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VIA ELECTRONIC FILING

Ms. Ann Cole, Director
Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 080134-TP

Dear Ms. Cole:

Enclosed for filing on behalf of Intrado Communications Inc. is an electronic version of the following document: Intrado Communications Inc.' Response to Response to Verizon Motion for Summary Final Order in the above referenced docket.

Thank you for your assistance with this filing.

Sincerely yours,



Floyd R. Self

FRS/amb

Enclosures

cc: Rebecca Ballesteros, Esq.
Parties of Record

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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
Verizon Florida LLC

Docket No. 080134-TP
Filed: March 27, 2009

**INTRADO COMMUNICATIONS INC. RESPONSE TO
VERIZON MOTION FOR SUMMARY FINAL ORDER**

Intrado Communications Inc. (“Intrado Comm”), by its attorneys, hereby respectfully submits its Response to the Motion for Summary Final Order (“Motion”) filed by Verizon Florida LLC (“Verizon”) in the above-referenced arbitration proceeding. Verizon’s request for the Florida Public Service Commission (“Commission”) to issue a summary final order is contrary to federal and state law. Accordingly, Verizon’s Motion should be denied and the Commission should move forward with its procedural schedule for the remainder of this arbitration proceeding.

INTRODUCTION

Verizon’s Motion fails to comply with the applicable statutory standard for a summary final order and the numerous Commission precedents, which require the absence of any genuine issue as to any material fact. There is no basis for this Commission to rule that there are no disputed issues of material fact because there are no facts of record in this case – no testimony, no discovery, no affidavits, and no facts of any kind established. The law requires that the facts be construed in the light most favorable to the party against whom a summary final order is

sought, in this case Intrado Comm.¹ Based on this standard of review, Verizon's Motion must fail.

Verizon asserts it is entitled to a summary final order based solely on the record established in the separate dockets addressing the Intrado Comm arbitrations with Embarq and AT&T.² Verizon conveniently assumes that the record that *will be developed* and does not yet exist in this docket will be *exactly the same* as that which was developed in the AT&T and Embarq dockets. There is no legal or factual basis for this conclusion. The only action that has taken place in this docket is the development of an issues list, and none of those issues go to the Commission's jurisdiction to arbitrate the unresolved interconnection agreement issues as discussed above. In order to prevail on its Motion, Verizon must prove that the facts here are the same as those in the other two arbitrations – but there is no factual record, let alone a record that would enable this Commission to conclude as a matter of law that the facts will be the same.

Dismissal of this arbitration based on Verizon's motion is contrary to federal and state law. The federal law issue of whether Intrado Comm is entitled to Section 251(c) interconnection with Verizon is not a matter that has been presented to the Commission for arbitration. The instant arbitration proceeding thus is distinctly different than Intrado Comm's arbitration proceedings with AT&T and Embarq. The Act limits the Commission's review in a Section 252 arbitration to only those issues presented by the Parties for arbitration,³ and neither

¹ Order No. PSC-04-0975-PCO-TP, at 4 (Oct. 8, 2004).

² See *Verizon Florida LLC Motion for Summary Final Order*, 2 (filed Dec. 16, 2008) ("Verizon Motion").

³ 47 U.S.C. § 252(b)(4)(A); see also, e.g., Order No. PSC-04-0488-PCO-TP, at 2 (May 12, 2004) (recognizing the limits of 252(b)(4)(A)); *Petition of Cavalier Telephone LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Arbitration*, 18 FCC Rcd 25887, ¶ 2 (2003) (noting that when standing in the shoes of a state commission, the Federal Communications Commission must "limit [its] consideration to only those issues" presented by the parties); *U.S. West Communications, Inc. v. Minnesota Public*

Party has designated Intrado Comm's right to Section 251(c) as an issue to be arbitrated.

Verizon's Motion must be denied for this reason alone.

