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Subject: 070699 Motion to Accept Brief One Day Out of Time and Post Hearing Statement and Brief
Attachments: 070699 Embarq Motion AND Post-hearing Statement and Brief 8-8-08.doc

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and POST-HEARING STATEMENT AND BRIEF

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and POST-HEARING STATEMENT AND BRIEF



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August 8, 2008

FILED ELECTRONICALLY

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

Re: Docket No. 070699-TP, Embarq Florida, Inc.'s Motion to Accept Post-Hearing Statement and Brief One Day Out of Time; and Embarq's Post Hearing Statement and Brief

Dear Ms. Cole:

Enclosed for filing on behalf of Embarq Florida, Inc. is our Motion to Accept Post-Hearing Statement and Brief One Day Out of Time. The Post Hearing Statement and Brief is also included for filing in the above referenced docket matter as the Commission was previously unable to open the document filed yesterday.

Copies are being served on the parties in this docket pursuant to the attached certificate of service.

Sincerely,

/s/ Susan S. Masterton
Susan S. Masterton

Enclosure

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**CERTIFICATE OF SERVICE
DOCKET NO. 070699-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by regular U.S. Mail and electronic mail on this 8th day of August, 2008 to the following:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of Petition by Intrado Communications, Inc. for arbitration of certain rates, terms, and conditions for interconnection and related arrangements with Embarq Florida, Inc., pursuant to Section 252(b) of the Communications Act of 1934, as amended, and Section 364.162, F.S.	Docket No. 070699-TP Filed: August 8, 2008
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EMBARQ FLORIDA, INC.'S
MOTION TO ACCEPT POST-HEARING STATEMENT AND BRIEF
ONE DAY OUT OF TIME

Embarq Florida, Inc. ("Embarq") hereby files this Motion requesting that the Commission accept the Post-hearing Statement and Brief, which has been filed with the Commission Clerk via electronic delivery, one day out of time. In support of this Motion Embarq states as follows:

1. The Order on Prehearing Procedure, Order No. PSC-08-0172-PCO-TP, required that the Post-hearing Statement and Brief in this docket be filed on August 7, 2008.
2. Embarq attempted to file the Post-hearing Statement and Brief via electronic filing on August 7, 2008 at 4:47 p.m.
3. Due to extreme weather, which caused Embarq to experience network and power failures, Embarq received notice from the Commission that the electronic filing was not received until August 7, 2008 at 7:56 p.m., and, as such is considered to be filed as of 8:00 a.m. on the next business day.
4. Simultaneously with the attempted electronic filing of the Post-hearing Statement and Brief, Embarq served the parties to this docket with electronic copies and also sent hard copies of the Post-hearing Statement and Brief via U.S. Mail. Therefore, no party will be prejudiced by the granting of this Motion as the parties have received service of the Post-hearing Statement and Brief. Embarq has notified the parties of its

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intent to file this Motion via e-mail and phone calls and can represent that Intrado does not object.

5. Furthermore, the interests of justice will be served if Embarq's Post-hearing Statement and Brief is considered in this docket.

Wherefore, for the above reasons, Embarq requests that the Commission grant this Motion and accept for filing one day out of time the Post-hearing Statement and Brief.

Respectfully submitted this 8th day of August, 2008.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Intrado Communications, Inc. for Arbitration
of Certain Rates, Terms, and Conditions for Interconnection and
Related Arrangements with Embarq Florida, Inc., pursuant to
Section 252(B) of the Communications Act of 1934,
as Amended, and Section 364.162, F.S.

Docket No. 070699-TP

Filed: August 7, 2008

**EMBARQ FLORIDA, INC.'S
POST-HEARING STATEMENT AND BRIEF**

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of Petition by Intrado Communications, Inc. for arbitration of certain rates, terms, and conditions for interconnection and related arrangements with Embarq Florida, Inc., pursuant to Section 252(b) of the Communications Act of 1934, as amended, and Section 364.162, F.S.	Docket No. 070699-TP Filed: August 7, 2008
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EMBARQ FLORIDA, INC.'S POST-HEARING STATEMENT AND BRIEF

Embarq Florida, Inc. ("Embarq"), in accordance with Order No. PSC-08-0172-PCO-TP, submits the following Post-hearing Statement and Brief.

