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PUBLIC SERVICE
COMMISSION

VIA OVERNIGHT MAIL

Mr. Jeff Derouen
Executive Director
Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40602

Re: Petition of Communications Venture Corporation,
d/b/a INdigital Telecom for Arbitration of Certain
Terms and Conditions of Proposed Interconnection
Agreement with BellSouth Telecommunications, Inc.
d/b/a AT&T Kentucky, Pursuant to the Communications
Act of 1934, as Amended by the Telecommunicates Act of 1996
KPSC 2009-00438

Dear Mr. Derouen:

Enclosed for filing in the above-referenced case are the original and five (5) copies of Reply Brief on Threshold Issue of BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky.

Should you have any questions, please let me know.

Sincerely,


Mary K. Keyer

Enclosures

cc: Party of Record

791053

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

Petition of Communications Venture Corporation, d/b/a INdigital Telecom for Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement with BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky, Pursuant to the Communications Act of 1934, as Amended by the Telecommunications Act of 1996))))))))))	Case No. 2009-000438
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**REPLY BRIEF ON THRESHOLD ISSUE
OF BELLSOUTH TELECOMMUNICATIONS, INC.
D/B/A AT&T KENTUCKY**

Pursuant to the approved procedural schedule, BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky ("AT&T Kentucky") hereby submits its reply brief on the threshold issue in this arbitration. The issue is whether the E911/911 service ("911 service") that petitioner Communications Venture Corporation, d/b/a INdigital Telecom ("INdigital") plans to provide to Public Safety Answering Point ("PSAP") customers qualifies it for interconnection to AT&T Kentucky under Section 251(c)(2) of the federal Telecommunications Act of 1996 ("Act" or "1996 Act") and compulsory arbitration of terms regarding such interconnection under Section 252(b). 47 U.S.C. §§ 251(c)(2), 252(b). The answer is no, it does not.

INTRODUCTION

Throughout its brief INdigital touts the alleged capabilities of its 911 service. But this threshold briefing does not concern the alleged benefits of INdigital's service. Nor does it concern INdigital's ability to provide that service in competition with AT&T

Kentucky. Indeed, AT&T Kentucky has made clear that it is ready and willing to enter into a non-Section 252 commercial agreement with INdigital that would enable INdigital to interconnect and obtain everything it may need to provide 911 service. The *only* issue here is whether INdigital is entitled to interconnect to AT&T Kentucky under Section 251(c)(2) of the 1996 Act or compel arbitration under Section 252(b) of the Act of any rates, terms, and conditions regarding such interconnection. The answer to that question depends on whether INdigital's proposed 911 service falls within the federal definition of "telephone exchange service" under 47 U.S.C. § 153(47). That is the *only* issue at this stage.¹

AT&T Kentucky's initial brief demonstrated that INdigital's 911 service does not fall within the definition of telephone exchange service. INdigital's initial brief claims that its 911 service does fall within that definition, but its arguments are either conclusory or contradict the FCC's orders interpreting the definition of telephone exchange service. INdigital provides little or no detail about what its service would do, and for the most part merely asserts that it is telephone exchange service without showing how that could be so. Rather, the few specific arguments that INdigital makes are easily refuted, as shown in part I below. INdigital also makes a few fallback arguments, both of which ignore federal law. Contrary to INdigital's claims, it cannot compel arbitration of terms for Section 251(c)(2) interconnection if its service does not qualify for Section 251(c)(2) interconnection, and state commissions cannot use state law to give themselves jurisdiction to conduct an arbitration under federal law. See *infra*, part II. Accordingly,

¹ INdigital's claim that other states have introduced competitive 911 service by compelling Section 252 interconnection agreements is not correct. To AT&T Kentucky's knowledge, Intrado, the 911 provider to which INdigital is referring, has yet to complete a 911 call in any of those states. Moreover, as noted above, AT&T Kentucky is willing to enter into an agreement to allow INdigital to interconnect and provide its competing 911 service, it just does not believe the agreement should be under Section 251(c)(2).

the Commission should find that INdigital's 911 service does not qualify as "telephone exchange service" and therefore that INdigital is not entitled to interconnection for that service under Section 251(c)(2) or to compel arbitration of an agreement related to interconnection for that service under Section 252(b).

ARGUMENT

I. INDIGITAL'S 911 SERVICE IS NOT "TELEPHONE EXCHANGE SERVICE"

Congress defines "telephone exchange service" as follows:

(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

47 U.S.C. § 153(47). The FCC explained how to apply the elements of that definition in its *Advanced Services Order*² and *Directory Listing Order*.³

INdigital claims that its 911 service meets the definition of telephone exchange service. Tellingly, however, INdigital does not address the elements of the definition or the capabilities of its 911 service to PSAPs until page 20 of its brief. And even then it does not allege, much less prove, that its 911 service allows PSAP customers to "originate," or "make calls" to "all subscribers within a geographic area" – even though these are critical requirements of a "telephone exchange service." *Advanced Services Order*, ¶¶ 20, 23-25, n.61; *Directory Listing Order*, ¶¶ 17, 21-22. Instead, INdigital tries

² *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd. 385 (1999) ("*Advanced Services Order*").

³ *Provision of Directory Listing Information Under the Telecommunications Act of 1934, as Amended*, 16 FCC Rcd. 2736 (2001) ("*Directory Listing Order*").

to lower the standard for what qualifies as telephone exchange service. For example, it argues that it is entitled to a presumption that its 911 service is telephone exchange service, that the definition of “telephone exchange service” should be interpreted “expansively,” and that the “intercommunicating” and call-origination requirements just mean two-way communication. INdigital is wrong on all counts. It is not entitled to any presumption, and the definition of “telephone exchange service” must be interpreted as it was written by Congress and applied by the FCC. Thus, among other things, subscribers must be able to “originate,” *i.e.*, “make calls,” to “all subscribers within a geographic area,” not merely engage in two-way communication. INdigital, however, never claims its PSAP customers can originate calls.

Two state commissions and one pair of arbitrators have found that a service just like INdigital’s 911 service – whereby PSAP subscribers cannot make calls, but rather can only answer incoming 911 calls and forward those calls, if necessary – does not meet the definition of “telephone exchange service.”⁴ The Commission should reach the same conclusion here.

⁴ Arbitration Decision, *Intrado, Inc. Petition for Arbitration pursuant to Section 252(b) of the Communications Act of 1934 as amended, to establish an Interconnection Agreement with Illinois Bell Telephone Company*, Ill. Commerce Comm’n, Docket No. 08-0545, at 7-15, 19, 21 (Mar. 17, 2009) (“*Illinois Order*”) (Att. 1 to AT&T Kentucky’s Initial Brief); Final Order, *Petition by Intrado Communications, Inc. for Arbitration*, Fla. Pub. Serv. Comm’n Docket No. 070736-TP, at 4-5 (December 3, 2008) (“*Florida Order*”) (Att. 2 to AT&T Kentucky’s Initial Brief), *rehearing denied* March 16, 2009; Order on Threshold Issue No. 1 And Granting AT&T’s Motion For Summary Decision, *In the Matter of Petition of Intrado, Inc. for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, to Establish an Interconnection Agreement with Southwestern Bell Telephone Company, d/b/a AT&T Texas*, Pub. Util. Comm’n of Texas, Docket No. 36176, at 13-22 (Nov. 23, 2009) (“*Texas Arbitrators’ Order*”), a copy of which is attached hereto as **Attachment 1**. The Illinois and Florida decisions have not been appealed. The Texas case is now on rehearing to allow submission of more evidence.

A. INdigital Is Not Entitled to a Presumption that Its 911 Service to PSAPs Is “Telephone Exchange Service”

INdigital argues (at 16) that its “status as a CLEC certificated by the Commission to provide competitive local exchange service” “entitles it to a presumption that it provides ‘telephone exchange service,’” citing paragraph 14 of the *Directory Listing Order*. INdigital is wrong. The Commission does not certify carriers as “CLECs.”⁵ INdigital called itself a CLEC when it filed a tariff on May 23, 2007, but there is no order or ruling that “certifies” it as such. Thus, no presumption could apply.⁶ Moreover, even if INdigital were entitled to a presumption that its 911 service to PSAPs is “telephone exchange service,” at most, all that would mean is that AT&T Kentucky has the burden of demonstrating that INdigital’s 911 service to PSAPs is not “telephone exchange service.” AT&T Kentucky easily met that burden in its Initial Brief and INdigital has presented nothing to contradict that showing.

B. The Definition of Telephone Exchange Service Must Be Read According to Its Plain Language as Interpreted by the FCC

INdigital argues (at 17-18) that Congress’s definition of “telephone exchange service” should be read “expansively,” citing paragraphs 17, 20-21 of the *Advanced Services Order*. However, the only point the FCC was making in those paragraphs (which is clear from the context) was that, while it had traditionally interpreted the telephone exchange service definition to refer to a voice communication, the definition was not limited to voice communications. Rather, so long as the requirements of the definition are met, the term “telephone exchange service” encompasses voice and data

⁵ See *Exemption for Providers of Local Exchange Service Other Than Incumbent Local Exchange Carriers*, Administrative Case No. 370, at 3 (Ky. Pub. Serv. Comm’n, Jan 8, 1998).

⁶ INdigital’s 2007 tariff does not appear to encompass its 911 service to PSAPs or any other specific service, so no presumption could apply to that service in any event.

services. That, however, does not mean the definition should be read “expansively” to include 911 services, like INdigital’s, that bear no resemblance whatsoever to other “telephone exchange services” and that fail to meet the requirements of the definition. Quite the contrary, the FCC has emphasized that “telephone exchange services” must be “comparable,” *i.e.*, they must “retain [] key characteristics and qualities” (*Advanced Services Order*, ¶ 30; *see also id.*, ¶ 29; *Directory Listing Order*, ¶¶ 20-21) – including the requirements that the service permit “intercommunication” and allow subscribers to “originate” or “make calls” to “all subscribers within a geographic area.” *Advanced Services Order*, ¶¶ 20, 23-25, n.61; *Directory Listing Order*, ¶¶ 17, 21-22. If a service does not meet these requirements – as is the case here with INdigital’s 911 service to PSAPs – it is not a “telephone exchange service” and the carrier is not entitled to interconnection and arbitration of an interconnection agreement for the provision of that service.

INdigital also suggests that the FCC supports an expansive interpretation of “telephone exchange service” because it has found that directory assistance with call completion and certain advanced xDSL services meet the definition. The fact that the FCC found that certain services meet the definition of “telephone exchange service” does not mean that the definition should be read expansively – it just means that those services satisfied the elements of the definition. And the FCC made clear – including in paragraph 17 of the *Directory Listing Order* quoted by INdigital – that the services in question met the definition of “telephone exchange service” because they allowed subscribers to “intercommunicate,” *i.e.*, “make calls” (*Directory Listing Order*, ¶ 17;

Advanced Services Order, ¶ 23). Making calls is something INdigital's PSAP customers cannot do with INdigital's 911 service.⁷

C. INdigital's Service Does Not Allow Its PSAP Subscribers to "Intercommunicate"

INdigital suggests (at 19) that the "intercommunicating" requirement (explicit in part A of the definition of "telephone exchange service") applies only under part A and not part B. INdigital is wrong. The FCC very clearly explained that the "intercommunicating" requirement applies under both parts of the definition of "telephone exchange service" because it is a "key component." *Advanced Services Order*, ¶ 30 (The FCC has "reject[ed] the argument that subparagraph (B) eliminates the requirement that telephone exchange service permit 'intercommunication' among subscribers within a local exchange area," because, "[a]s prior Commission precedent indicates, a key component of telephone exchange service is 'intercommunication' among subscribers within a local exchange area.") Thus, if INdigital's E911 service to PSAPs fails to meet this requirement, the Commission's analysis need go no further.

The term "intercommunicating" – as the FCC has made clear – has two components: subscribers must be able to "*make calls*," and be able to (i) make calls (ii) to an entire "community of interconnected customers," meaning "*all subscribers* within a geographic area" or "*any other subscriber* located on that network." *Advanced Services Order*, ¶¶ 20, 23-24, n. 61; *Directory Listing Order*, ¶¶ 17, 21 (emphases added).

⁷ INdigital claims that the addition of part B to the definition of "telephone exchange service" "has been understood as Congress's intent to broaden the inclusion of the services that would fall within the telephone exchange service category." Again, INdigital overstates the facts. The FCC explained that part A and part B of the definition have many of the same requirements because part B was created only to "ensure that the definition of telephone exchange service was not limited to traditional voice telephony, but included non-traditional means of communications within a local calling area." *Directory Listing Order*, ¶ 21. Services under part B, however, must still "retain the key characteristics and qualities" as services under part A, and those include meeting the intercommunicating and call origination requirements. *Advanced Services Order*, ¶¶ 29-30; *Directory Listing Order*, ¶¶ 20-21.

INdigital claims that its service allows PSAP subscribers to “intercommunicate,” but INdigital avoids discussing the two components of the definition. Instead, it makes the circular argument (at 21) that its PSAP customers can intercommunicate because they can intercommunicate. That says nothing.