Verizon's Motion must also be denied pursuant to state law. While Intrado Comm strongly disagrees with the Commission's prior rulings, the decision that Intrado Comm was not entitled to Section 251(c) interconnection agreements with AT&T and Embarq was based upon the factual record developed in each of those dockets regarding the network services that Intrado Comm was at that time proposing to offer customers in the AT&T and Embarq service areas. There is no record here as to what services Intrado Comm will be offering customers in the Verizon service area. More importantly, there is no evidence and no record that the services Intrado Comm will be offering customers in the Verizon service area will be exactly the same as the services offered to customers in the AT&T and Embarq service areas. Intrado Comm, as a matter of public policy is entitled to present its case to the Commission, and that case will be

Utilities Commission, 55, F. Supp. 2d 968, 976-77 (D. Minn. 1999) (finding that 252(b)(4)(A) "indicates that the [state commission] cannot independently raise an issue not raised by one of the parties"); Arizona Docket No. T-01051B-07-0693, *Qwest Corporation's Petition For Arbitration And Approval Of Amendment To Interconnection Agreement With Arizona Dialtone, Inc. Pursuant To Section 252(B) Of The Communications Act Of 1934, As Amended By The Telecommunications Act Of 1996 And Applicable State Laws*, Opinion and Order (Aug. 6, 2008) (acknowledging that "Section 252(b)(4)(A) limits the Commission's authority in an arbitration under § 252(b)"); Illinois Docket No. 04-0371, *Petition for Arbitration of an Amendment to an Interconnection Agreement with Illinois Bell Telephone Company Pursuant o Section 252(b) of the Communications Act of 1934, as Amended*, Amendatory Arbitration Decision (Oct. 28, 2004) ("The Commission can only resolve issues - which, in the context of Section 252, are precisely delineated disputes on points of fact, law or policy."); Kansas Docket No. 04-L3CT-1046-ARB, *Arbitration Between LEVEL 3 COMMUNICATIONS, LLC and SBC COMMUNICATIONS, INC., Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, for Rates, Terms, and Conditions of Interconnection*, Arbitrator's Decision 10: Decision (Feb. 4, 2005) (recognizing that "Section 252(b)(4)(A) of the Act expressly prohibits State commissions from arbitrating issues other than those set forth for arbitration"); Ohio Case No. 04-1822-TP-ARB, *TelCove Operations, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Ohio Bell Telephone Company d/b/a SBC Ohio*, Arbitration Award (Jan. 25, 2000) (finding the parties' attempts to introduce new issues was "beyond the scope of [the] arbitration" based on the requirements of Section 252(b)(4)(A)); Tennessee Docket No. 04-00017, *Petition for Arbitration of Aeneas Communications, LLC with BellSouth Telecommunications, Inc.*, Order Denying Supplemental Petition for Arbitration (Jan. 6, 2006) (denying a request to add issues to the arbitration beyond those previously identified by the parties).

different than that presented in the AT&T and Embarq dockets. Further, Intrado Comm is also entitled to present its state law case for an interconnection agreement, which the Commission found was not demonstratively presented in the previous arbitrations. Thus, Verizon's Motion lacks any evidence of record upon which a determination can now be made as a matter of law that there are no disputed material facts of record. Accordingly, Verizon's Motion must also be denied under state law.

I. VERIZON HAS NOT SATISFIED THE LEGAL STANDARD FOR ISSUANCE OF A SUMMARY FINAL ORDER

This Commission has considered motions for summary final order on multiple occasions. The guiding principle for such motions has been established by the Florida Legislature, which has determined that a summary final order shall be granted if “from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order.”⁴ This legislative enactment was created in 1998, and this Commission has stated that a “‘summary final order’ is analogous to ‘summary judgment,’ so case law and orders addressing ‘summary judgment’ are generally applicable to ‘summary final order.’”⁵ This Commission has further explained the basis for a summary final order as follows:

Under Florida law, ‘the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact,’ and every possible inference must be drawn in favor of the party against whom a summary judgment is sought. The burden is on the movant to demonstrate that the opposing party cannot prevail. ‘A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law.’ ‘Even where the facts are undisputed, issues as to the interpretation of such facts may be such as to preclude the

⁴ Fla. Stat. § 120.57(1)(h).