INTRODUCTION

Of the fourteen issues identified by the parties at the issue identification conference, all or part of six of the issues subsequently have been resolved.¹ The issues that remain in dispute include Issues 1(a)-(d), Issue 2(a) and (b), Issue 3(a) and (b), Issue 4(a) and (b), Issue 5, Issue 6(b), Issue 7, Issue 11, Issue 13 and Issue 14. This Post-hearing Statement Brief addresses these disputed issues.

The primary disagreement between Embarq and Intrado is whether and how section 251(c) of the federal Telecommunications Act² governs the terms and conditions for interconnection when Intrado is the 911 service provider to a Public Safety Answering Point (PSAP). It is Embarq's position that section 251(c) does not, and was never intended to, apply to these arrangements but that these arrangements are governed by section 251(a) of the Act and should be included in a separate commercial agreement negotiated by parties.

¹ Issues 3(c), 6(a), 8, 9, 10 and 12 have been resolved and, consequently, are not addressed in this Post-hearing Statement and Brief.

² 47 U.S.C. §§ 151 et.seq.

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Contrary to Intrado's assertions, Embarq does not oppose Intrado's entry into the 9-1-1 services market here in Florida or anywhere else. Embarq has offered to do business with Intrado just like it does with any other CLEC or 9-1-1 service provider. In the context of a commercial agreement Embarq has agreed to Intrado's requests, including: 1) establishing points of interconnection on Intrado's network; 2) providing direct end office trunking where end offices are served by a single Intrado-served PSAP; 3) not charging for the use of Embarq's selective router to route Embarq's end user 911 calls to an Intrado-served PSAP in split wire centers; 4) establishing trunks for inter-selective routing; and 5) incorporating these commercial terms (if clearly delineated as such) in a single agreement that may also contain 251(c) terms.

Embarq's positions on the disputed issues are fair, reasonable and consistent with the Act and with Commission and FCC precedent and should be approved by the Commission. Specifically, the Commission should find that:

- Section 251(c) does not apply to Embarq's interconnection when Intrado is the 911 service provider to a PSAP.
- Section 251(c) does not require Embarq to establish either one or more POIs on Intrado's network.
- Neither Section 251(c) nor section 251(a) authorize Intrado to dictate to Embarq the facilities or manner of Embarq's interconnection on Intrado's network and Embarq cannot be required to implement one way trunking with class marking (or line attribute routing) in lieu of routing traffic through its existing selective routers.
- Section 251(a) applies to inter-selective router trunking arrangements between the parties, to Intrado's provision of services to Embarq, and to Embarq's provision of its subscribers' ALI records to Intrado when Intrado is the ALI database provider to a PSAP.

- Based on Intrado’s representation of the services it expects to provide and the end users it anticipates it will serve, Embarq’s definition of “End User,” which includes customers calling 911 and PSAPs receiving 911 calls, is appropriate for the interconnection agreement.

- Embarq should be allowed to continue to charge for the subscriber ALI records it provides to populate Intrado’s ALI database, in accordance with Embarq’s tariffs.

- The parties should not be required to incur the additional costs associated with using a third party auditor for all audits.

For those terms and conditions governed by section 251(c) the Commission should approve Embarq’s proposed language which reflects the standard terms and conditions for 251(c) interconnection included in the numerous interconnection agreements Embarq has entered into with competitive carriers in Florida. The Commission should order the parties to negotiate those terms and conditions not governed by section 251(c) and include them in a separate commercial agreement or in a separately delineated section of any 251(c) agreement.

ISSUES AND ARGUMENT

Issue 1(a) What service(s) does Intrado currently provide or intend to provide in Florida?

Embarq’s Position: **Intrado has indicated that it will offer 911/E911 services to PSAPs through its IP-based Intelligent Emergency Network and is aggressively pursuing the provisioning of Next-Generation 911 services. Intrado currently does not provide local exchange services to end users to dial 911 or wholesale services to carriers or other wholesale providers.**

Argument

While Embarq agrees that Intrado may be a telecommunications carrier entitled to interconnection under section 251(a), Embarq disagrees that when Intrado provides 911/E911

services to PSAPs these services qualify as telephone exchange service or entitle Intrado to interconnection and access to UNEs under 251(c).