To meet the “intercommunicating” requirement INdigital’s service must permit the PSAP subscribers to “make calls” to “*all subscribers within a geographic area.*”

INdigital’s PSAP customers, however, cannot *make calls* using INdigital’s E911 service – much less make calls to all other subscribers in a geographic area. INdigital service allows PSAPs to “*answer telephone calls* placed by dialing the number 911,” and “includes the service provided by the lines and equipment associated with the service arrangement for the *answering, transferring, and dispatching of* public emergency telephone calls dialed to 911.” See Petition, Attachment 05-911-E911 (Generic), Introduction, § 2.8 (emphasis added). In addition, a PSAP is defined as “an *answering* location for 911 calls originating in a given area.” *Id.* at §2.12 (emphasis added). INdigital’s PSAP customer “may designate a PSAP as primary or secondary, which refers to the order in which calls are directed *for answering*. Primary PSAPs *answer calls*, secondary PSAPs *receive calls on a transfer basis.*” *Id.* (emphasis added).

INdigital makes no allegation that its PSAP customers can “make calls.” Instead, it raises two smokescreens. *First*, INdigital tries to confuse the issue by saying (at 10) that its service “would allow Kentucky end users to make calls to PSAPs and communicate with other local emergency personnel.” But the E911 service at issue here is not provided to “Kentucky end users” that make 911 calls. Those end-users make 911 calls using their local exchange service provided by a different carrier (*e.g.*,

AT&T Kentucky), not by using INdigital's E911 service, which is provided only to PSAPs. The relevant inquiry here is whether *INdigital's PSAP customers* can make calls *using INdigital's E911 service*. They cannot, as the service only permits PSAPs to answer incoming 911 calls and, at most, forward those incoming 911 calls to other PSAPs. See Petition, Attachment 05-911-E911 (Generic), Introduction, §§ 2.12, 2.8.

Second, INdigital tries to rewrite the definition of "intercommunicating" by claiming that it does not include the requirement that subscribers be able to "make calls" (even though those words repeatedly appear in the FCC's discussion of "intercommunicating"), but rather just means that subscribers can engage in "two-way voice communication." INdigital is wrong. The FCC did not equate "two-way voice communication" with "intercommunication." Rather, it defined "intercommunicating" as the ability to "make calls" and to make such calls to an entire "community of interconnected customers." *Advanced Services Order*, ¶¶ 20, 23-25, n.61; *Directory Listing Order*, ¶¶ 17, 21-22. Indeed, the FCC found that certain advanced xDSL and DA with call completion services meet the definition of telephone exchange service, not because they provide two-way communication, but because they allow the subscriber to "make calls." *Advanced Services Order*, ¶¶ 20, 23-24; *Directory Listing Order*, ¶¶ 17, 21. And even though private line services and DA without call completion indisputably permit subscribers to engage in "two-way communication," the FCC found that they did *not* meet the definition of "telephone exchange service." *Advanced Services Order*, ¶¶ 23-26, n.61; *Directory Listing Order*, 17, 21-22. The FCC did so because those services did not permit "intercommunication," *i.e.*, the ability to "make calls" to an entire "community of interconnected customers." *Id.*

INdigital claims that paragraph 30 of the *Advanced Services Order* says that “intercommunication is ‘a key component of telephone exchange service’ that ‘refer[s] to the provision of individual two-way voice communication.’” But INdigital is mixing language from two different paragraphs of the *Advanced Services Order*, paragraphs 20 and 30, and thus misstating what the FCC said. While the FCC stated that intercommunication is a key component of a “telephone exchange service,” it did not say that intercommunication (or telephone exchange service) is the provision of two-way voice communication, as INdigital suggests. INdigital’s strained reading of these paragraphs cannot be reconciled with the FCC’s precise and repeated statements that “intercommunicating” requires the ability to “make calls” – not mere two-way communication. *Advanced Services Order*, ¶¶ 20, 23, 24, n.61; *Directory Listing Order*, ¶¶ 17, 21.

Even if INdigital’s PSAP customers could make calls (which they cannot), the second component of an “intercommunicating” service is that it permit subscribers to make calls to an entire “community of interconnected customers” – *i.e.*, “*all subscribers within a geographic area*” or “*any other subscriber located on that network*” *Advanced Services Order*, ¶¶ 20, 23, 24, n.61; *Directory Listing Order*, ¶¶ 17, 21 (emphases added). INdigital ignores this component, claiming (at 20) that the statute does not quantify intercommunication and that the FCC has not defined the scope of intercommunication. INdigital is wrong. While the *statute* might not quantify “intercommunication,” the *FCC* did when it said that an “intercommunicating” service must enable the subscriber to make calls to “all subscribers” (*i.e.*, “any other subscriber”) on the network. *Advanced Services Order*, ¶¶ 20, 23-24, n.61; *Directory*

Listing Order, ¶¶ 17, 21.⁸ And the FCC explicitly rejected the notion that intercommunication could be “minimal” when it held that a designated connection between one or more points is not “intercommunication.”⁹ *Advanced Services Order*, ¶¶ 20, 23-26, n.61; *Directory Listing Order*, ¶¶ 17, 21-22. INdigital’s 911 service to PSAPs – like private line service and DA without call completion which the FCC has held do not meet the definition of “telephone exchange service” – allows the PSAPs to connect only with “specific, predetermined points” (*i.e.*, 911 callers, PSAPs, and first responders). It therefore does not provide subscribers with “intercommunication” and does not meet the definition of “telephone exchange service.”

D. INdigital’s Service Does Not Allow Subscribers to “Originate and Terminate” a Telecommunications Service

INdigital incorrectly assumes that the call-origination requirement applies only under part B of the definition of “telephone exchange service.” Call origination is an

⁸ Even if it were proper to consider INdigital’s PSAP customers, 911 callers, and first responders as a “community of interconnected customers” (which it is not, as explained in the text), under the FCC’s definition, *all* members of that community must be able to place calls to all other members of that community using INdigital’s service. But here, 911 callers, PSAPs, and first responders cannot place any calls using INdigital’s service, and can only connect if and when the 911 caller places a call to the PSAP using another carrier’s service.

⁹ As explained in AT&T Kentucky’s Initial Brief, in the *Advanced Services Order*, ¶¶ 20, 23-26, n.61, the FCC explained that xDSL services meet the definition of “telephone exchange service” because “a customer may rearrange the service to communicate with *any other subscriber* located on that network,” but that private line services (*i.e.*, services “whereby facilities for communications between two or more designated points are set aside for the exclusive use or availability of a particular customer and authorized users during stated periods of time”) do not meet the definition because “customers subscribing to private line service . . . may communicate only between those specific, predetermined points set aside for that customer’s exclusive use.” (Emphasis added). And in the *Directory Listing Order*, ¶¶ 17, 21-22, the FCC found that directory assistance (“DA”) call completion services (which permit the caller to complete a call to any requested number that is listed) meet the “intercommunicating” requirement, but that DA without call completion (which permits a connection only with the DA operator) does not.

explicit requirement of part B, and it is essential to the “intercommunicating” requirement of part A. It therefore applies under both parts of the definition.¹⁰

INDigital claims (at 26) that “[n]either call origination nor termination is defined by the Act, and there is a near paucity of guidance as to their application.” But the meaning of the term “originate” is not technical and does not need to be quantified.¹¹ Originating a call plainly means *initiating or making* a call. And the FCC has emphasized that subscribers must have control over the service by, for example, being able to choose with whom, from a multiplicity of customers, they will connect. *Directory Listing Order*, ¶¶ 17-18, 20, 21; *Advanced Services Order*, ¶¶ 24-25. INDigital’s PSAP customer cannot initiate or make calls using INDigital’s service, much less make any choices about with whom it will connect, but rather must wait to *receive* a 911 call before it can do anything, and even then the PSAP is limited to transferring that existing 911 call, if necessary, to a predetermined point. See Petition, Attachment 05-911-E911 (Generic), Introduction, §§ 2.12, 2.8. Answering a call is not originating a call. And the transfer of a 911 call that was already originated by the 911 caller is not origination. *Florida Order* at 5; *Illinois Order* at 8-10; *Texas Arbitrators’ Order* at 18-19 (Att. 1 hereto). Calls cannot be originated twice.

¹⁰ Part A of the definition of “telephone exchange service” requires the service “to furnish to subscribers *intercommunicating service*,” and an “intercommunicating” service is one “that permits a community of interconnected customers to *make calls to one another*.” *Advanced Services Order*, ¶ 23; *Directory Listing Order*, ¶ 17 (emphasis added). In order “to furnish to subscribers” a service “that permits a community of interconnected customers to make calls to one another” (as required under part A), those subscribers obviously must be able to originate (*i.e.*, “make”) calls.

¹¹ As the Illinois Commission correctly observed, call origination is not “a *quantitative matter*. The appropriate inquiry is qualitative – *can* the customer originate a call using Intrado’s 911 service?” *Illinois Order* at n.23 (emphasis in original).

INdigital does not even claim that its service to PSAPs allows them to actually originate and terminate calls. Instead, as it did with its analysis of the “intercommunicating” requirement, INdigital claims (at 27) that “originating” a call just means “two-way communication,”¹² and because its service “will allow its subscribers to carry on two-way voice communication between PSAPs as well as between PSAPs and 911 callers,” then the requirement has been met. So according to INdigital “intercommunicating,” “originating” a call, and “two way communication” are all the same thing. That is false. If the FCC had intended to require just “two-way communication,” it would have said so; but, instead, the FCC repeatedly stated that subscribers must be able to “make calls” – as even the language quoted by INdigital (at 26-27) shows.

INdigital once again tries to confuse the issue by saying that its 911 service will “allow[] a caller at his or her request to connect to another local telephone subscriber.” But as the FCC’s definition makes clear, to qualify as telephone exchange service, the “caller” must be the subscriber to the “telephone exchange service.” The “subscriber” here is INdigital’s PSAP customer, and *that* customer does not make any calls. Rather, calls are originated by the 911 caller using a local exchange service provided by another carrier, not INdigital’s 911 service, which is provided only to PSAPs. The PSAP does not make any calls, but rather waits for an incoming 911 call, answers it, and possibly transfers it to another PSAP. That is not originating a call.

At various points INdigital relies on decisions by state commissions in Ohio and North Carolina that found a 911 service offered by Intrado Communications Inc. to be

¹² Again, if two-way communication is all it took to qualify as “telephone exchange service,” the FCC would have found that the private line service and DA without call completion meet the definition; but it did not.

telephone exchange service.¹³ Neither of those decisions has the kind of detailed analysis set forth in the Illinois, Florida, and Texas decisions that AT&T Kentucky has discussed. The *Ohio Decision*,¹⁴ for example, does not even cite, much less discuss, the leading FCC decisions in the *Advanced Services Order* and *Directory Listing Order*. And this refusal to account for the FCC decisions led the Ohio commission into error. For example, it concluded that Intrado's service met the "intercommunicating" requirement because it allows Intrado's PSAP customers to communicate with some other customers, *Ohio Decision* at 15, even though the FCC's decisions make clear that "intercommunicating" requires a service to allow subscribers to communicate with "all subscribers within a geographic area." *Advanced Services Order*, ¶ 20. The Ohio commission also erred in finding that Intrado's IEN service provided "origination" of calls based on one paragraph that assumed that the ability to transfer calls or conference in another PSAP is the same thing as originating a call. *Ohio Decision* at 16. It is not, as the Illinois, Florida, and Texas decisions correctly found.¹⁵

¹³ The AT&T ILECs in Ohio and North Carolina have appealed those decisions and the cases remain pending. INdigital also refers to decisions by state commissions in West Virginia and Indiana, but neither of those addressed the issue before the Commission here. In West Virginia the commission expressly stated that it was not deciding that threshold issue. Arbitration Award, Case No. 08-0298-T-PC, 2008 W. Va. PUC LEXIS 3080, at *25 (W. Va. Pub. Serv. Comm'n, Nov. 14, 2008). The Indiana case also has no bearing here, since in that case INdigital did not request interconnection to the AT&T ILEC under Section 251(c)(2) and the Indiana commission appeared to address the issues under some mix of state law and Section 251(a) (since the case was not a Section 252 arbitration). Final Order, Cause No. 43499, at 40 (Ind. Util. Reg. Comm'n, Feb. 10, 2010) ("INdigital has not requested interconnection under § 251(c)"). INdigital also cites a California decision from 2001 regarding a company called SCC, but to AT&T Kentucky's knowledge SCC did not offer the same type of service INdigital seeks to offer here.

¹⁴ Arbitration Award, Case No. 07-1280-TP-ARB, at 15-16 (Pub. Utils. Comm'n Ohio, Mar. 4, 2009) ("*Ohio Decision*").

¹⁵ The North Carolina commission did not address the call-origination requirement and otherwise relied heavily on the Ohio decision. Recommended Arbitration Order, Docket No. P-1187, Sub 2 (N.C. Utils. Comm'n, Apr. 24, 2009); Order Ruling on Objections, Docket No. P-1187, Sub 2 (N.C. Utils. Comm'n, Sept. 10, 2009).