⁵ Order No. PSC-07-1008-PAA-TL, at 4, n.1 (Dec, 19, 2007).

award of summary judgment.’ If the record reflects the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt as to an issue of fact, summary judgment is improper. However, once a movant has tendered competent evidence to support his or her motion, the opposing party must produce counter-evidence sufficient to show a genuine issue because it is not enough to merely assert that an issue exists.⁶

While it is clear that a summary final order may be granted only when the moving party is entitled to the relief sought as a matter of law, the Commission has further elaborated on the important policy implications of summary final orders “that policy considerations should be taken into account in ruling on a motion for summary final order.”⁷ As the Commission has explained:

We are also aware that a decision on a motion for summary judgment is also necessarily imbued with certain policy considerations, which are even more pronounced when the decision also must take into account the public interest. Because of this Commission's duty to regulate in the public interest, the rights of not only the parties must be considered, but also the rights of the Citizens of the State of Florida are necessarily implicated, and the decision cannot be made in a vacuum. Indeed, even without the interests of the Citizens involved, the courts have recognized that

[t]he granting of a summary judgment, in most instances, brings a sudden and drastic conclusion to a lawsuit, thus foreclosing the litigant from the benefit of and right to a trial on the merits of his or her claim. *Coastal Caribbean Corp. v. Rawlings*, 361 So. 2d 719, 721 (Fla. 4th DCA 1978). It is for this very reason that caution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment must be observed.

⁶ Order No. PSC-07-1008-PAA-TL, at 4 (Dec. 19, 2007) (citing *Green v. CSX Transportation, Inc.*, 626 So. 2d 974 (Fla. 1st DCA 1993); *Christian v. Overstreet Paving Co.*, 679 So. 2d 839 (Fla. 2nd DCA 1996); *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985); *Franklin County v. Leisure Properties, Ltd.*, 430 So. 2d 475, 479 (Fla. 1st DCA 1983); *Albelo v. Southern Bell*, 682 So. 2d 1126 (Fla. 4th DCA 1996); *Golden Hills Golf & Turf Club, Inc. v. Spitzer*, 475 So. 2d 254, 254-255 (Fla. 5th DCA 1985)); see also *McCraney v. Barberi*, 677 So. 2d 355 (Fla. 1st DCA 1996) (finding that summary judgment should be cautiously granted, and that if the evidence will permit different reasonable inferences, it should be submitted to the jury as a question of fact).

⁷ Order No. PSC-07-1008-PAA-TL, at 4 (Dec. 19, 2007).

Page v. Staley, 226 So. 2d 129,132 (Fla. 4th DCA 1969).
The procedural strictures are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim. They are not merely procedural niceties nor technicalities.⁸

Thus, before this Commission can grant Verizon's Motion, the Commission must conclude not only that there exists no genuine issue as to any material fact and that Verizon is entitled as a matter of law to the entry of a summary final order, but that public policy would support the entry of a summary final order before any record has been developed in this matter. Verizon's Motion does not support such a legal conclusion and should therefore be denied.

II. GRANT OF VERIZON'S MOTION IS CONTRARY TO FEDERAL LAW

Verizon is wrong when it claims that a "key determination" in this case is whether Intrado Comm is providing telephone exchange service.⁹ The Commission's decisions in the Embarq and AT&T arbitration proceedings have no bearing on the instant proceeding. The issue of whether Intrado Comm is providing telephone exchange service or is entitled to Section 251(c) interconnection for the competitive provision of 911/E-911 services to public safety answering points ("PSAPs") and other public safety agencies is not an issue in the instant arbitration proceeding before the Commission. Verizon's belated attempt to challenge Intrado Comm's right to a Section 251(c) interconnection agreement must be rejected as a matter of law.

The Communications Act of 1934, as amended ("Act"), sets forth specific parameters for state commissions to follow when conducting arbitrations under Sections 251 and 252 of the Act. Specifically, under the Act, the party petitioning for arbitration (Intrado Comm in this situation) must identify the unresolved issues for which it seeks arbitration, and the respondent (Verizon in

⁸ Order No. PSC-98-1538-PCO-WS, at 8 (Nov. 20, 1998).