The services that are at issue in this proceeding are the competitive 911/E911 emergency services that Intrado proposes to offer to PSAPs. Intrado acknowledges that it does not offer dial tone local exchange services to end user customers and has no plans to do so in the foreseeable future. (See, e.g., Hearing Exhibit 3, Intrado's Response to Staff's Interrogatories Nos. 9, 35 and 57.) Embarq believes that these 911/E911 emergency services are not local telephone exchange services, but rather are unique services that do not fall into the categories contemplated under section 251(c) of the Act. Embarq's position is based on the unique characteristics of 911 service, enumerated by Embarq's witness James M. Maples in his direct testimony. These characteristics include: 1) the requirements of federal law that all voice providers must provide end user access to 911 service;³ 2) the FCC's description of the Wireline E911 Network as "separate from" the Public Switched Telephone Network ("PSTN");⁴ 3) the exclusive nature of the service, once the PSAP chooses a Wireline E911 Network provider;⁵ 4) the one-way nature of the traffic, i.e., it flows only from the end user who dials 911 to the PSAP who will provide the 911 service;⁶ 4) the fact that 911 traffic is jurisdictionally agnostic;⁷ 5) the fact that intercarrier compensation does not apply to 911 service;⁸ and 6) the funding of 911/E911 services and the Wireline E911 Network through end user surcharges.⁹ These unique

³ See, 47 C.F.R. §§9, 20.3 and 64.3. See also, TR 240, Maples Direct.

⁴ See, 47 U.S.C. § 9.3 and TR 234, Maples Direct.

⁵ TR 321, Maples Rebuttal.

⁶ TR 259, Maples Direct. Mr. Hicks' assertion (Hearing Exhibit 8, Hicks Deposition at p. 67) that when an Intrado-served PSAP transfers a call it is "outgoing" does not change the nature of the traffic, that is, that it originates from an end user dialing 911 and ultimately terminates to the PSAP who will provide emergency services to the caller.

⁷ TR 258 & 259, Maples Direct.

⁸ TR 259, Maples Direct. As Intrado states in, its Response to Staff's Interrogatory No. 17 the Parties have agreed that intercarrier compensation will not apply to 911/E911 traffic under the interconnection agreement. (Hearing Exhibit 3, p. 11).

⁹ Section 365.172, F.S.; TR 21, Maples Opening Statement; Hearing Exhibit 10 at p. 6.

characteristics of 911/E911 traffic demonstrate that the service is not telephone exchange service subject to section 251(c) interconnection and unbundling requirements.

Intrado's testimony confirms the unique nature of 911 traffic by repeatedly distinguishing between voice telephone service and the 911/E911 service it proposes to provide to PSAPs. In responding to Staff's Interrogatory No. 61, Intrado acknowledges that 911 is different from traditional interconnection arrangements and states "interconnection for the purposes of providing competitive 911/E911 services must look beyond the traditional interconnection arrangements used for plain old telephone service ("POTS") and seek to establish physical architecture arrangements that specifically address the special needs of 911 callers and first responders." (Hearing Exhibit 3 at p. 54.) While Intrado professes to ask the Commission to apply section 251(c) in a similar manner to how it is applied in other competitive situations and also professes to request parity with arrangements Embarq has with other voice providers, Intrado consistently requests exceptions to these arrangements due to the distinctive nature of its 911 service offerings. For example, in the summary of his testimony at the hearing, Intrado's witness Mr. Thomas W. Hicks states "Deviating from a traditional POI arrangement in these instances when Intrado Comm is serving the PSAP is the most efficient and effective network....for the provision of 911 services. (TR 95 & 96. See, also, TR 73, where on cross-examination Mr. Hicks acknowledges that it is Intrado's position that section 251(c) can be applied selectively to 911 and non-911 traffic.)

Intrado claims that the classification of the services it offers depends solely on the nature of the service that is offered to its PSAP customers. (TR 156, Spence-Lenss Rebuttal.) Intrado argues that the combined, integrated service it proposes to provide must be treated as telephone exchange on the basis that some components of this integrated service involve

telecommunications. However, providing a service that involves telecommunications is not the same as providing a telecommunications service. A telecommunications service is the direct provision of telecommunications to an end user, but when an entity uses telecommunications to provide an information service to an end user, that entity is providing an information service, not a telecommunications service, to that end user (TR 326, Maples Rebuttal). That is the reasoning used by the FCC when it determined that ILEC Internet access provided via xDSL was an information service.¹⁰

Contrary to what Intrado claims, Embarq is not asking the Commission to classify Intrado's services by treating each of the components of Intrado's network separately. Rather Embarq is simply pointing out that the integrated services being purchased by PSAPs are not necessarily comprised, in their entirety and in all respects, as telephone exchange service. If the customer's perception of the service is the determining factor, as Intrado suggests, then Embarq submits that PSAPs know that they are not buying local dial tone. (TR 156, Spence-Lenss Rebuttal.)