E. INdigital's 911 Service Fails to Meet the Requirements That the Service Be "Within A Telephone Exchange, or Within a Connected System of Telephone Exchanges Within the Same Exchange Area" and Be "Of the Character Ordinarily Furnished by a Single Exchange, and Which is Covered By the Exchange Service Charge"¹⁶

INdigital tries to rewrite the federal definition of "telephone exchange service" and misconstrues federal law, claiming that the FCC determined in its 1998 *BellSouth Louisiana II Order*¹⁷ that the definition of telephone exchange service "does not require a specific geographic boundary." INdigital Br. at 21. That is not true. What the FCC actually said was that "section 3(47)(A) does not require a specific geographic boundary *other than an area covered by an exchange service charge.*"¹⁸ *BellSouth Louisiana II Order*, ¶ 30 (emphasis added).

INdigital's point seems to be (at 21) that the requirement to operate "within a telephone exchange" or "within a connected system of telephone exchanges within the same exchange area" is not limited to the ILEC's exchange boundary. While that may be true, it does not mean that any geographical area qualifies. The *Advanced Services*

¹⁶ These requirements apply under both parts of the definition of "telephone exchange service." *Advanced Services Order*, ¶ 30 (the FCC rejected the argument that subpart B "eliminates the requirement that telephone exchange service permit 'intercommunication' among subscribers *within a local exchange area.*") (emphasis added).

¹⁷ *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599, ¶ 30 (1998) ("*BellSouth Louisiana II Order*").

¹⁸ Notably, this is not the only misrepresentation INdigital makes. *First*, INdigital suggests (at 21) that in the *Advanced Services Order*, the FCC stated that the "concept of an exchange is based on geography and regulation," not "the ILEC's exchange boundaries." But what the FCC really said was that "the concept of an exchange is based on geography and regulation, not equipment." *Advanced Services Order*, ¶ 22. *Second*, INdigital claims (at 21) that the FCC determined that wireless providers' geographic service areas, which are different from typical wireline exchange area boundaries, were "considered to be 'within a telephone exchange' or 'a connected system of telephone exchanges within the same exchange area' for the purpose of" the Act's definition of "telephone exchange service." But the FCC did not determine that all wireless providers' geographic areas would be considered "within a telephone exchange" or "connected system of telephone exchanges within the same exchange area." To the contrary, the FCC pointed out that "cellular telephone service may not be treated as telephone exchange services." *BellSouth Louisiana II Order*, ¶ 27.

Order and *Directory Listing Order* make clear that a telephone exchange service must operate within, and must permit communication among all subscribers within, a local exchange area *or the equivalent of a local exchange area*.¹⁹ And the FCC made clear that a connection between two or more designated points does not constitute telephone exchange service. *Advanced Services Order*, ¶ 25; *Directory Listing Order*, ¶ 22.

Consistent with this, the connection between a PSAP and 911 caller is not the equivalent of a local exchange area, but rather is a communication between two designated points, which the FCC held is not a telephone exchange service.

Finally, because INdigital's PSAP customer does not "communicate within the equivalent of an exchange area," any charge it pays for the service it receives is not an "exchange service charge."²⁰

F. INdigital's Service is Not a "Comparable" Service

INdigital does not even try to analogize its service to other services meeting the definition of telephone exchange service. Nor could it. Part A of the definition encompasses typical local exchange service to typical residential or business end-users. *Advanced Services Order*, ¶¶ 17, 19, 21; *Directory Listing Order*, ¶ 21.

INdigital's service plainly is not comparable to traditional voice telephony because subscribers to that service can make calls to any other subscriber of their choosing in

¹⁹ *Advanced Services Order*, ¶ 15 (telephone exchange service requires traffic to "originate[] and terminate[] within the equivalent of an exchange area"); *Id.*, ¶ 27 ("charges that a LEC assesses for originating and terminating xDSL-based advanced services *within the equivalent of an exchange area* would be covered by the 'exchange service charge.'"); *Id.* ¶ 29 ("a service falls within the scope of section 3(47)(B) if it permits intercommunication within the equivalent of a local exchange area and is covered by the exchange service charge"); *Directory Listing Order*, ¶ 17 (to come within the definition of telephone exchange service, "a service must permit 'intercommunication' among subscribers within the *equivalent of a local exchange area*..."); *Id.*, ¶ 19 (the phrase "by virtue of being part of a connected system of exchanges, and not a toll service" "implies that an end-user obtains the *ability to communicate within the equivalent of an exchange area* as a result of entering into a service and payment agreement with a provider of a telephone exchange service").

²⁰ *Advanced Services Order*, ¶ 27.

the exchange, while INdigital's service does not allow the PSAP subscribers to make any calls, much less to make calls to anyone of their choosing. Moreover, the FCC found that certain xDSL and directory assistance call completion services meet the definition of telephone exchange service because they allow subscribers to make calls to all other end-users in the exchange (*i.e.*, they allow "intercommunicating") and because the other requirements of the definition were met. *Advanced Services Order*, ¶¶ 20, 24, 27, 29; *Directory Listing Order*, ¶¶ 16-17, 19. In stark contrast to these services, INdigital's service does not allow "intercommunicating" because its subscribers (PSAPs) cannot make calls to anyone in the exchange – much less everyone in the exchange.

Instead of drawing any parallels between its service and other services found to be telephone exchange services, INdigital quotes irrelevant passages from the FCC's *Advanced Services Order* and *Directory Listing Order*. For example, it cites (at 25) the FCC's statement in the *Directory Listing Order* that telephone exchange service is not limited to voice transmission. That statement is of no consequence here because there is no dispute over whether a non-voice transmission can qualify as "telephone exchange service." The dispute is over whether the "intercommunicating," "originat[ing] and terminat[ing]," and other requirements of the definition of "telephone exchange service" (which the FCC found applicable regardless of the type of transmission) are met. INdigital also quotes the FCC's statement that part B of the definition of "telephone exchange service" is not limited to market substitutes for two-way switched voice service. Again, that is of no consequence here because AT&T Kentucky has never argued that INdigital's service must be a market substitute.

INdigital admits – as it must – that services under part B must share some of the same characteristics and qualities as other telephone exchange services, but then INdigital claims (at 25-26) that it is not really clear which characteristics and qualities those are. INdigital is wrong. The FCC has clearly stated that all telephone exchange services must permit the subscriber to “intercommunicate,” *i.e.*, “make calls” to an entire “community of interconnected customer.” INdigital’s service cannot do that and therefore does not meet the definition.

II. INDIGITAL’S FALLBACK ARGUMENTS FAIL

A. If INdigital Does Not Qualify for Section 251(c)(2) Interconnection, It Cannot Compel Arbitration of Contract Language Regarding Such Interconnection

As a fallback, INdigital argues that even if its 911 service does not qualify as telephone exchange service, and “therefore the issues relating to this service f[a]ll outside of AT&T Kentucky’s interconnection duties,” it nevertheless still would be entitled to compel arbitration of those very issues. INdigital Br. at 27-28. That argument does not make sense. The parties are briefing the question whether INdigital’s 911 service is a telephone exchange service up front because it is a *threshold* issue. It is a threshold issue because if INdigital’s service does not qualify it for interconnection to AT&T Kentucky under Section 251(c)(2) of the Act, then it obviously is not entitled to arbitrate any of the other issues regarding contract language for such interconnection. Rather, all such issues become moot. *See Florida Order* at 6-7, 9; *Illinois Order* at 28; *Texas Arbitrators’ Order* at 2. Moreover, INdigital’s theory is wrong on both the law and the facts.

On the law, INdigital's claim (at 27-28) that arbitrations under Section 252(b) are not limited to implementing an ILEC's duties under Sections 251(b) and (c) is simply incorrect. The duty to arbitrate under Section 252(b) arises only when a carrier has first sought to negotiate an interconnection agreement under Section 252(a). See 47 U.S.C. §§ 252(a)-(b). An ILEC's duty to negotiate an interconnection agreement under Section 252(a) arises exclusively from Section 251(c)(1). Section 251(c)(1), titled "Duty to Negotiate," states that an ILEC must negotiate with a requesting carrier "the particular terms and conditions of agreements to fulfill the duties *described in paragraphs (1) through (5) of subsection (b) and this subsection [c].*" *Id.*, § 251(c)(1) (emphasis added). Since the duty to negotiate under Section 252(a) is limited to terms to implement Sections 251(b) and (c), and the duty to arbitrate is limited to agreements negotiated under Section 252(a), the duty to arbitrate is likewise limited to issues regarding an ILEC's obligations under Sections 251(b) and (c), as various courts have held. *Qwest Corp. v. Public Utils. Comm'n of Colorado*, 479 F.3d 1184, 1197 (10th Cir. 2007) ("a CLEC may only compel arbitration of issues that an ILEC is under a duty to negotiate pursuant to § 251(c)(1)"); *MCI Telecomms. Corp. v. BellSouth Telecomms. Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002) (requiring arbitration on all issues "is contrary to the scheme and text of [the] statute, which lists only a limited number of issues on which incumbents are mandated to negotiate" under Sections 251(b) and (c)).²¹ The

²¹ INdigital implies that the Commission could arbitrate interconnection disputes under Section 251(a). That is both incorrect and inapplicable here. INdigital did not request interconnection under Section 251(a) and raised no arbitration issue regarding Section 251(a) in its Petition, so there could be no "open issue" regarding Section 251(a) for this Commission to arbitrate. 47 U.S.C. § 252(b)(4)(A) ("The State Commission shall limit its consideration of any petition [for arbitration] to the issues set forth in the petition and in the response"). Moreover, nothing in the Act indicates or implies that Section 251(a) issues could be subject to Section 252(b) arbitration. The duty to negotiate, and thus to arbitrate, under Section 252 applies only to ILECs via Section 251(c)(1), and thus only to terms to implement Sections 251(b) and (c). Further, Section 251(a) applies to all carriers, not just ILECs, and nothing in Section 252 says or suggests

only conceivable exception (though AT&T Kentucky does not concede that even this would be appropriate) might be if carriers agreed to negotiate an issue under Section 252(a) and to include it for arbitration before a state commission. That, however, did not occur here, as shown below.

On the facts, INdigital's theory appears to be that AT&T Kentucky "willingly negotiated the terms and conditions of [an ICA], including the terms and conditions for the provision of 911/E911 services," and therefore must be compelled to arbitrate every issue INdigital has raised under Section 251(c)(2) – even if INdigital is not entitled to Section 251(c)(2) interconnection. INdigital Br. at 28-31. That is false. AT&T Kentucky made plain to INdigital, from the start of negotiations onward, that it did *not* agree that INdigital was entitled to interconnection under Section 251(c)(2), and that it was discussing contract terms with INdigital *only* in case the Commission were to disagree with AT&T Kentucky on that threshold point. In other words, AT&T Kentucky's discussion of terms for interconnection for 911 service was all conditional, becoming relevant only if AT&T Kentucky were to lose on the threshold issue now being briefed. In a February 26, 2009 e-mail to INdigital, attached hereto as **Attachment 2**, AT&T Kentucky explained that

AT&T does not agree that the attached 911 Attachment/Appendix should be included or is applicable for a 251 Agreement as redlined by INdigital. If

that state commissions are to have jurisdiction over all interconnection matters between any and all kinds of carriers. Thus, Section 251(a) issues are not subject to compulsory arbitration, even if INdigital had raised one. *Sprint Comms. Co., L.P. v. Public Util. Comm'n of Texas*, 2006 WL 4872346, at *5 and n.4 (W.D. Tex. 2006); Arbitration Award, *Intrado Comms., Inc. and Verizon West Virginia Inc., Petition for Arbitration*, Case No. 08-0298-T-PC, 2008 W. Va. PUC LEXIS 3080, at *36-*37 (Pub. Serv. Comm'n of W. Va., Nov. 14, 2008) ("*West Virginia Order*"); *Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996*, 2003 Colo. PUC LEXIS 109, *22-*23 (¶¶ 33-34) (Colo. Pub. Utils. Comm'n, Jan. 17, 2003) ("[A] state commission's § 252 authority is limited to requests for interconnection agreements implicating §§ 251(b) and (c) obligations. *As such, a state commission has no arbitration authority over § 251(a) matters.*") (emphasis added).

INdigital is interested in a commercial agreement in relation to the attached redline AT&T would be glad to discuss that further with INdigital.

When INdigital asked for an explanation of AT&T Kentucky's position, AT&T Kentucky responded in a March 6, 2009 e-mail, attached hereto as **Attachment 3**, that

INdigital's proposed revisions to the 911 attachment are not appropriate for a Section 251(c) ICA [because] the 911 service that INdigital proposes to provide does not meet the definition of "telephone exchange service" as set forth in 47 U.S.C. 153(47) because the service will not provide the ability to both originate and terminate calls. ... AT&T remains willing to negotiate a commercial agreement for INdigital's 911 services."

In an e-mail on October 21, 2009, attached hereto as **Attachment 4**, AT&T Kentucky reiterated its position:

AT&T Kentucky's position, which has not changed, is that this language [in Appendix 911 and Appendix 911 NIM] is not appropriate for a Section 251(c) interconnection agreement. *The language was intended to be provided to INdigital in the event that AT&T Kentucky were to lose the issue concerning the definition of "telephone exchange service" as set forth in 47 U.S.C. 153(47), and not as a replacement for the language in AT&T Kentucky's 251(c) interconnection agreement.* [Emphasis added.]