⁹ Verizon Motion at 2.

this situation) may designate additional issues for resolution by the state commission.¹⁰ When evaluating the petition and response, the state commission is required to “limit its consideration . . . to the issues set forth in the petition and in the response, if any.”¹¹

On September 11, 2008, the Parties held an Issue Identification session with Commission staff. This session followed several weeks of back-and-forth between the Parties to develop a “joint” issues matrix setting forth the Parties’ agreed-upon issues to be arbitrated by the Commission. The joint issues matrix presented to Commission Staff on September 8, 2008 was nearly identical to the matrices used by the Parties in the other states in which arbitration proceedings are pending. Importantly, neither the joint issues matrix presented to Commission Staff, nor the issues list contained in the Commission’s November 12, 2008 *Order Establishing Procedure*, contains Intrado Comm’s entitlement to Section 251(c) interconnection as an issue to be arbitrated by the Commission. This is based on the agreement reached between Intrado Comm and Verizon that Intrado Comm’s entitlement to Section 251(c) would not be an issue for arbitration between the Parties consistent with Intrado Comm’s pending arbitration proceedings¹² with Verizon¹³ in Delaware,¹⁴ Illinois,¹⁵ Maryland,¹⁶ Massachusetts,¹⁷ North Carolina,¹⁸ Ohio,¹⁹

¹⁰ 47 U.S.C. §§ 252(b)(2), (3).

¹¹ 47 U.S.C. § 252(b)(4)(A). *See also* Order No. PSC-96-0933-PCO-TP, at 2 (July 17, 1996) (“Section 252(b)(4) requires this Commission to limit its consideration to the issues raised by the petition and the response.”)

¹² The issue of whether Intrado Comm is entitled to Section 251(c) interconnection is present in Intrado Comm’s arbitration proceeding with Verizon in Texas due to a Texas commission rule permitting Administrative Law Judges to identify “threshold issues” to be addressed prior to other issues raised in the proceeding. *See, e.g.*, TEX. PUC INTERCONNECTION RULES § 21.61(a). The issue was not raised by Intrado Comm in its petition for arbitration. The Parties filed briefs on the issue in October and November 2007, and a decision is pending from the Administrative Law Judges.

¹³ The issue of whether Intrado Comm is entitled to Section 251(c) interconnection is present in Intrado Comm’s arbitration proceeding with Verizon before the Wireline Competition Bureau of the Federal Communications Commission (standing in the shoes of the Virginia commission) only by virtue of the Bureau’s decision to consolidate the Intrado Comm/Verizon and Intrado Comm/Embarq Virginia arbitrations. The issue was not present in Intrado Comm’s arbitration proceeding with Verizon before the Bureau because neither Intrado Comm (in its petition) nor Verizon (in its response) designated it as an issue for arbitration. *See, e.g.*, WC Docket

No. 08-185, Petition of Intrado Communications of Virginia Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended, to Establish an Interconnection Agreement with Verizon South Inc. and Verizon Virginia Inc. (collectively, "Verizon"), Reply of Intrado Communications of Virginia Inc. at 9-10 (filed Jan. 26, 2009), *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520194156. A decision is expected from the Bureau in early May. However, it was designated as an issue in Embarq/Virginia arbitration under review by the FCC similar to the arbitration with Embarq in Florida. Thus, the consolidated Embarq/Verizon arbitrations with Intrado Comm pending before the FCC include this issue solely by virtue of the Embarq arbitration.

¹⁴ See, e.g., Delaware Docket No. 08-61, *In the Matter of the Petition of Intrado Communications Inc. for the Arbitration of Unresolved Issues from the Interconnection Negotiations with Verizon Delaware LLC* (filed March 5, 2008), Direct Testimony on behalf of Verizon Delaware LLC at 9, lines 168-70, 173-75 (filed Nov. 3, 2008) ("Verizon agreed to negotiate and arbitrate an interconnection agreement with Intrado on the same basis it does with any CLEC. . . . Verizon's position here is that it will provide Intrado the same interconnection and other services it provides to any CLEC").

¹⁵ See, e.g., Illinois Docket No. 08-0550, *Intrado Inc. Petition for Arbitration pursuant to Section 252(b) of the Communications Act of 1934, as amended, to Establish an Interconnection Agreement with Verizon North, Inc. and Verizon South, Inc.*, Rebuttal Testimony on behalf of Verizon North, Inc. and Verizon South, Inc. at lines 168-71 (filed Nov. 26, 2008) (stating that Intrado Comm "approached Verizon as a competitive local exchange carrier ("CLEC") and Verizon agreed to negotiate and arbitrate an interconnection agreement with Intrado on the same basis it does with any CLEC"), *available at* <http://www.icc.illinois.gov/docket/files.aspx?no=08-0550&docId=131270>.