Intrado argues that the use of Internet protocol in its network is irrelevant to this proceeding (TR 161, Hicks Testimony Summary.) Certainly, Intrado's view is not the way the industry has been debating the issue over the last few years. The FCC defined an IP-enabled

¹⁰ *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era; CC Docket No. 02-33; CC Docket No. 01-337; CC Docket Nos. 95-20, 98-10; WC Docket No. 04-242; WC Docket No. 05-271; First Report and Order and Notice of Proposed Rulemaking; Released September 23, 2005; 20 FCC Rcd 14853.*

service as any service or application that relies on the Internet Protocol family.¹¹ The FCC further stated that an IP-enabled service can be provided over broadband or narrowband facilities.¹² The FCC has conducted many dockets that have looked at the very issue of how Internet protocol is being used in providing various services and has considered the appropriate classifications of these services based on the specific configurations that have been examined. Intrado's use of IP technology is certainly relevant to the issue of whether Intrado's proposed service arrangements constitute telephone exchange service for the purposes of section 251(c). Certainly, to the extent Intrado implements an IP-based service to PSAPs as part of its Next Generation network, this IP-based service is not a telecommunications service or a telephone exchange service and 251(c) should not apply.

Intrado describes its network as designed to work with existing legacy PSAP equipment (TR 15, Hicks Opening Statement), thus focusing on the CPE that its end user (PSAP) uses to receive 911 calls. This description implies that a 911 call will be transmitted as IP over Intrado's broadband facilities to the PSAP but will be converted to TDM at the PSAP.¹³ Intrado is, therefore, representing that it is providing a TDM-IP-TDM service that has been ruled as telecommunications by the FCC.¹⁴ Intrado conveniently ignores the existence and likelihood of IP-originated 911 calls that are handed off to Intrado as IP and are terminated as TDM (i.e., IP-TDM calls). Furthermore, Intrado's proposals do not adequately take into account the proper

¹¹ *In the Matter of IP-Enabled Services*; WC Docket No. 04-36; Notice of Proposed Rulemaking; Released March 10, 2004; 19 FCC Rcd 4863.

¹² *Id.*

¹³ Broadband facilities, such as DS1 and xDSL services, are used to provide connectivity to PSAPs today, which clearly meet one test of an interconnected VoIP service.

¹⁴ *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*; WC Docket No. 02-361; Order; Released April 21, 2004; 19 FCC Rcd 7457.

legal framework for information services (e.g., database administration and management) that are provided via IP over that same network utilizing computer processing equipment.

Intrado's arguments also incorrectly presume that the classification of its service won't be affected by, and should not take into account, whether the PSAP has implemented IP customer premise equipment.¹⁵ In that situation, Intrado's entire Wireline E911 Network will be IP-enabled. In addition, Intrado trumpets its plans to implement an advanced, "Next Generation" 911 network as support for its urgent need to obtain interconnection arrangements and UNEs it seeks from Embarq under section 251(c).¹⁶ However, from Intrado's own description of the technology and capabilities of the planned NG network, it is clear that this service may not be a telecommunication service entitled to interconnection under any provision of section 251, much less a telephone exchange service entitled to interconnection and access to UNEs under section 251(c). (TR 315, Maples Rebuttal.) Rather, this network will provide IP-based information service, a type of service which has never been deemed by the FCC to be entitled to 251(c) rights.

Issue 1(b) Of the services identified in (a), for which, if any, is Embarq required to offer interconnection under Section 251(c) of the Telecommunications Act of 1996?

Embarq's Position: **Section 251(c) applies when Embarq is the 911 provider to a Public Safety Answering Point (PSAP) and Intrado seeks interconnection to terminate end user 911 calls. When Intrado is the 911 provider to a PSAP, section 251(a) applies and interconnection terms and conditions should be included in a commercial agreement.**

¹⁵ Some PSAP manufacturers are marketing IP PSAP CPE today.