And in an e-mail on November 9, 2009, attached hereto as **Attachment 5**, AT&T Kentucky stated as follows:

AT&T Kentucky's position, which has not changed, is that the Alternate 911 and Alternate 911 NIM language are not appropriate for a Section 251(c) interconnection agreement. *As previously indicated the language in the Alternate 911 and Alternate 911 NIM are [sic] intended for use only in the event that AT&T Kentucky loses the issue concerning the definition of "telephone exchange service" as set forth in 47 U.S.C. 153(47), and not as a replacement for the language in AT&T Kentucky's 251(c) interconnection agreement.* [Emphasis added.]

In sum, AT&T Kentucky never agreed to arbitrate all other issues regardless of the outcome of the threshold issue. To the contrary, it repeatedly made clear to INdigital that its negotiation was not "without regard to" Section 251(c)(2), but rather was entirely subject to the requirement of Section 251(c)(2) that a requesting carrier provide telephone exchange service or exchange access, and that if it won that issue all other

issues regarding interconnection for E911 service would be moot. Thus, INdigital's argument that it can compel arbitration of all other issues even if it loses the threshold issue is contrary to the law, and its claim that AT&T Kentucky agreed to arbitrate issues regardless of the outcome of the threshold issue is contrary to the facts.

Finally, AT&T Kentucky notes the recurring point in INdigital's brief that AT&T Kentucky has included provisions in Section 251(c)/252 interconnection agreements regarding the receipt of 911 calls from CLEC end-users. That is true but completely irrelevant here. Because AT&T Kentucky is a 911 service provider to PSAPs, it has agreed to include provisions regarding 911 traffic in interconnection agreements with CLECs as a matter of convenience. The key distinction between that situation and the situation here, of course, is that the CLECs *actually provided telephone exchange service* and therefore were otherwise entitled to interconnect to AT&T Kentucky under Section 251(c)(2). It therefore was convenient to also include provisions for receipt of 911 calls from those CLECs end-users. INdigital, by contrast, does not provide telephone exchange service, and therefore does not meet the threshold requirement for Section 251(c)(2) interconnection.

B. State Law is Irrelevant to Whether INdigital Can Compel Interconnection and Arbitration Under Federal Law

In another fallback argument, INdigital claims that the Commission has authority under state law "to determine the appropriate terms and conditions for INdigital Telecom's provision of competitive 911/E911 services." INdigital Br. at 31. INdigital also contends that the 1996 Act does not preempt the Commission from using state law to arbitrate the issues INdigital has presented. *Id.* at 33. INdigital is incorrect.

INdigital filed its Petition for Arbitration exclusively under *federal law, i.e.,* the 1996 Act. Thus, the only issue in this threshold briefing is whether INdigital is entitled to interconnect under Section 251(c)(2) and compel arbitration under that *federal law, i.e.,* Section 252(b). If it is not, then state law becomes irrelevant. A state commission asked to conduct an arbitration under Section 252(b) is not acting as an independent agent. Nor is it acting pursuant to state law. Rather, it acts only as a “deputized’ federal regulator[.]” whose authority is “confined to the role that the Act delineates.” *Pacific Bell v. Pac-West Telecomm., Inc.*, 325 F.3d 1114, 1126 (9th Cir. 2003), quoting *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 344 (7th Cir. 2000). Accordingly, if the party requesting arbitration does not qualify for interconnection to the ILEC under Section 251(c)(2), there is nothing for the state commission to arbitrate in its delegated role under Section 252. In other words, while a state commission might be able to consider state law in the context of a specific issue in a Section 252 arbitration, it cannot use state law to create the authority to conduct that arbitration in the first place. Rather, a state commission can proceed with an arbitration under Section 252(b) only if the requesting carrier first qualifies for interconnection and arbitration under federal law. Any authority the Commission may or may not have outside the Section 252 arbitration context under the 1996 Act simply is not relevant to whether INdigital is entitled to interconnection and arbitration under federal law.

CONCLUSION

For the reasons stated in AT&T Kentucky’s briefs, the Commission should find that INdigital’s 911 service does not qualify as “telephone exchange service” and therefore that INdigital is not entitled to interconnection for that service under Section

251(c)(2) or to compel arbitration of an agreement related to interconnection for that service under Section 252(b).

Respectfully submitted,


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ATTACHMENT 1

DOCKET NO. 36176

IN THE MATTER OF THE PETITION § PUBLIC UTILITY COMMISSION
OF INTRADO, INC. FOR §
ARBITRATION PURSUANT TO § OF TEXAS
SECTION 252(b) OF THE §
COMMUNICATIONS ACT OF 1934, AS §
AMENDED, TO ESTABLISH AN §
INTERCONNECTION AGREEMENT §
WITH SOUTHWESTERN BELL §
TELEPHONE COMPANY D/B/A AT&T §
TEXAS §

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SECTION

ORDER ON THRESHOLD ISSUE NO. 1 AND GRANTING AT&T'S MOTION FOR SUMMARY DECISION

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I. Summary

The Arbitrators find that Intrado, Inc. (Intrado) does not provide “telephone exchange service” or “exchange access” and thus its request for physical interconnection with Southwestern Bell Telephone Company d/b/a AT&T Texas (AT&T) to offer emergency services in Texas does not fall under Section 252(b) of the Communications Act of 1934, as Amended (FTA).¹ Therefore, AT&T’s motion for summary decision is GRANTED.² The Arbitrators rule on only the first threshold issue because it is dispositive and resolution of the remaining threshold issues is not necessary. If this order is appealed and overturned, the Arbitrators will rule on all of the remaining threshold issues.

II. Introduction and Procedural History

On Sept. 22, 2008, Intrado filed with the Public Utility Commission of Texas (Commission) a petition for arbitration with AT&T pursuant to FTA § 252(b) to establish certain rates, terms, and conditions for interconnection and related arrangements (Petition).³ In its Petition, Intrado states that it seeks physical interconnection with AT&T to offer emergency services in Texas, including a competitive alternative to AT&T’s 9-1-1 network provided to Public Safety Answering Points (PSAPs) and other public safety agencies.⁴ To provide such services, Intrado asserts that it requires interconnection with AT&T to ensure that customers of each carrier can seamlessly complete or receive calls.⁵ On September 26, 2008 Intrado filed a supplement to its Petition updating the Petition to include a Decision Point List (DPL) setting

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 and 47 U.S.C.) (FTA).

² AT&T Texas’ Brief on Threshold Issues and Motion for Summary Decision (Oct. 31, 2008).

³ Petition for Arbitration (Sept. 22, 2008).

⁴ Petition for Arbitration at 5.

⁵ *Id.*

forth the list of issues, the relevant contract provisions, and each party's position on the outstanding issues.⁶ The Parties filed a joint DPL on October 7, 2008.⁷

A prehearing conference was held on October 8, 2008. The Arbitrators instructed the Parties to file initial briefs and reply briefs on the following threshold legal issues:

1. Are "emergency services" "telephone exchange service" or "exchange access" for purposes of FTA § 251(c)(2)(A)?
2. Can AT&T Texas be compelled to arbitrate an interconnection agreement solely for the exchange of "emergency services" traffic?
3. Assuming AT&T can be compelled to arbitrate an interconnection agreement (ICA) solely for the exchange of "emergency services" traffic; does such interconnection entitle Intrado to interconnect in a different manner than other competitive local exchange carriers (CLECs)?
4. What authority permits this Commission to establish a competitive "emergency services" network for wireline telecommunications customers?
5. What authority permits this Commission to require equal access to competitive "emergency services" providers for wireline telecommunications customers?

On October 17, 2008, AT&T filed its response to Intrado's Petition.⁸ AT&T claims that Intrado is not entitled to interconnection under FTA § 251(c)(2) or to compulsory arbitration of an ICA under FTA § 252.⁹

On October 17, 2008, the Texas Commission on State Emergency Communications, the Texas 9-1-1 Alliance, and the Municipal Emergency Communications Districts Association (collectively the Texas 9-1-1 Agencies) requested leave to file a statement of position.¹⁰ On October 31, 2008 the Texas 9-1-1 Agencies filed their joint statement of position addressing the

⁶ Supplement to Petition for Arbitration at 1 (Sept. 26, 2008) (Intrado DPL).

⁷ Letter to ALJ – Joint DPL (Oct. 7, 2008).

⁸ AT&T Texas' Response to Intrado's Petition for Arbitration (Oct. 17, 2008).

⁹ AT&T Texas' Response to Intrado's Petition for Arbitration at 2, (Oct. 17, 2008).

¹⁰ Unopposed Joint Motion for Leave to File a Statement of Position (Oct. 17, 2008).

threshold issues.¹¹ In addition to the authority recited herein below the Texas 9-1-1 Agencies point to Public Utility Regulatory Act, TEX. UTIL. CODE ANN. § 60.124 (Vernon 1998 & Supp. 2005) (PURA) and FTA § 251(d)(3)(A) as granting the Commission additional authority over the selective routing wireline E-9-1-1 networks.¹² The Texas 9-1-1 Agencies stated that a compelling state and local public safety interest in emergency services exists regardless of the technology used or the provider involved¹³ and stated that any rulings on the threshold issues must be subject to the requirements and responsibilities that the Commission has established in its 9-1-1 orders and rules.¹⁴

Intrado filed an initial brief¹⁵ and a reply brief.¹⁶ AT&T filed an initial brief and motion for summary decision¹⁷ and a reply brief on the threshold issues and in support for its motion for summary decision.¹⁸ Since the initial and reply briefs were filed, Intrado and AT&T (collectively, Parties) have filed information supporting their respective positions regarding other state's actions on similar Intrado petitions.¹⁹ Additionally, the Federal Communications

¹¹ Joint Statement of Position on Threshold Issues of the Texas Commission on State Emergency Communications, the Texas 9-1-1 Alliance, and the Municipal Emergency Communication Districts Association (Oct. 31, 2008).

¹² *Id.* at 4.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Initial Brief of Intrado Inc. on Threshold Legal Issues (Oct. 31, 2008) (Intrado Initial Brief).

¹⁶ Reply Brief of Intrado Inc. on Threshold Legal Issues (Nov. 7, 2008) (Intrado Reply Brief).

¹⁷ AT&T Texas Brief on Threshold Issues and Motion for Summary Decision (Oct. 31, 2008) (AT&T Initial Brief).

¹⁸ AT&T Texas Reply Brief on Threshold Legal issues and in Support of AT&T Texas' Motion for Summary Decision (Nov. 7, 2008) (AT&T Reply Brief).

¹⁹ AT&T's Additional Filing Related to the Pending Threshold Issues (Nov. 20, 2008)(filing bringing the Florida Public Service Commission's (FPSC) support for AT&T to the Commission's attention and rebutting alleged mischaracterizations by Intrado in its response to Verizon in Docket No. 36185 regarding the Florida ruling); AT&T's Letter to ALJs (Dec. 5, 2008) (updating the Commission on the FPSC's final ruling); Intrado's Supplemental Authority Filing (Dec. 5, 2008) (updating the Commission on the decision of the Indiana Regulatory Utility Commission (IRUC) that a private, commercial agreement between various Verizon entities and INdigital Telecom is an interconnection agreement subject to the requirements of Section 252 of the FTA, based on a service offering similar to that proposed by Intrado and providing a copy of a brief by the Staff of the North Carolina Public Utilities Commission (NCPUC) explaining that Intrado's EIN was telephone exchange service and that AT&T should be required to arbitrate an interconnection agreement); AT&T's Letter to Judges Re: Intrado's Supplemental Authority Submission (Dec. 9, 2008) (asserting that the two authorities submitted by Intrado were not on point for the issues in this case because the IRUC case related to whether a negotiated agreement must be filed for approval,

Commission (FCC) has granted Intrado's request and preempted the Virginia Corporation Commission in two arbitrations that address the same issues involved in the instant docket, although the FCC has not yet ruled on the merits.²⁰ The Arbitrators asked the Parties whether this proceeding should be abated pending the outcome of the FCC's arbitration.²¹ Both Parties responded that this arbitration should not be abated.²² A glossary of important terms is provided in Attachment 1.

III. Jurisdiction

The Commission's jurisdiction to approve, reject, or arbitrate FTA §§ 251/252 an ICA is found in federal law.²³ The FCC promulgated rules implementing the FTA guidelines and requirements for ICA approval, rejection, or arbitration.²⁴ Accordingly, this Commission

not whether such service was telephone exchange service and the citation to the NCPUC's case was just to a brief, not a holding); Intrado Supplemental Authority In Response to AT&T 12/5/08 Filing (Dec. 5, 2008) (providing the Commission a copy of Intrado's motion for reconsideration of the FPSC's decision and AT&T's response to Intrado's motion for reconsideration); AT&T's Letter to Judges Kayser and Goodson Re: Proposed Arbitration Decision in an Illinois Proceeding (Feb. 27, 2009) (providing a copy of the Illinois Commerce Commission's (ICC) Proposed Arbitration Decision recommending dismissal because Intrado was not entitled to interconnection under the FTA); Intrado's Supplemental Authority (March 3, 2009) (providing copies of Intrado's responses to the ICC's Proposed Arbitration Decision and reminding the Commission that it is not a final order); Intrado's Supplemental Authority (March 5, 2009) (providing a copy of the Ohio Public Utility Commission's (OPUC) ruling that Intrado's EIN is telephone exchange service); AT&T's Response to Intrado's Submission of an Arbitration Decision by the Public Utility Commission of Ohio (March 12, 2009) (claiming that the OPUC's decision was incorrect); Intrado's Supplemental Authority (April 30, 2009) (providing NCPUC's recommended arbitration award finding Intrado's EIN is telephone exchange service and finding that AT&T is required to arbitrate a 251(c) interconnection agreement with Intrado).

