSOPKB0402-4674
(v) 913-534-2313
(f) 913-534-7833
Kathryn.L.Feeney@embarq.com

From: Hicks, Thomas
Sent: Wednesday, October 24, 2007 8:59 AM
To: Feeney, Kathryn L [EQ]
Cc: Hicks, Thomas
Subject: RE: Intrado-Embarq Negotiations

Thank you Kathryn.

We look forward to your response, and please feel free to call me if you should need any clarification of our proposed edits.

Tom Hicks, ENP
Intrado Inc.
Director-Carrier Relations
Tel: (972) 772-5883
Mob: (972) 342-4482
Email: thomas.hicks@intrado.com

From: Feeney, Kathryn L [EQ] [<mailto:Kathryn.L.Feeney@Embarq.com>]
Sent: Wednesday, October 24, 2007 8:55 AM
To: Hicks, Thomas
Subject: Negotiations

Tom - I just wanted to touch base with you. We are working on a response to you, but it is taking longer than anticipated. I hope to have something for your review by early next week.

Kathryn L. Feeney
Manager - Contract Management
9300 Metcalf
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Mailstop: KSOPKB0402-4674
(v) 913-534-2313
(f) 913-534-7833
Kathryn.L.Feeney@embarq.com

From: Feeney, Kathryn L [EQ] [mailto:Kathryn.L.Feeney@embarq.com]
Sent: Thursday, November 01, 2007 2:38 PM
To: Hicks, Thomas
Subject: Negotiations

Tom:

Embarq's regulatory policy and legal departments have reviewed your request for interconnection under §251(c)(2) of the Act. The database network arrangements Intrado has requested are for the exchange of data or information, not for the transmission of local telephone exchange and exchange access telecommunications. As such, they are not subject to the interconnection obligations of §251(c)(2) of the Act. However, we may be able to work out an arrangement under a commercial agreement and would like to get some more details from you. We are available for a call November 13th, 14th or 15th from 4 to 5 CST. Does that time on one of those days work for you?

Kathryn L. Feeney
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Mailstop: KSOPKB0402-4674
(v) 913-534-2313
(f) 913-534-7833
Kathryn.L.Feeney@embarq.com

From: Feeney, Kathryn L [EQ] [mailto:Kathryn.L.Feeney@embarq.com]

Sent: Thursday, November 01, 2007 3:26 PM

To: Hicks, Thomas

Subject:

Tom - I got your vm and am trying to get some times together for a meeting tomorrow or early next week. I have been asked to clarify one point in my earlier email to you. We do believe that parts of the request fall under 251a but not 251b and 251c so arbitration doesn't apply. We take the position that a 251a agreement is a commercial agreement.

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(f) 913-534-7833
Kathryn.L.Feeney@embarq.com

From: Hicks, Thomas

Sent: Thursday, December 13, 2007 11:16 AM

To: Ballesteros, Rebecca; Sorensen, Eric; 'Cindy Clugy (cclugy@comcast.net)'; Kiser, Cherie

Cc: Hicks, Thomas; Spence, Carey

Subject: Embarq 251 Negotiaions

For your records...

Please be advised that I left a callback message this morning for Kathryn Feeney (Embarq) acknowledging that we have filed for arbitration (not sure she is aware) and informing her that we would be happy to participate on any call she may wish to arrange to cooperatively work towards resolution of any of the outstanding issues identified in our filing.

I will advise once/if I hear back from her.

Tom Hicks, ENP

Intrado Inc.

Director-Carrier Relations

Tel: (972) 772-5883

Mob: (972) 342-4482

Email: thomas.hicks@intrado.com

From: Feeney, Kathryn L [EQ] [mailto:Kathryn.L.Feeney@embarq.com]

Sent: Friday, December 14, 2007 8:29 AM

To: Hicks, Thomas

Subject: Intrado Arbitrations

Tom:

I got your voice mail message asking if Embarq would be willing to negotiate some of the issues Intrado raised during negotiation to see if there are any issues we could resolve. I checked with our legal department and we are going to be busy preparing our responses to the filings and won't be available for any continued negotiations until after the first of the year, unless Intrado would be willing to withdraw its petitions and move back the filing date or agree to waive the 270 time frame in the federal act and file a joint motion holding the arbitrations in abeyance to give the parties additional time to negotiate.

Kathryn L. Feeney

Manager - Contract Management

9300 Metcalf

Overland Park, KS 66212

Mailstop: KSOPKB0402-4674

(v) 913-534-2313

(f) 913-534-7833

Kathryn.L.Feeney@embarq.com

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of the Petition)	
of Intrado Communications Inc. for Arbitration)	Docket No. 070699-TP
Pursuant to Section 252(b) of the Communications Act)	
of 1934, as amended, and Section 364.162, Florida)	Filed: December 24, 2007
Statutes to Establish an Interconnection Agreement with)	
Embarq Florida, Inc.)	

INTRADO’S REQUEST FOR ORAL ARGUMENT

Intrado Communications Inc. (“Intrado”), pursuant to Rule 25-22.0022, Florida Administrative Code, hereby requests that it be granted an opportunity to present oral argument on its Opposition to Embarq’s Motion to Dismiss, being filed concurrently with this Request.

While Embarq failed to request oral argument, Intrado believes that allowing Intrado and Embarq to address the Commission will aid the Commissioners in evaluating the issues before it. A motion to dismiss is an extreme remedy, and Embarq bears a very heavy burden in seeking dismissal as a matter of law, which requires that the Commission to accept all of the allegations in the Petition as facially correct.

Intrado has comprehensively addressed in its Opposition that is being filed today why Embarq has completely failed to meet its burden on the pleadings, which in and of itself is a sufficient basis for denying Embarq’s motion without any further consideration. However, Intrado recognizes that the issues raised by the motion and Intrado’s Opposition are matters of first impression for the Commission – as far as we can ascertain the Commission has never dismissed a complete petition for arbitration as a matter of law under both the applicable federal

and state statutes relied upon by Embarq. Furthermore, the interplay between the negotiation and arbitration statutes under both federal and state law is also a question that has not been previously addressed by the Commission. Finally, without exaggerating, it is fair to say that the provision of 911 service to Florida consumers is unquestionably a matter of life and death, and the ability of a competitive carrier such as Intrado to interconnect and exchange traffic with Embarq under Sections 251 and 252 of the 1996 Federal Act and the corresponding provisions of Chapter 364, Florida Statutes, is critical both to the interoperability of a ubiquitous public switched network and the ability of emergency responders to timely perform their jobs.

While a denial of the motion to dismiss solely on the pleadings would be a proper and correct disposition without any further argument, Intrado hereby seeks the opportunity for the parties to address the Commission to the extent it would be helpful to the Commissioners for understanding why Embarq's motion should be denied.

WHEREFORE, Intrado respectfully requests that it be granted oral argument on its Opposition to the Motion to Dismiss.

[document continues on the next page]

Respectfully submitted,

INTRADO COMMUNICATIONS INC.



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