¹⁶ While Intrado insists that the immediate services it is planning to offer are not Next Generation, but are "similar" to Embarq's current 911 offerings (TR 148, Spence-Lenns Rebuttal); this assertion is belied by the numerous references made by Intrado's witnesses with respect to Intrado's plans to implement NG-911 and its need for an interconnection agreement with Embarq in order to enable those plans. See, e.g., TR 99, Hicks Direct; TR 136, 139, Spence-Lenns Direct; TR 211, Melcher Rebuttal; Hearing Exhibit 3, Intrado's Response to Staff Interrogatory No. 31 at p. 35.

Argument

The crux of the dispute between Embarq and Intrado in this arbitration is essentially whether section 251(c) is applicable to the interconnection of the parties' networks when Intrado is the 911 service provider to a PSAP. Intrado maintains that it is a competitive local exchange provider in this scenario and, therefore, section 251(c) applies. It is Embarq's position that section 251(a) rather than 251(c) applies in this scenario, and Embarq has offered to interconnect with Intrado under terms and conditions established through commercial agreements.

Embarq's offer to interconnect with Intrado under a commercial agreement is consistent with the arrangements that Embarq has entered into with other carriers when Embarq is not the 911 service provider to the PSAP, for purposes of enabling Embarq to meet its obligations to provide 911 calling to its end users. (TR 235, Maples Direct; Hearing Exhibit 5, Embarq's Response to Staff's Interrogatory No. 2b, at p. 3.) The plain truth is that Embarq has offered Intrado the parity it is requesting, but inexplicably, Intrado continues to argue that Embarq is denying and delaying its entry into the market. Had Intrado been willing to accept Embarq's offer to interconnect and provide services under the commercial terms Embarq proposed (and in parity with the arrangements Embarq has with other carriers), Intrado would be in a position to enter the 911 market to compete for PSAP business in Embarq's territory today.

Section 251 of the Telecommunications Act establishes the rights and obligations of telecommunications carriers in a competitive market.

Section 251 of the Telecommunications Act establishes the rights and obligations of telecommunications carriers and local exchange telecommunications carriers for interconnection between these carriers' networks in a competitive local exchange environment. Subsection (a) sets forth the obligation for all telecommunications carriers to allow other telecommunications

carriers to interconnect with their networks. Subsection (b) sets forth additional obligations of local exchange carriers. And, subsection (c) establishes even more specific obligations for incumbent local exchange carriers, such as Embarq, for interconnection by competing carriers to the incumbent's network.¹⁷ In the 12 years since the Telecommunications Act was enacted, the rights and obligations set forth in section 251, and particularly section 251(c), have been considered extensively and in numerous regulatory proceedings by the Federal Communications Commission ("FCC") and by state commissions and in judicial proceedings by federal courts.

Although Intrado presents its arbitration petition as a simple request for section 251(c) interconnection with Embarq to enable Intrado to provide competitive 911 services, Intrado's petition encompasses a variety of distinctive scenarios for interconnection between the two parties, and the issues raised by each scenario are not identical. Examples of these various scenarios are depicted in Attachments JMM-1 through JMM-6 to the Direct Testimony of James M. Maples (See, Hearing Exhibits 36-42). For the purposes of determining when section 251(c) applies, these various scenarios can be broken down as: 1) when Embarq is the 911 service provider to a PSAP; 2) when Intrado is the 911 service provider to a PSAP; and 3) when Intrado and Embarq each serve a different PSAP and need to transfer calls from one to the other. In the first instance, Embarq recognizes that section 251 (c) clearly applies.¹⁸ However, section 251(c) does not apply to the second or third scenarios. Mr. Hicks reveals Intrado's fundamentally

¹⁷ See, *In re: Joint Petition by TDS Telecom d/b/a TDS Telecom/Quincy Telephone; ALLTEL Florida, Inc.; Northeast Florida Telephone Company d/b/a NEFCOM; GTC, Inc. d/b/a GT Com; Smart City Telecommunications, LLC d/b/a Smart City Telecom; ITS Telecommunications Systems, Inc.; and Frontier Communications of the South, LLC ["Joint Petitioners"] objecting to and requesting suspension and cancellation of proposed transit traffic service filed by BellSouth Telecommunications, Inc.; In re: Petition and Complaint for Suspension and Cancellation of Transit Traffic Service Tariff No. FL2004-284 filed by BellSouth Telecommunications, Inc., by AT& T Communications of the Southern States, LLC*, Order No. PSC-06-07776-FOF-TP, Issued September 18, 2006 in Docket Nos. 050125-TP and 050119-TP, (hereinafter "Transit Traffic Order") at p. 42 for a discussion by the Commission of the scope of paragraph's (a), (b) and (c) of section 251.