²⁰ Petition of Intrado Communications of Virginia Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Arbitration of an Interconnection Agreement with Central Telephone Company of Virginia and United Telephone - Southeast, Inc. (collectively, Embarq), WC Docket No. 08-33, Memorandum Opinion and Order at, 23 FCC Rcd 8715, 8717 (WCB 2008) (June 4, 2008); see also Petition of Intrado Communications of Virginia Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Arbitration of an Interconnection Agreement with Verizon South Inc. and Verizon Virginia Inc. (collectively Verizon), WC Docket no. 08-185, Memorandum Opinion and Order, 23 FCC Rcd. 15008, 15011 (WCB 2008) (October 16, 2008).

²¹ Order No. 3 at 1 (June 17, 2009).

²² Intrado's Comments Responding to Order No. 3 (July 2, 2009); AT&T's Comments in Response to Order No. 3 (July 2, 2009).

²³ 47 U.S.C. 252.

²⁴ 47 C.F.R., CHAPTER I, SUBCHAPTER B, PART 51.

promulgated procedural rules pursuant to which it may exercise its authority to approve, reject, or arbitrate an ICA.²⁵

IV. Threshold Issue No.1 - Are “emergency services” “telephone exchange service” or “exchange access” for purposes of § 251(c)(2)(A) of the Federal Telecommunications Act of 1996?

A. Intrado's Position

Intrado does not claim that its 911/E911 service is “exchange access,” but does claim that it is “telephone exchange service.” Intrado states that its 911/E911 services are provided over an enhanced internet protocol (IP)-technology network.²⁶ Intrado asserts that its 911/E911 service falls squarely within the FTA’s definition of telephone exchange service.²⁷ Intrado states that its 911/E911 service allows subscribers to “intercommunicate” as required by FTA § 153(47)(A) and it allows subscribers to “originate and terminate” a telecommunications service as required by FTA § 153(47)(B).²⁸ Intrado goes on to say that its 911/E911 services “allow Texas consumers to be connected with PSAPs and communicate with local emergency personnel.”²⁹

Intrado holds a service provider certificate of authority (SPCOA) in Texas³⁰ and Intrado points to its certification as proof that its 911/E911 service is telephone exchange service.³¹ In addition, Intrado claims its services fit within the definition of “basic local telephone service” as defined in Texas law because Intrado provides access to emergency services.³² Furthermore, its end user customers will include wholesale and retail customers calling other customers on or connected to the public switched telephone network (PSTN), including for 9-1-1 calls, and

²⁵ TEX. ADMIN. CODE, TITLE 16, PART 2, CHAPTER 21, Subchapter D.

²⁶ Petition at 5.

²⁷ Intrado Initial Brief at 4.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Application of Intrado, Inc. for An Amendment to its Service Provider Certificate of Operating Authority*, Docket No. 34570, Notice of Approval (Sept. 10, 2007) (removing the data-only restriction and amending certificate to reflect Intrado’s authority to provide facilities-based, data, and resale telecommunications services throughout the entire State of Texas).

³¹ Petition at 15.

³² *Id.* at 17.

PSAPs that need to receive 9-1-1 calls.³³ Intrado states that it offers “intercommunication among subscribers within a local exchange area” by connecting calls placed by persons in a local exchange area to a relevant PSAP, allowing callers to both communicate to and receive communication from PSAP personnel.³⁴ Intrado asserts that this type of call between a caller and a PSAP is unquestionably “two-way voice communication.”³⁵ According to Intrado, this type of communication is greater than the degree of communication available in a fax communication, which the FCC has declared to be telephone exchange service.³⁶

Intrado explains that its 911/E911 has the same qualities as other services deemed to be telephone exchange service by the FCC, specifically noting that the FCC has said that “[i]n this era of converging technologies, limiting the telephone exchange service definition to voice-based communications would undermine a central goal of the 1996 Act.”³⁷ Intrado notes that other states have recognized the benefits of its 911/E911 service and have determined that its 911/E911 service is telephone exchange service.³⁸ Intrado says its 911/E911 service has the same quality as other services deemed to be telephone exchange service by this Commission in 2000.³⁹ Intrado claims that the “mutual exchange” of traffic between local exchange carriers (LECs) need not actually occur over the same trunks.⁴⁰ Lastly, Intrado claims its 911/E911

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 18 (citing to *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, 22 FCC Rcd. 3513, ¶ 11 (2007) (“It is not clear under the Commission’s precedent that the definition of ‘telecommunications services’ is not limited to retail services . . .”); *Federal-State Board on Universal Service*, 12 FCC Rcd. 8776, ¶ 785 (1997) (“Common carrier services include services offered to other carriers, such as exchange access service, which is offered on a common carrier basis, but is offered primarily to other carriers.”)).

³⁷ Intrado Initial Brief at 5 (citing *In the Matter of the Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, Order on Remand, 15 FCC Rcd. 385 at ¶ 21 (1999) (*Advanced Services Order*)).

³⁸ Petition at 6.

³⁹ *Id.*

⁴⁰ Intrado Initial Brief at 9.

service is similar to AT&T's 9-1-1 service and notes that AT&T's tariff states that its 9-1-1 service is a telephone exchange service.⁴¹

Intrado argues that its 911/E911 service is not required to operate within incumbent local exchange company (ILEC) exchange boundaries to be telephone exchange service.⁴² In support of its argument, Intrado notes that the FCC has found that FTA § 153(47)(A) does not require a specific geographic boundary.⁴³ Intrado goes on to say that its 911/E911 service uses selective routers to interconnect PSAPs and 9-1-1 callers located in the same geographic area.⁴⁴ Intrado claims that extended area service (EAS) and expanded local calling service (ELCS) were developed to ensure that all members of a community of interest can reach other subscribers without incurring a toll charge, thereby comparing the 9-1-1 fees collected to fees for EAS and ELCS.⁴⁵ Finally, Intrado notes that in the Modified Final Judgment in the AT&T divestiture, the district court specifically waived local access and transport area (LATA) restrictions for 9-1-1 services.⁴⁶ Intrado claims that whether its services are covered by an exchange service fee has no bearing on the issue of whether emergency services are telephone exchange service or exchange access.⁴⁷

B. AT&T's Position

AT&T states that Intrado's 911/E911 service, its only service offering, is neither "telephone exchange service" nor "exchange access;" therefore, Intrado is not entitled to FTA § 251(c) interconnection.⁴⁸ AT&T notes that the FTA requires an ILEC to allow requesting carriers to interconnect on the ILEC's network for the transmission and routing of telephone

⁴¹ *Id.* at 8.

⁴² Intrado Reply Brief at 6.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 7.

⁴⁶ *Id.*

⁴⁷ Intrado Reply Brief at 8.

⁴⁸ AT&T Initial Brief at 2-3.

exchange service and exchange access.⁴⁹ AT&T argues that if a carrier does not provide either of these services, the carrier cannot compel interconnection to the ILEC.⁵⁰ AT&T goes on to say that the FCC has held that to qualify as “telephone exchange service,” a service must allow a customer to originate and terminate a call to anyone in the local exchange.⁵¹ AT&T states that Intrado’s service does not do this.⁵²

AT&T claims that Intrado’s 911/E911 service merely allows its customers to receive calls.⁵³ AT&T argues that Intrado’s 911/E911 service does not satisfy the FTA’s definition of telephone exchange service because it does not provide intercommunication; specifically, it does not provide for origination.⁵⁴ Furthermore, Intrado’s 911/E911 customers cannot originate any call of any kind; much less reach everyone in an exchange.⁵⁵ AT&T notes that Intrado’s Texas Rate Sheet states that Intrado does not provide local exchange service and requires Intrado’s customer to obtain local exchange service from another carrier.⁵⁶

AT&T claims that Intrado’s request for arbitration violates Commission precedent and reveals Intrado’s intent to shift its cost of doing business to AT&T and to require AT&T to rearrange its network to accommodate Intrado’s business plan.⁵⁷ AT&T posits that bilateral arbitration of an ICA under FTA §§ 251 and 252 is not the proper procedure to establish competitive emergency services because 9-1-1 policy and stakeholder groups are impacted.⁵⁸

AT&T notes that in determining whether traffic originates and terminates within an exchange, the FCC has explained that it “. . . traditionally has determined the nature of communications by looking at the end points of the communications, and has consistently

⁴⁹ *Id.* at 3.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ AT&T Initial Brief at 3.

⁵⁴ *Id.* at 11.

⁵⁵ *Id.* at 3.

⁵⁶ *Id.* at 3-4.

⁵⁷ AT&T Initial Brief at 4.

⁵⁸ *Id.* at 16.

rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers.”⁵⁹ AT&T claims that because Intrado’s customers may or may not be within the same exchange as the originating caller, and in fact because PSAPs serve areas that are independent of and unrelated to exchange boundaries, Intrado’s 911/E911 service does not satisfy FTA § 153(47)(A).⁶⁰ AT&T’s also claims Intrado’s 911/E911 service is not of a character ordinarily furnished by a local exchange as required by FTA § 153(47) because it is neither covered by the exchange service charge nor is it toll.⁶¹

C. Arbitrators’ Decision

1. Introduction

Intrado’s only service offering in Texas is its 911/E911 service. Intrado’s 911/E911 customers are PSAPs and other public safety agencies.⁶² Intrado’s customers will receive 9-1-1 calls originated by end-user customers of LECs with whom Intrado is directly or indirectly interconnected in areas where Intrado is designated the emergency services provider by the appropriate 9-1-1 entity. Intrado’s PSAP and other emergency services customers will be able to conference and transfer emergency calls to other PSAPs or other public safety providers.⁶³ However, if Intrado’s customers wish to place a call to a destination other than to another PSAP or other public safety agency, even returning an emergency call that was inadvertently disconnected, Intrado’s customers must have an “administrative” telephone line from a LEC to make all such outbound calls.⁶⁴

The Arbitrators agree with Intrado’s description of its 911/E911 service as a “competitive 911/E911 service offering to Texas public safety agencies.”⁶⁵ It is a competitor to the wireline E911 network, which is by definition a dedicated network that is interconnected but largely

⁵⁹ AT&T Brief at 10.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Petition at 5.

⁶³ Intrado Reply Brief at 4-5.

⁶⁴ AT&T Initial Brief at 3-4.

⁶⁵ Intrado Initial Brief at 1.

separate from the PSTN.⁶⁶ The Arbitrators also agree with Intrado's statement that, even though its 911/E911 service competes with the wireline E911 network, it is still telephone exchange service if it satisfies either FTA § 153(47)(A) or (B).⁶⁷

2. Applicable Law

FTA § 251 provides an ascending hierarchy of interconnection obligations between different types of telecommunications carriers. FTA § 251(a) imposes a general duty on all telecommunications carriers to interconnect.⁶⁸ Section 251(b) imposes additional but identical obligations on all LECs, whether ILECs such as AT&T or CLECs such as Intrado, including the duty to offer nondiscriminatory resale, number portability, dialing parity, access to rights-of-way, and reciprocal compensation for the transport and termination of telecommunications.⁶⁹ Section 251(c) imposes additional obligations on ILECs such as AT&T, including the duty to negotiate in good faith for specific purposes, such as interconnection for the transmission and routing of telephone exchange service and exchange access,⁷⁰ and subjecting them to compulsory arbitration if negotiations fail.⁷¹

Section 251(c) ICAs, whether arrived at by negotiations or arbitration, must be filed with and approved by the Commission.⁷² Section 251(c)(2) requires ILECs to interconnect "for the transmission and routing of telephone exchange service and exchange access" . . . at "rates, terms and conditions that are just, reasonable and nondiscriminatory, in accordance with . . . the requirements of this section and section 252."⁷³

FTA § 153(47) defines the term telephone exchange service as:

⁶⁶ 47 C.F.R. 9.3(1).

⁶⁷ Intrado Initial Brief at 6. The Arbitrators do not agree with Intrado's analysis of the FCC's discussion referenced in its footnote 17; the FCC was discussing local loop alternatives, not 911 service technology alternatives.

⁶⁸ 47 U.S.C. 251(a).

⁶⁹ 47 U.S.C. 251(b).

⁷⁰ 47 U.S.C. 251(c)(2).

⁷¹ 47 U.S.C. 252(b).

⁷² 47 U.S.C. 252(e).

⁷³ 47 U.S.C. 251(c)(2).