¹⁶ See, e.g., Maryland Case 9138, *Petition of Intrado Communications Inc. for Arbitration to Establish an Interconnection Agreement with Verizon Maryland Inc. Pursuant to the Federal Telecommunications Act*, Panel Direct Testimony on behalf of Verizon Maryland Inc. at 9, lines 1-4 (noting that Intrado Comm "approached Verizon as a CLEC and Verizon agreed to negotiate and arbitrate an interconnection agreement with Intrado on the same basis it does with any CLEC"), *available at* http://webapp.psc.state.md.us/Intranet/Casenum/CaseAction_new.cfm?RequestTimeout=500.

¹⁷ See, e.g., Massachusetts DTC 08-09, *Petition of Intrado Communications Inc. for Arbitration pursuant to Section 252(b) of the Communications Act of 1934, as amended, to Establish an Interconnection Agreement with Verizon New England Inc. d/b/a Verizon Massachusetts*, Prefiled Testimony on behalf of Verizon Massachusetts at 7, lines 20-21 (filed Dec. 29, 2008) (stating Intrado Comm "approached Verizon for negotiation of an interconnection agreement as any other CLEC would").

¹⁸ See, e.g., North Carolina Docket No. P-1187, Sub 3, *Petition of Intrado Communications Inc. for Arbitration with Verizon South Inc. d/b/a Verizon North Carolina*, Direct Testimony on behalf of Verizon South Inc. at 8, lines 152-54, 157-59 (filed Oct. 31, 2008) ("Verizon agreed to negotiate and arbitrate an interconnection agreement with Intrado on the same basis it does with any CLP. . . . Verizon's position here is that it will provide Intrado the same interconnection and other services it provides to any CLP"), *available at* <http://ncuc.commerce.state.nc.us/cgi-bin/webview/senddoc.pgm?dispfmt=&itype=Q&authorization=&parm2=9AAAAA80380B&parm3=000128292>

¹⁹ See, e.g., Ohio Case No. 08-198-TP-ARB, *Petition of Intrado Communications Inc. for Arbitration pursuant to Section 252(b) of the Communications Act of 1934, as amended, to Establish an Interconnection Agreement with Verizon North, Inc.*, Refiled Testimony on behalf of Verizon North, Inc. at lines 152-56 (filed Dec. 30, 2008) ("Verizon does not agree that Intrado is entitled to section 251(c) interconnection for the 911 services it seeks to provide. However, the Commission has already determined that issue and has required Verizon and other ILECs to negotiate and arbitrate with Intrado under sections 251 and 252 of the Act."), *available at* <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=156bb9c6-ab87-4bb4-bf41-3ecb622b847c>.

and its finalized proceeding with Verizon in West Virginia.²⁰ Indeed, the West Virginia commission specifically noted that it would not address the issue given that it was not squarely raised by the Parties and Verizon had waived the issue by entering into interconnection agreement negotiations with Intrado Comm.²¹

Importantly, the only issue the Commission addressed in the Embarq and AT&T arbitrations was whether Intrado Comm is entitled to Section 251(c) interconnection.²² That issue is not before the Commission for arbitration in this proceeding.²³ The law is clear that “state commissions are limited to deciding issues set forth by the parties” because “the *parties* determine what issues will be resolved through arbitration, not the state commission.”²⁴

Accordingly, Verizon’s Motion must be denied under federal law.

III. THERE IS NO STATE LAW BASIS FOR ISSUANCE OF A SUMMARY FINAL ORDER

The only substantive actions that have taken place in this docket are Intrado Comm’s petition for arbitration filed on March 5, 2008, Verizon’s response to the petition on March 31,

²⁰ See, e.g., West Virginia Case No. 08-0298-T-PC, *Intrado Communications Inc. and Verizon West Virginia Inc., Petition for Arbitration pursuant to § 252(b) of 47 U.S.C. and 150 C.S.R. 6.15.5*, Direct Testimony on behalf of Verizon West Virginia Inc. at lines 172-74 (filed Sept. 9, 2008) (“Verizon has agreed to negotiate and arbitrate an interconnection agreement with Intrado on the same basis it does with any CLEC”), available at <http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=248548&NotType=WebDocket>.

²¹ West Virginia Case No. 08-0298-T-PC, *Intrado Communications Inc. and Verizon West Virginia Inc., Petition for Arbitration pursuant to § 252(b) of 47 U.S.C. and 150 C.S.R. 6.15.5*, Arbitration Award, at 16-17 (Nov. 14, 2008) (“*West Virginia ALJ Award*”), approved by Commission Order (Dec. 16, 2008).