- (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or
- (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.⁷⁴

The Arbitrators note that FTA § 153(47) is written in the disjunctive. Satisfying only one part, A or B, will qualify a service as telephone exchange service. Therefore, if Intrado's 911/E911 service satisfies either part A or B of FTA § 153(47), it is classified as telephone exchange service for purposes of FTA § 251(c).

3. Certification

Intrado holds an SPCOA in Texas,⁷⁵ and Intrado points to its certification as proof that its 911/E911 service is telephone exchange service.⁷⁶ The FCC has said that any entity that is certified as a CLEC by the appropriate state commission is presumptively a competing provider of telephone exchange service.⁷⁷ Therefore, so long as Intrado holds a certificate from this Commission, there is a presumption that Intrado provides telephone exchange service in Texas. However, the presumption can be overcome.⁷⁸

In the *Directory Assistance Order*, the FCC conditioned a CLEC's rights to FTA § 251 services and resources to those to which the CLEC is "entitled."⁷⁹ Further, a federal appeals court has held that the FTA definition of a LEC only applies to the extent a person actually

⁷⁴ 47 U.S.C. 153(47).

⁷⁵ *Application of Intrado, Inc. for An Amendment to its Service Provider Certificate of Operating Authority*, Docket No. 34570, Notice of Approval (Sept. 10, 2007) (removing the data-only restriction and amending certificate to reflect Intrado's authority to provide facilities-based, data, and resale telecommunications services throughout the entire State of Texas).

⁷⁶ Petition at 15.

⁷⁷ Provision of Directory Listing Information Under the Telecommunications Act of 1934, as Amended, 16 FCC Rcd. 2736 at 14 (2001) (*Directory Assistance Order*).

⁷⁸ Fed. R. Evid. 301; *Emery v. Barfield*, 183 S.W. 386, 390 (Tex.Civ.App. 1916).

⁷⁹ *Directory Assistance Order* ¶ 14.

engages in providing telephone exchange service.⁸⁰ Thus, the Arbitrators conclude that a CLEC is entitled to FTA § 251 services and resources only to the extent it actually provides telephone exchange service or exchange access. This reading of FTA § 251 is consistent with Commission precedent,⁸¹ the 5th Circuit's interpretation of FTA § 251,⁸² and with FCC Orders.⁸³

The Arbitrators find that certification as an SPCOA alone does not entitle Intrado to FTA § 251(c) services and resources from AT&T. In addition, the Arbitrators find that the presumption that Intrado, as an SPCOA holder, provides telephone exchange service is overcome by Intrado's own description of its 911/E911 service.

4. FTA § 153(47)(A) - Intercommunication

The term "intercommunication" is used in FTA § 153(47)(A), the first part of the definition of telephone exchange service, and is discussed in two FCC orders that are relied upon by both Parties.

First, in the *Advanced Services Order*, the FCC said that although "intercommunications" is not defined in the FTA or the FCC's rules, the statutory context for the term and the FCC's own precedent support a conclusion that telephone exchange services must permit "intercommunication" among subscribers within the equivalent of a local exchange area.⁸⁴

⁸⁰ *Worldcom, Inc. v. F.C.C.*, 246 F.3d 690, 694 (C.A.D.C. 2001) (explaining that even though the FTA defines the term "local exchange carrier" as any person engaged in the provision of telephone exchange service or exchange access, the definition only applies to the extent these terms apply).

⁸¹ *Petition of Sprint Communications Company L.P. for Compulsory Arbitration under the FTA to Establish Terms and Conditions for Interconnection with Consolidated Communications of Fort Bend County*, Docket No. 31577 and *Petition of Sprint Communications Company L.P. for Compulsory Arbitration under the FTA to Establish Terms and Conditions for Interconnection with Consolidated Communications of Texas Company*, Docket No. 31578, Order No. 2 Dismissing Proceeding (May 23, 2006) (finding that the duty of an ILEC to provide interconnection for the purposes of exchanging "telephone exchange service" is solely and expressly an FTA § 251(c)(2) obligation).

⁸² *Coserv Limited Liability Corporation v. Southwestern Bell Telephone Company*, 350 F.3d 482, 487 (5th Cir. 2003) (concluding that an ILEC is only required by the Act to negotiate about those duties listed in FTA § 251(b) and (c)).

⁸³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 F.C.C. Rcd. 15499, ¶ 191 (1996) (stating that an interexchange carrier (IXC) that requests interconnection solely for the purpose of originating or terminating its interexchange traffic, not for the provision of telephone exchange service and exchange access to others, on an ILEC's network is not entitled to receive interconnection pursuant to FTA § 251(c)(2)). See also *Directory Assistance Order* at ¶ 21-22 (stating that not all directory assistance providers' service may satisfy the statutory requirements of telephone FTA § 153(47)).

⁸⁴ *Advanced Services Order* at ¶ 24.

Further, the FCC said that precedent establishes that "intercommunication" refers to a service that "permits a community of interconnected customers to make calls to one another over a switched network."⁸⁵

Second, the FCC discussed the term intercommunication in its *Directory Assistance Order*.⁸⁶ There, the FCC explained that if a directory assistance provider offered call completion service to the original calling party once the requested number was located, whether the call completion service was provided using the directory assistance provider's own equipment or resale, it permitted a community of interconnected customers to make calls to one another, and was therefore "intercommunication" within the meaning of FTA § 153(47)(A).⁸⁷ The FCC stated that while directory assistance with call completion service "may not take the form of an ordinary telephone call (i.e. one initiated by LEC provision of dial tone), [it] nonetheless 'allows a local caller at his or her request to connect to another local telephone subscriber' thereby permitting a community of interconnected customers to make calls to one another."⁸⁸ The FCC also said that "[e]ngaging in call completion allows a local caller to connect to another local telephone end subscriber and, in that process, through a system of [either] owned or resold switches, enables the caller to originate and terminate a call."⁸⁹ The Arbitrators find the FCC's specific language significant. The FCC said "*offered call completion service to the original calling party,*" and "*call completion service allows a local caller to connect to another local telephone subscriber.*" When considering whether call completion service constituted telephone exchange service, the FCC looked at the originating local exchange caller and the destination local exchange number, not the call to the directory assistance provider. Additionally, the FCC concluded that the offering of call completion service by competitive directory assistance providers constituted telephone exchange service.⁹⁰ Thus, the Arbitrators conclude that except for the offering of call completion service, competing directory assistance service does not

⁸⁵ *Id.*

⁸⁶ *Directory Assistance Order* ¶ 16-17.

⁸⁷ *Id.* at 18.

⁸⁸ *Id.* at 21.

⁸⁹ *Id.* at 20.

⁹⁰ *Id.* at 22.

constitute telephone exchange service. For these reasons, the Arbitrators conclude that the term intercommunicating includes the concept of local subscribers being able to call one another, i.e. to originate and terminate calls to one another.

Intrado relies upon the portion of the *Directory Assistance Order* where:

[t]he FCC reasoned that the call completion service allows a "local caller to connect to another local telephone subscriber and, in that process, through a system of either owned or resold switches, enables the caller to originate and terminate a call." Thus, while the call completion service offered by the directory assistance provider "may not take the form of an ordinary call (i.e., one initiated by LEC provision of dial tone)," [it] nonetheless "allows a local caller at his or her request to connect to another local telephone subscriber."⁹¹

Intrado states that this analogy applies for its 911/E911 service.⁹² Intrado goes on to say that its provision of services to the PSAP allows the 9-1-1 caller to connect to its requested party, i.e., the first responder answering the emergency call.⁹³ The Arbitrators do not agree with Intrado's interpretation.

It is not a matter of the technology involved, or whether the call is provisioned as a traditional telephone call. The FCC was clear; even if a directory assistance provider offers call completion service, if it does not provide call completion service by using its own facilities or resale, the directory assistance provider is not offering a telephone exchange service.⁹⁴ There can be no mistake about the FCC's meaning. A competing directory assistance provider has not offered telephone exchange service to an originating directory assistance/4-1-1 caller until it has offered to complete a call to the originating caller's requested telephone number, and uses its own facilities or resale to complete the call. The Arbitrators conclude that for a competing directory assistance provider to offer telephone exchange service there must be two calls. The first call to 4-1-1 is part of the telephone exchange service that is provided by the 4-1-1 caller's

⁹¹ Intrado Initial Brief at 9-10.

⁹² Intrado Initial Brief at 10.

⁹³ Intrado Initial Brief at 10.

⁹⁴ *Directory Assistance Order* ¶ 10.

LEC. The second call to another local exchange telephone number of the originating caller's choice, but completed by the directory assistance provider using its own facilities or resale, is telephone exchange service provided by the directory assistance provider to the originating caller. In essence, the directory service provider is switching the originating caller's second call, thus permitting the originating 4-1-1 caller to originate and terminate a local exchange call to a phone number of the originating caller's choice, even though the originating caller did not have to get dial tone a second time to originate the second call. The Arbitrators conclude that while access to directory assistance service is part of telephone exchange service, directory assistance service standing alone is not telephone exchange service.

A caller to Intrado's 911/E911 service makes a 9-1-1 call and reaches an emergency services first responder, whether the original answerer or a subsequent answerer if the call is "hookflash" transferred. The originating caller's 9-1-1 call is analogous to a 4-1-1 call. The telephone exchange service provided to the originating caller by the originating caller's LEC includes access to both 4-1-1 and 9-1-1. But with Intrado's 911/E911 service, there is no second call comparable to the call completion provided to the originating 4-1-1 caller by the directory assistance provider. Intrado cannot "switch" the originating caller to another number of the originating caller's choice using Intrado's facilities or resale. If Intrado's "hookflash" supported such functionality, Intrado could transfer originating 9-1-1 callers to local exchange numbers that are not emergency services numbers. The Arbitrators see this as the determinative distinction between Intrado's 911/E911 service and directory assistance with call completion service and conclude that Intrado's 911/E911 service is not analogous to directory assistance with call completion service.

Intrado argues that its 911/E911 service supports "two-way communications" as evidence of "intercommunication."⁹⁵ But this argument is flawed and misleading. "Two-way communication" and "two-way traffic" are not the same thing. Two-way communication is equivalent to full-duplex transmission or two-way simultaneous operation, which means transmission and reception at the same time. It means the parties to a call can hear and be

⁹⁵ Intrado Initial Brief at 8.

heard.⁹⁶ Two-way traffic on the other hand is a type of circuit operation that provides for both originating and terminating traffic;⁹⁷ i.e. traffic can flow in either direction, inbound or outbound, on any given call.

The Arbitrators do not dispute the fact that an end-user customer that dials 9-1-1 and is connected to an Intrado 911/E911 customer can both hear and be heard. Undoubtedly, Intrado's 911/E911 service provides "two-way communications." However, for three reasons, the Arbitrators do not agree with Intrado's interpretation of the FCC's statement "the provision of individual two-way voice communication by means of a central switching complex to interconnect all subscribers within a geographic area" as somehow equating "two-way communications" with "intercommunication."⁹⁸ First, the FCC was discussing the definition of the term "exchange", not "intercommunication." Second, this statement discusses establishment of calls between subscribers, not the transmission capabilities of the connection once established. Third, as the Arbitrators have already discussed, the FCC was clear in the *Advanced Services Order* that "intercommunicating" refers to service that "permits a community of interconnected customers to make calls to one another over a switched network."⁹⁹ The Arbitrators conclude that the FCC's emphasis was on the ability to make calls to one another, i.e., two-way traffic, not on whether or not there was full-duplex transmission once a connection is established.¹⁰⁰

The Arbitrators agree with Intrado's claim that the "mutual exchange" of traffic between LECs may include the use of different facilities; i.e. one facility for inbound calls and another for outbound calls.¹⁰¹ But the remainder of the FCC quote Intrado relies upon states that the "mutual exchange" of traffic may be properly reflected by traffic flows of originating and terminating traffic between the various trunking configurations established between the interconnected

⁹⁶ NEWTON'S TELECOM DICTIONARY 721 (17th ed. 2001) (Newton's).

⁹⁷ NEWTON'S at 721.

⁹⁸ *Advanced Services Order* ¶ 20.

⁹⁹ *Advanced Services Order* ¶ 23.

¹⁰⁰ NEWTON'S at 296 (supports simultaneous two-way communication).

¹⁰¹ Intrado Initial Brief at 9.

parties.¹⁰² Here, all of the traffic between the interconnected parties will be one-way from AT&T to Intrado. Thus, this analogy is misplaced. Additionally, the Arbitrators do not find that a requirement that Intrado's customers obtain local exchange service from another LEC satisfies FTA § 153(A).

The Arbitrators do not understand Intrado's claim that its 911/E911 service provides a type of communication greater than the degree of communication available in a fax communication, which the FCC has declared to be telephone exchange service.¹⁰³ Fax communications are nothing more than data exchanged between fax machines over a telephone exchange service connection or an exchange access connection. If Intrado is referencing the ability of the originating caller to originate and terminate telephone exchange service calls or exchange access calls over which a facsimile may be sent, then Intrado's comparison is inappropriate because Intrado's 911/E911 does not provide origination or termination of telephone exchange service or exchange access. If Intrado is referencing the actual modulated message that is exchanged between two fax machines, the comparison is also inappropriate because once a connection is established between the two fax machines, whether a telephone exchange service call or an exchange access call, there is two-way communication between the two fax machines that is the same as the two-way communication provided by Intrado's 911/E911 service once a connection has been established between a 9-1-1 caller and an emergency services responder. As discussed above, two-way communication and two-way traffic are not the same thing.

Intrado's 911/E911 customers can be called by local exchange subscribers of other LECs, but they cannot originate local exchange calls themselves using Intrado's 911/E911 service. The only calling capability provided by Intrado's 911/E911 service is a "hookflash" capability, which

¹⁰² *Id.* (citing to *Advanced Services Order* ¶ 20-21, 30 (discussing "intercommunication" as the hallmark of telephone exchange service)).

¹⁰³ *Id.* at 18 (citing to *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, 22 FCC Rcd 3513, ¶ 11 (2007) ("It is not clear under the Commission's precedent that the definition of 'telecommunications services' is not limited to retail services . . ."); *Federal-State Board on Universal Service*, 12 FCC Rcd 8776, ¶ 785 (1997) ("Common carrier services include services offered to other carriers, such as exchange access service, which is offered on a common carrier basis, but is offered primarily to other carriers.")).

provides conferencing and transfer capabilities within the 9-1-1 network.¹⁰⁴ The Arbitrators find that Intrado's "hookflash" conference and transfer capability, its only call origination capability, is not similar or comparable to directory assistance with call completion service. Intrado's "hookflash" capability merely extends or completes the original 9-1-1 call. This finding is consistent with the fact that Intrado's 911/E911 service customers must obtain telephone exchange service from another LEC to make calls to non-9-1-1/emergency services customers of other LECs with which Intrado is interconnected either directly or indirectly.¹⁰⁵ For these reasons, the Arbitrators find that Intrado's 911/E911 service falls short of providing "intercommunication" as required by FTA § 153(47)(A).

5. FTA § 153(47)(B) - Comparable Origination and Termination

If a service does not satisfy FTA § 153(47)(A), it may still be classified as telephone exchange service if it satisfies FTA § 153(47)(B), which provides that telephone exchange service is "comparable service provided through the system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service."¹⁰⁶ The FCC said that the term "comparable," though not defined in the FTA, is generally understood to mean "having enough characteristics and qualities to make comparison appropriate."¹⁰⁷ Specifically and consistent with the Arbitrators' analysis in part (4) above, the FCC has determined that directory assistance with call completion service is a "comparable service" for purposes of this statute.¹⁰⁸

The FCC explained that to be "comparable service," a provider must allow a calling party the ability, 'through the system of switches, transmission equipment, or other facilities (or combination thereof)' to originate and terminate a telecommunications service."¹⁰⁹ The FCC said that "allowing the calling party the ability . . . to connect to another local telephone

¹⁰⁴ Intrado Reply Brief at 8.

¹⁰⁵ AT&T Initial Brief at 83, Attachment A, Section 5.2.9.

¹⁰⁶ FTA § 153(47)(B).

¹⁰⁷ *Advanced Services Order* ¶ 29.

¹⁰⁸ *Directory Assistance Order* ¶ 20.

¹⁰⁹ *Id.*

subscriber . . . enables the caller to originate and terminate a call.”¹¹⁰ Thus, for the FCC, “comparable”, for purposes FTA § 153(47)(B), means that a subscriber of local exchange service must have the ability to originate and terminate calls to any other subscriber of local exchange service in the first subscriber’s local exchange.

Further expanding on the term “comparable,” the FCC explained that not all call completion service constitutes telephone exchange service.¹¹¹ If a directory assistance provider simply hands the call off to another carrier to complete the call, it is not a provider of telephone exchange service.¹¹²

The FCC also said that the word “comparable” in FTA § 153(47)(B) means that services described therein share some of the same characteristics and qualities as the services described in FTA § 153(47)(A), including the key component, “intercommunicating.”¹¹³ Again, the FCC made it clear that “intercommunicating” refers to a service that provides both “origination” and “termination” because it “permits a community of interconnected customers to make calls to one another over a switched network.”¹¹⁴ The Arbitrators have concluded that the words “make calls to one another” require a telephone exchange service to be capable of terminating calls and originating calls in some form, even if it is not in the form of traditional dial tone services. To be comparable, Intrado’s 911/E911 service must provide a similar capability, but it does not.

The Arbitrators find multiple distinctions between the FCC’s explanations of “comparable” in the *DA Services Order* and Intrado’s 911/E911 service. First, Intrado’s 911/E911 service is not local exchange service; it is solely an emergency service that local exchange customers can access. Second, Intrado’s 911/E911 customers cannot originate and terminate calls in their local exchange to and from customers of any LEC. Finally, Intrado’s 911/E911 service’s only “originating” calling capability, its “hookflash” capability, operates only within the 9-1-1 network. Thus, Intrado’s 911/E911 service does not provide service that is

¹¹⁰ *Id.* at 21.

¹¹¹ *Id.* at 22.

¹¹² *Id.*

¹¹³ *Advanced Services Order* ¶ 30.

¹¹⁴ *Id.* at ¶ 23.

“comparable” for purposes of 47 U.S.C. 153(47)(B). For these reasons, the Arbitrators find that Intrado’s 911/E911 service falls short of being “comparable” or of providing “origination” as required by FTA § 153(47)(B).

6. FTA § 153(47)(A) - “[w]ithin a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge.”

The Arbitrators do not agree with Intrado’s analogy that 9-1-1 fees collected for maintaining a 9-1-1 network are equivalent to or serve the same purposes as EAS and ELCS fees. 9-1-1 fees are mandatory and are assessed upon all customers, including wireline¹¹⁵ and wireless.¹¹⁶ 9-1-1 fees pay for the entire wireline 9-1-1 network; including but not limited to trunks, PSAPs, and selective routers. It is by definition, a network that is interconnected with but separate from the PSTN.¹¹⁷

On the other hand, EAS and ELCS fees, some optional and some mandatory, cover the additional cost of traffic that would otherwise be covered by toll and/or access fees. Additionally, neither EAS nor ELCS are a service provided over a network that is interconnected but separate from the PSTN. EAS and ELCS are merely different ways to bill for services provided over the PSTN. Intrado’s 911/E911 service is not analogous to EAS or ELCS.

Further, the Arbitrators disagree with Intrado that its fee is an exchange service charge. The FCC did not say that a fee charged by a local exchange carrier is an exchange service charge. The FCC said that any fee charged for telephone exchange service is an exchange service charge.¹¹⁸ Thus, because the Arbitrators conclude that Intrado’s 911/E911 service is not telephone exchange service, its fee is not an exchange service charge.

Lastly, the Arbitrators agree with Intrado that 9-1-1 services that are classified as telephone exchange service are fundamentally different in nature than other telephone exchange

¹¹⁵ TEX. HEALTH & SAFETY CODE § 771.071.

¹¹⁶ TEX. HEALTH & SAFETY CODE § 771.0711.

¹¹⁷ 47 C.F.R. 9.3(1).

¹¹⁸ *Directory Assistance Order* ¶ 19.

services, and consistent with the FCC,¹¹⁹ find that if Intrado's 911/E911 service is ultimately classified as telephone exchange service, it would not be required to operate entirely within AT&T's exchange boundaries.

7. Precedent

Intrado claims that the Commission has already determined that Intrado's 911/E911 service has the same qualities as other services deemed to be telephone exchange service; i.e. there is applicable Commission precedent.¹²⁰ Intrado quotes the Commission as saying that Intrado's service would "both transmit and route 9-1-1 calls, which calls are telephone exchange service and/or exchange access."¹²¹ However, for several reasons, the Arbitrators do not agree with Intrado's reading of the Commission's precedent, and even if Intrado's interpretation of the Commission's decision in Docket No. 23378 were correct, the undersigned Arbitrators do not reach the same result as the arbitrators in that docket.

First, contrary to Intrado's assertion, the issue in Docket No. 23378 with Intrado's predecessor company was not whether or not its service was telephone exchange service but whether its predecessor was a "telecommunications carrier" and its service a "telecommunications service."¹²² Such a finding is consistent with the inclusion of access to 9-1-1 service as a component part of basic local telecommunications service.¹²³ Therefore, the earlier proceeding dealt with much more basic issues. The issue of whether or not Intrado's 911/E911 service is telephone exchange service was neither analyzed nor decided.

Second, the arbitrators in the previous proceeding stated that the inbound calls delivered to the PSAPs were telephone exchange service or "exchange access," not that Intrado's service

¹¹⁹ *Bell Operating Companies; Petition for Forbearance from the Application of Section 272 of the Communications Act of 1934, as amended, to Certain Activities*, CC Docket No. 96-149, 13 FCC Rcd. 2627 ¶ 51 (February 6, 1998) (*Forbearance Order*).

¹²⁰ Intrado Reply Brief at 6.

¹²¹ *Id.* at 7.

¹²² *Id.* at 3 (citing to 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, Docket No. 23378, Order No. 8 at 3 (Jan. 4, 2002)).

¹²³ PURA § 51.002(1)(E).

standing alone was telephone exchange service.¹²⁴ Therefore, the Arbitrators conclude that the arbitrators in the earlier proceeding were looking at the end-to-end 9-1-1 call, not just 9-1-1 service as a stand-alone product, which is not the same analysis as the Arbitrators make herein.

Third, consistent with the Arbitrators' discussion of FTA § 153(47)(B) and the terms "comparable," "origination," and "termination" in part (5) above, the inbound caller to Intrado's 911/E911 service will have originated and terminated a call, thus utilizing telephone exchange service. However, Intrado's 911/E911 service standing alone is not telephone exchange service.

The arbitrators in Docket No. 23378 found that AT&T was obligated to provide interconnection to Intrado for purposes of terminating 911 calls,¹²⁵ and the undersigned Arbitrators agree. However, the undersigned Arbitrators find that Intrado is not entitled to FTA § 251(c) interconnection because Intrado's 911/E911 service is not telephone exchange service. Therefore Intrado is entitled to interconnect with AT&T pursuant only to FTA § 251(a) and (b), through a commercial agreement, not through an ICA.

Finally, because Intrado's predecessor's SPCOA was data-only,¹²⁶ the Arbitrators find that the two arbitrations are factually distinguishable and any precedent established in the prior proceeding is not directly applicable to this proceeding because the services at issue are different. As a result, the Arbitrators do not find Commission precedent applies.

8. Summary Decision

AT&T asked for summary decision in this matter.¹²⁷ P.U.C. PROC. R. 21.69 provides that a presiding officer may grant a motion for summary decision on any or all issues to the extent that the pleadings, affidavits, materials obtained by discovery or otherwise, admissions, matters officially noticed, or evidence of record show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor, as a matter of law, on the

¹²⁴ *Id.* at 11.

¹²⁵ *Id.* at 11-12.

¹²⁶ *Application of Intrado, Inc. for Amendment to its Service Provider Certificate of Operating Authority*, Docket No. 34570, Application at 6 (July 27, 2007) (amending SPCOA from being a data-only provider to being a facilities-based, resale only, data only, or a combination provider, yet still indicating that the only telecommunications services that will be offered in Texas will be 9-1-1 selective routing, switching, aggregation, and transport).

¹²⁷ AT&T Texas' Brief on Threshold Issues and Motion for Summary Decision at 1 (Oct. 31, 2008).

issues expressly set forth in the motion.¹²⁸ Intrado admits its 911/E911 service is not exchange access. Thus, the sole issue decided in this order, that Intrado's 911/E911 service is not telephone exchange service, is dispositive because as a matter of law AT&T therefore cannot be compelled to arbitrate an ICA with Intrado. AT&T's motion for summary decision is therefore GRANTED.

9. Texas 9-1-1 Agencies

This decision does not abrogate Commission rules relating to 9-1-1 or E9-1-1 services and does not impinge on the Texas 9-1-1 Agencies' right to designate any Texas certificated telecommunications utility as their wireline E9-1-1 network provider. If any of the Texas 9-1-1 Agencies wishes to designate Intrado as its wireline E9-1-1 network provider, they may do so. However, the interconnection between Intrado and AT&T will be governed by FTA § 251(a) and (b), not FTA § 251(c). In addition, the Arbitrators note that a CLEC that provides "telephone exchange service" or "exchange access" and that also provides a competitive 9-1-1 network would have the right to compel AT&T to arbitrate an ICA pursuant to FTA § 251(c).

10. Emergency Services Interconnection Rights

The Arbitrators do not agree with Intrado's assertion that for the purpose of providing competitive 911/E911 services, interconnection rights differ from traditional interconnection arrangements.¹²⁹ Except for where the FCC has made some concessions based on the nature of emergency services, such as relaxed exchange boundaries,¹³⁰ there is nothing in the FTA or FCC precedent that authorizes the Commission to impose interconnection obligations on any ILEC simply because the CLEC's service is an emergency service. Intrado claims that interconnection between carriers for the purpose of each other's customers calling the other's residential or business customers may be different than interconnection that ensures 9-1-1 callers reach the right PSAP when they have an emergency and need help.¹³¹ The Arbitrators agree with this statement. The Commission's current interconnection rule contains heightened requirements

¹²⁸ P.U.C. PROC. R. 21.69(a).

¹²⁹ *Id.* at 3.