²² Order No. PSC-08-0798-FOF-TP (Dec. 3, 2008) (Docket No. 070736-TP, Intrado Comm-AT&T arbitration); Order No. PSC-08-0799-FOF-TP (Dec. 3, 2008) (Docket No. 070699-TP, Intrado Comm-Embarq arbitration).

²³ The law clearly does not permit this issue to be added to this arbitration at this stage, but even if it did, then it would be an issue *to be decided* by the Commission based upon the record *to be developed* in this matter. Under the law, such a prospective issue is not appropriate for a summary final order given the lack of any evidentiary record as further discussed herein.

²⁴ *TCG Milwaukee, Inc. v. Public Service Commission of Wisconsin*, 980 F. Supp. 992, 999-1001 (W.D. Wis. 1997) (emphasis in original).

2008, and the issuance of the Order Establishing Procedure on November 12, 2008.²⁵ There has not been any testimony, depositions, interrogatory answers, admissions, or affidavits of record in this matter. There is no dispute that this case is still very much in the preliminary stages.²⁶ As this Commission has recognized numerous times, it is premature to consider a motion for summary final order before the parties to the proceeding have had the opportunity to complete discovery and file testimony.²⁷ Thus, unless and until an evidentiary record is established in this matter, a summary final order is entirely premature.

It is also important to note that even if a record had been developed in this case, Verizon would still bear the burden of demonstrating that there are no disputed material issues of fact and that Verizon is entitled to judgment as a matter of law.²⁸ Such a record must conclusively establish the lack of disputed facts.²⁹ The Commission has found that even the sufficiency of the evidence may be grounds for denying a motion for summary final order.³⁰ None of these circumstances apply here since there is no record.

²⁵ Order No. PSC-08-0745-PCO-TP. There was a motion for an abeyance, that was withdrawn, and an agreed 60-day extension to allow the parties to further negotiate, but these matters have not substantively added to the evidentiary record in this case.

²⁶ Order No. PSC-08-0415-FOF-TP (June 28, 2008) (denying Nextel's motion for summary final order where there had not yet been any testimony or discovery of record).

²⁷ Order No. PSC-00-2388-AS-WU, at 6 (Dec. 13, 2000) ("Therefore, we find that it is premature to decide whether a genuine issue of material fact exists when OPC has not had the opportunity to complete discovery and file testimony.") (citing *Brandauer v. Publix Super Markets, Inc.*, 657 So. 2d 932, 933 (Fla. 2d DCA 1995); Order No. PSC-02-1464 (Oct. 23, 2002) ("We believe that the suitable time to seek summary final order, if otherwise appropriate, is after testimony has been filed and discovery has ceased.")

²⁸ For example, the Commission has not considered the fact that Intrado Comm will provide services to telematics providers (such as OnStar) and private branch exchange ("PBX") owners who originate 911 calls as discussed in Intrado Comm's petition for arbitration. See Intrado Comm Petition at 6, 7, n.12.

²⁹ Order No. PSC-04-0992-PCO-EI (Oct. 11, 2004).

³⁰ Order No. PSC-04-0164-PCO-TP (Feb. 17, 2004).

On the rare occasions where a summary final order has been granted, it is important to note that the issue was usually the construction or interpretation of a preexisting contract. For example, in the *ITC^DeltaCom* case, the Commission granted a summary final order on the basis of an existing contract.³¹ The Commission found that the contract was unambiguous on its face and thus not subject to any extrinsic evidence as to the meaning of the contractual terms, and because the Commission had already ruled on the meaning of the contractual terms at issue.³² There is nothing even close to the unique and specific facts, law, and circumstances present in the *ITC^DeltaCom* case in the present case. The fundamental issue in this case is the *creation* of a contract through the negotiation and arbitration process Intrado is entitled to pursuant to federal and state law.