¹³⁰ *Forbearance Order* ¶ 51.

¹³¹ *Id.*

related to provisioning 9-1-1 service.¹³² However, the fact that there are heightened interconnection requirements between carriers for the exchange of 9-1-1 traffic as compared to interconnection requirements between carriers for the exchange of non-9-1-1 traffic is not relevant to the instant facts. Intrado is not seeking to interconnect with AT&T as a carrier whose customers will dial 9-1-1 and be routed to AT&T's 9-1-1 services or as a carrier whose customers will exchange calls with AT&T's customers. Intrado seeks arbitration of an ICA with AT&T for one purpose, to establish a competitive 9-1-1 network.

V. Conclusion

The authority of the Commission to compel AT&T to arbitrate an FTA § 251(c) ICA with Intrado is limited by the terms of the FTA. The Arbitrators find nothing in the FTA that authorizes them to compel AT&T to arbitrate a FTA § 251(c) ICA with Intrado or any other company that does not provide "telephone exchange service" or "exchange access."¹³³ Intrado admits that it does not provide "exchange access."¹³⁴ Therefore, the sole issue for purposes of Threshold Issue No. 1 is whether or not Intrado's 911/E911 service is "telephone exchange service." The Arbitrators have concluded that Intrado's 911/E911 service is not telephone exchange service.

The Arbitrators make no comment on the value of establishing a competitive 9-1-1 network or the fact that Intrado's 911/E911 service is IP based. These factors do not impact the Commission's authority or the Arbitrators' decision. The Arbitrators do note, however, that a CLEC that provides "telephone exchange service" or "exchange access" and that also provides a competitive 9-1-1 network would have the right to compel AT&T to arbitrate an FTA § 251(c) ICA pursuant to FTA § 252(b).

Because the Arbitrators' ruling on Threshold Issue No. 1 is dispositive of this matter, the Arbitrators do not address any of the other threshold issues at this time. However, if this order is overturned, the Arbitrators will rule on the remaining threshold issues. The granting of AT&T's

¹³² P.U.C. SUBST. R. 26.272(e).

¹³³ 47 U.S.C. 251(c).

¹³⁴ Intrado Initial Brief at 3, fn 5.

motion for summary decision resolves all issues in this arbitration. Pursuant to P.U.C. PROC. R. 21.69(e) and consistent with and P.U.C. PROC. R. 21.75(b)(2), a motion for reconsideration of this order shall be filed within 20 days of the issuance of this order and a response to a motion for reconsideration shall be filed within ten days of the filing of the motion.

SIGNED AT AUSTIN, TEXAS the 23rd day of November 2009.

PUBLIC UTILITY COMMISSION OF TEXAS

Susan E. Goodson by permission EK
SUSAN E. GOODSON, ARBITRATOR

Liz Kayser
LIZ KAYSER, ARBITRATOR

VI. Attachment 1: Glossary

ALI

Automatic Location Identification. Information provided to a 9-1-1 database that routes calls to the correct emergency services provider for the particular location.

CLEC

Competitive Local Exchange Carrier. A term coined for the deregulated, competitive telecommunications environment envisioned by the Telecommunications Act of 1996. CLECs compete on a selective basis for local exchange service, as well as long distance, international, internet access, and entertainment. They build or rebuild their own local loops, wired or wireless, and/or they lease local loops from incumbent local exchange carriers (ILECs) at wholesale rates for resale to customers.

DPL

Decision Point List. List of issues to be decided by arbitrators in an FTA § 252 arbitration.

EAS

Extended Area Service.

ELCS

Expanded Local Calling Service.

FCC

Federal Communications Commission.

FTA

Federal Telecommunications Act. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 and 47 U.S.C).

ILEC

Incumbent Local Exchange Carrier. An ILEC is a local telephone company in the United States that was in existence at the time of the divestiture of AT&T.

ICA

Interconnection Agreement. Commission-approved FTA interconnection agreement, not a commercial agreement.

IP

Internet Protocol.

IXC

Interexchange Carrier. Facilities-based Inter-LATA long distance carriers.

LATA

Local Access and Transport Area. A geographic area established for the provision and administration of communications service. It encompasses one or more exchanges. The area within which an ILEC was permitted to provide local and toll services before obtaining FTA § 271 relief.

LEC

Local Exchange Carrier.

PSAP

Public Safety Answering Point.

PSTN

Public Switched Telephone Network.

SPCOA

Service Provider Certificate of Operating Authority.

ATTACHMENT 2

From: COLON, LORI (ATTASIAIT) [lc2683@att.com]
Sent: Thursday, February 26, 2009 6:10 PM
To: Depp,Tip
Cc: Brent Cummings; TURBES, MICHAEL M (Legal)
Subject: RE: INdigital Telecom ICA; GTC
Attachments: REDLINE_ INdigital - AT&T ICA_ (Att. 5_ 911).DOC

Tip,

AT&T does not agree that the attached 911 Attachment/Appendix should be included or is applicable for a 251 Agreement as redlined by INdigital. If INdigital is interested in a commercial agreement in relation to the attached redline AT&T would be glad to discuss that further with INdigital. Please let me know. Thanks.

Lori Colon
Lead Interconnection
Agreements Manager
AT&T Wholesale
AT&T Illinois
847-248-2093
lc2683@att.com

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From: COLON, LORI (ATTASIAIT)
Sent: Thursday, February 26, 2009 5:58 PM
To: 'Depp,Tip'
Cc: Brent Cummings; TURBES, MICHAEL M (Legal)
Subject: INdigital Telecom ICA; GTC

Tip,

Please find attached AT&T's response on the GTC. Please let me know your availability for tomorrow and next week and I will get some time scheduled to discuss. Thank you.

Lori Colon
Lead Interconnection
Agreements Manager

AT&T Wholesale
AT&T Illinois
847-248-2093
lc2683@att.com

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ATTACHMENT 3

From: COLON, LORI (ATTASIAIT) [lc2683@att.com]
Sent: Friday, March 06, 2009 10:32 AM
To: Depp,Tip
Cc: Brent Cummings; TURBES, MICHAEL M (Legal)
Subject: RE: INdigital Telecom ICA; GTC

Tip,

In response to your request for legal authority supporting AT&T's assertion that INdigital's proposed revisions to the 911 attachment are not appropriate for a Section 251(c) ICA, note that the 911 service that INdigital proposes to provide does not meet the definition of "telephone exchange service" as set forth in 47 U.S.C. 153(47) because the service will not provide the ability both to originate and terminate calls. Accordingly, AT&T is not required to provide interconnection pursuant to the provisions set forth in Section 251(c).

For your reference, I attached a copy of a recent Final Order by the Florida Public Service Commission concluding that Section 251(c) was not applicable to 911 services that were substantially similar to those proposed by INdigital.

AT&T remains willing to negotiate a commercial agreement for INdigital's 911 services. We look forward to hearing from INdigital regarding such negotiations.

Lori Colon
Lead Interconnection
Agreements Manager
AT&T Wholesale
AT&T Illinois
847-248-2093
lc2683@att.com

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From: Depp,Tip [mailto:tip.depp@dinslaw.com]
Sent: Thursday, February 26, 2009 8:24 PM
To: COLON, LORI (ATTASIAIT)
Cc: Brent Cummings; TURBES, MICHAEL M (Legal)

Subject: RE: INdigital Telecom ICA; GTC

Lori,

Can you or your legal counsel (who I think is copied here) provide me with your legal authority for the proposition that the proposed 911 attachment is not appropriate for a 251 ICA? We're going to need to take a look at that. Thanks.

-Tip

-----Original Message-----

From: COLON, LORI (ATTASIAIT) [mailto:lc2683@att.com]

Sent: Thu 2/26/2009 7:09 PM

To: Depp,Tip

Cc: Brent Cummings; TURBES, MICHAEL M (Legal)

Subject: RE: INdigital Telecom ICA; GTC

Tip,

AT&T does not agree that the attached 911 Attachment/Appendix should be included or is applicable for a 251 Agreement as redlined by INdigital. If INdigital is interested in a commercial agreement in relation to the attached redline AT&T would be glad to discuss that further with INdigital. Please let me know. Thanks.

Lori Colon
Lead Interconnection
Agreements Manager
AT&T Wholesale
AT&T Illinois
847-248-2093
lc2683@att.com

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From: COLON, LORI (ATTASIAIT)
Sent: Thursday, February 26, 2009 5:58 PM
To: 'Depp,Tip'
Cc: Brent Cummings; TURBES, MICHAEL M (Legal)
Subject: INdigital Telecom ICA; GTC

Tip,

Please find attached AT&T's response on the GTC. Please let me know your availability for tomorrow and next week and I will get some time scheduled to discuss. Thank you.

Lori Colon
Lead Interconnection
Agreements Manager
AT&T Wholesale
AT&T Illinois
847-248-2093
lc2683@att.com

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ATTACHMENT 4

From: COLON, LORI (ATTASIAIT) [lc2683@att.com]
Sent: Wednesday, October 21, 2009 7:20 PM
To: Depp,Tip; Brent Cummings
Cc: TURBES, MICHAEL M (Legal)
Subject: INDigital DPLs - 911
Attachments: 082509 INDIGITAL ATT 5 911 DPL.doc; 093009 ATT 5 911 DPL.doc; 101309 ATT 5 911 NIM DPL.doc

Tip,
Brent,

In reviewing documents for the upcoming arbitration, it appears that I did not restate AT&T Kentucky's position when I provided to you via email Appendix 911 on September 30, 2009 and Appendix 911 NIM on October 12, 2009. Based on our email exchanges between September 21 and now, I am afraid I may have inadvertently created some confusion as to the purpose of those documents and wanted to make sure we were on the same page as you indicated in your email to me dated October 15, 2009. AT&T Kentucky's position, which has not changed, is that this language is not appropriate for a Section 251(c) interconnection agreement. The language was intended to be provided to INDigital in the event that AT&T Kentucky were to lose the issue concerning the definition of "telephone exchange service" as set forth in 47 U.S.C. 153(47), and not as a replacement for the language in AT&T Kentucky's 251(c) interconnection agreement. Therefore, in the event the Kentucky Commission decides in favor of AT&T Kentucky regarding the definition of "telephone exchange service," the language in the attached, Attachment 5 - 911/E911 DPL dated August 25, 2009, would be AT&T Kentucky's proposed language. If, however, the Kentucky Commission renders a decision in favor of INDigital on this same issue, the language in Appendix 911 and Appendix 911 NIM referenced above and sent to you on September 30 and October 12, 2009, respectively, and inserted into the attached DPLs entitled ATT-5 - 911/E911 dated 9/30/09, and ATT 911 NIM dated 10/13/09, would be AT&T Kentucky's proposed language.

Sorry for any confusion my previous emails may have created. If you have any questions, please let me know.

<<082509 INDIGITAL ATT 5 911 DPL.doc>> <<093009 ATT 5 911 DPL.doc>> <<101309 ATT 5 911 NIM DPL.doc>>

Lori Colon
Lead Interconnection
Agreements Manager
AT&T Wholesale
AT&T Illinois
847-248-2093
lc2683@att.com

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>

ATTACHMENT 5

From: COLON, LORI (ATTASIAIT) [lc2683@att.com]
Sent: Monday, November 09, 2009 2:49 PM
To: Depp,Tip
Cc: bcummings@indigital.net; TURBES, MICHAEL M (Legal)
Subject: RE: Indigital Extension

Tip,

In response to the below,

AT&T Kentucky's position, which has not changed, is that the Alternate 911 and Alternate 911 NIM language are not appropriate for a Section 251(c) interconnection agreement. As previously indicated the language in the Alternate 911 and Alternate 911 NIM are intended for use only in the event that AT&T Kentucky loses the issue concerning the definition of "telephone exchange service" as set forth in 47 U.S.C. 153(47), and not as a replacement for the language in AT&T Kentucky's 251(c) interconnection agreement.

Therefore AT&T has named the attachments below as:

- Generic Attachment 05 - 911/E911 (CLEC)
- Alternate Attachment 05 - 911/E911 (Service Provider)
- Alternate Attachment 05A - 911/E911 NIM (Service Provider)

Please let me know if you have any questions. Thanks.

Lori Colon
Lead Interconnection
Agreements Manager
AT&T Wholesale
AT&T Illinois
847-248-2093
lc2683@att.com

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-----Original Message-----

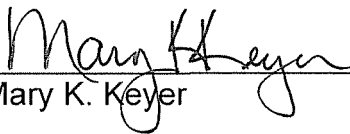
From: Depp,Tip [mailto:tip.depp@dinslaw.com]
Sent: Monday, November 09, 2009 9:24 AM
To: COLON, LORI (ATTASIAIT)
Cc: bcummings@indigital.net
Subject: RE: Indigital Extension

I'm aiming for 3 or 4 today. We have things essentially ready to go, and I'd like to get the issues inserted into the DPLs today, which means I'll need them no later than 4 p.m. EST today.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the following individual by mailing a copy thereof via U.S. Mail, this 11th day of the March 2010.

Edward T. Depp,, Esq.
Dinsmore & Shohl, LLP
1400 PNC Plaza
500 W. Jefferson Street
Louisville, KY 40202



Mary K. Keyer