Verizon's Motion is predicated on the assumption that the facts regarding Intrado Comm's provisioning of local exchange services to its customers within the Verizon service territory will be *exactly the same* as the Commission found in the AT&T and Embarq dockets. Verizon assumes that the Commission will find again that as a matter of federal law Intrado Comm does not offer telephone exchange services because it does not offer originating telephone service and therefore Intrado is not entitled to 251(c) interconnection.³³ First, there is no reason to assess in this proceeding whether Intrado Comm offers telephone exchange service because that issue has not been raised as discussed above. Second, without any evidence of record at this

³¹ Order No. PSC-00-1540-FOF-TP (Aug. 24, 2000).

³² Order No. PSC-00-1540-FOF-TP (Aug. 24, 2000). Contrast the *ITC^DeltaCom* situation with that in the TCG dispute with BellSouth over the interpretation of the parties interconnection agreement – in the TCG case the Commission denied TCG's motion for a partial summary final order on the grounds that while the interconnection agreement appeared clear on its fact, it may be subject to interpretation due to changes in the governing law. *See* Order No. PSC-01-1427-FOF-TP (July 3, 2001).

³³ Order No. PSC-08-0798-FOF-TP (Dec. 3, 2008) (AT&T Order); Order No. PSC-08-0799-FOF-TP (Dec. 3, 2008) (Embarq Order).

time, let alone competent substantial evidence of record that the services to be provided by Intrado Comm's will be exactly the same as those under review in the Embarq, AT&T arbitrations, Verizon's Motion is premature at best. As a matter of law and public policy, Intrado Comm is entitled to the opportunity to present its case to the Commission; an opportunity that awaits the issuance of a new procedural schedule and the filing of testimony and the pursuit of discovery. Granting Verizon's Motion would improperly deny Intrado Comm of its right to present any case at all.

This Commission has determined that arbitration proceedings, and the results of such proceedings, are limited *only* to the parties *to that proceeding*. In one of the very first arbitrations conducted by the Commission under the Act, the Commission initially granted intervention to ACSI in a consolidated arbitration involving separate interconnection agreements between BellSouth and AT&T, MCI, and MFS.³⁴ The Commission originally determined that intervention would not be appropriate to third parties:

Upon review of the Act, I find that intervention with full party status is not appropriate for purposes of the Commission conducting arbitration in this docket. Section 252 contemplates that only the party requesting interconnection and the incumbent local exchange company shall be parties to the arbitration proceeding. For example, Section 252(b)(1) of the Act states that the "carrier or any other party to the negotiation" may request arbitration (emphasis added). Similarly, Section 252(b)(3) says, "a non-petitioning party to a negotiation may respond to the other party's petition" within 25 days (emphasis added). Section 252(b)(4) requires this Commission to limit its consideration to the issues raised by the petition and the response. None of these statutory provisions provides for intervenor participation. Accordingly, only BellSouth and AT&T shall be granted full party status for purposes of arbitration of the issues set forth in AT&T's petition. It follows,

³⁴ The separate arbitrations with BellSouth and AT&T, MCI, and MFS were consolidated at the request of the parties in that "the proceedings in the two dockets will involve many common questions of law, fact, and policy" and because "[t]he Act is clear that the State commission may consolidate requests for arbitration to reduce administrative burdens on the parties and the State commission itself." Order No. PSC-96-1039-PCO-TP (Aug. 9, 1996) (citing § 252(g) of the Act).

therefore, that only AT&T and BellSouth shall be bound by the agreement resulting from the AT&T petition filed in this proceeding.³⁵

Notwithstanding this determination, in later allowing ACSI party status, the Commission concluded that under the circumstances presented by ACSI that ACSI would be allowed to participate as a full party of record:

Although participation in the original arbitration proceedings was limited to the Petitioner and Respondent, it appears intervention is appropriate at this time. The Commission will be setting permanent rates for certain network elements in this proceeding that are common to ACSI. Specifically, the rates for collocation that contain cross connect charges will be reviewed in this proceeding. Further, the Commission will set permanent rates for 2-wire ADSL and 2 wire/4 wire HDSL loops which are contained in the BellSouth/ACSI agreement. Since the Commission will be setting these rates for AT&T Communications of the Southern States, Inc., MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc., and Metropolitan Systems of Florida, Inc., it appears appropriate and expedient to permit ACSI to participate at this time.³⁶

The Commission ultimately, however, reversed its grant of intervention. The Commission reconsidered its basis for allowing the intervention and determined again that under the Act intervention was *not* appropriate:

The arbitration proceedings are limited to the issues raised by the immediate parties to the particular negotiations. The outcome of arbitration proceedings is an agreement between those parties that is binding only on them. The Act does not contemplate participation by other entities who are not parties to the negotiations and who will not be parties to the ultimate interconnection agreement that results. Entities not party to the negotiations are not proper parties in arbitration proceedings, even though they may, in some indirect way, be affected by a particular decision. This conclusion is consistent with the conclusion reached by the Prehearing Officer at page 2 in Order No. PSC-96-0933-PCO-TP, which established procedure in Docket No. 960833-TP[.]³⁷

³⁵ Order No. PSC-96-0933-PCO-TP, at 2 (July 17, 1996).

³⁶ Order No. PSC-97-1399-PCO-TP (Nov. 6, 1997).

³⁷ Order No. PSC-98-0007-PCO-TP (Jan. 2, 1998) (quoting the text cited at page 13 above).

As the Commission conclusively established through the process of denying, granting, and then reconsidering and denying intervention, arbitration decisions affect *only* the parties to that particular arbitration. Such a limited scope reflects the structure of the Act and the unique issues, evidence, and findings associated with each negotiation and arbitration process.

The Commission should not blindly accept Verizon's wrongful assumption that the record in this arbitration will be the same. The Commission's decisions in the AT&T and Embarq cases addressed an issue not before the Commission in this case and, as such, Intrado Comm will present a different case with respect to Intrado Comm's entitlement to the interconnection agreement it seeks with Verizon under the federal Act. As a matter of law, Intrado Comm is entitled to present its case in chief with respect to its service offerings and network configurations so the Commission can make an informed decision regarding Intrado Comm's interconnection agreement.³⁸

It is also legally significant that even if the record developed here was to be exactly as that in the AT&T and Embarq dockets, Florida law provides an independent right for the interconnection and mutual exchange of traffic.³⁹ While Intrado Comm is entitled to interconnect and exchange traffic with Verizon pursuant to a 251(c) interconnection agreement, Intrado Comm intends to pursue all of its rights, including its state law rights to interconnection and mutual traffic exchange as indicated in its petition.⁴⁰ Such state law interconnection

³⁸ Indeed, there may additional legal precedent not yet considered by the Commission, which Intrado Comm is entitled to present in this proceeding. *See, e.g., Verizon California, Inc. et al. v. FCC*, 555 F.3d 270 (D.C. Cir. 2009); Docket 080731-TP, Petition by Comcast Phone of Florida, LLC d/b/a Comcast Digital Phone for arbitration of an interconnection agreement with Quincy Telephone Company d/b/a TDS Telecom, pursuant to Section 252 of the Federal Communications Act of 1934, as amended, and FLA. STAT. ANN. §§ 120.57(1), 120.80(13), 364.012, 364.15, 364.16, 364.161, and 364.162, and Rule 28-106.201, F.A.C.

³⁹ FLA. STAT. ANN. § 364.16, 364.161, and 364.162.

⁴⁰ Intrado Comm Petition at 1, 8.

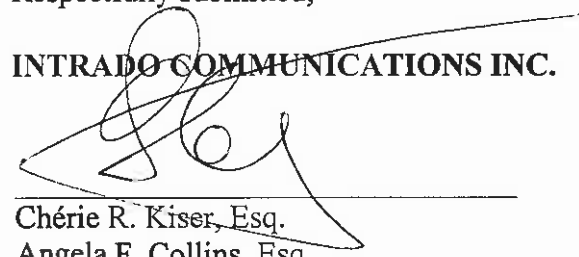
agreement rights were not fully explored in the AT&T and Embarq cases, but Intrado Comm is fully entitled to the right to do so here.⁴¹ The record is a blank slate with respect to state law interconnection rights, and therefore it would be inappropriate for a summary final order.

CONCLUSION

For the foregoing reasons, Intrado Comm respectfully requests that the Commission deny Verizon's Motion for Summary Final Order and move forward with its procedural schedule.

Respectfully submitted,

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⁴¹ The Commission found that "Intrado Comm never made a demonstrative 'state law argument' in the case it built through testimony and exhibits." Order No. PSC-09-0155, at 7 (March 16, 2009) (Embarq docket) and Order No. PSC-09-0156-FOF-TP, at 7 (March 16, 2009) (AT&T docket).

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 27th day of March, 2009.

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