¹⁸ The first scenario is essentially irrelevant to this arbitration, since Intrado has acknowledged that it does not currently offer, and has no definitive plans to offer, dial tone service to end users that would enable the initiation of 911 calls. (See, e.g., Hearing Exhibit 3, Intrado's Response to Staff Interrogatories No. 9, 35, and 57.)

flawed misunderstanding of the various obligations imposed on telecommunications carriers, local exchange companies and ILECs under the Act in his Deposition Testimony at page 9. Mr. Hicks asserts that Intrado is “entitled to the same interconnection arrangement when Intrado serves as the wireline network provider that is afforded Embarq when they are the wireline 911/E911 provider.” (Hearing Exhibit 8, Hicks Deposition at p. 9) Intrado’s position patently ignores the careful delineation of the rights afforded and obligations imposed on telecommunications carriers, local exchange carriers and incumbent local exchange carriers in paragraphs (a), (b) and (c) of section 251.

Mr. Hicks refers to Mr. Maples explanation of the appropriate regulatory treatment for the various interconnection arrangements Intrado seeks as “dizzily confounding.” (TR 112, Hicks Rebuttal.) While this is, perhaps, a nice turn of phrase, it is more appropriately applied to Intrado’s positions in this arbitration. It is “dizzily confounding” how Intrado slips and skips from one proposed interconnection scenario to another and relies on a “dizzily” array of out-of-context citations to various unrelated FCC orders to attempt to cobble together an illusion of support for its fundamentally flawed, but indisputably self-serving, positions. Intrado’s Response to Staff’s Interrogatory No. 61 (Hearing Exhibit 3 at page 54.) provides a sweeping view of Intrado’s ignorant or intentional misunderstanding of the applicable law. Intrado says it wants interconnection so that Embarq’s end users can complete calls to Intrado-served PSAPs, but Intrado is really demanding far more. Intrado’s proposal seeks to compel Embarq to provide facilities and services that Intrado is marketing to PSAPs, but which Intrado itself does not provide, while denying Embarq cost recovery for these facilities and services from either Intrado or the PSAPs. Intrado’s positions are inconsistent and unfounded under section 251(c) and

federal and state decisions implementing this provision, as well as state law implementing 911/E911 service in Florida.

Mr. Hicks' reliance on a "public interest" standard to negate the express provisions of section 251(c) and FCC and Commission decisions implementing this law is also unfounded. As Mr. Maples stated in response to the staff attorney's questions to him during his deposition "I don't think the public interest could be taken into consideration where it would misapply or change a rule." (Hearing Exhibit 7, Maples Deposition at p. 41) When Congress intended a public interest standard to apply, it explicitly said so, as it did in section 251(f) addressing the application of 251(c) to rural ILECs. Importantly, Congress specifically required states to consider a public interest criterion when reviewing negotiated 251(c) agreements. (Section 252(e)(2)(A).) However, a state commission may only reject an arbitrated agreement if it finds that it does not meet the more specific requirements of section 251, including the FCC's regulations pursuant to section 251. (Section 252(e)(2)(B).) In addition, this Commission has recognized that a public interest standard cannot apply to override the express jurisdiction accorded it by the applicable law.¹⁹

Whether section 251(a) or 251(c) applies in any given scenario is important because the rights and obligations for providing and obtaining interconnection, as well as the appropriate pricing methodologies for services and facilities provided by Embarq in accordance with these obligations, vary significantly under each of these provisions. In addition, the regulatory classification of emergency services is extremely important to the issue of how the existing

¹⁹ *In re: Joint Petition of MSCG Capital Corporation, IDS Telecom Corp. and IDS Telecom LLC for approval for name change and transfer of CLEC Certificate No. 5228 from IDS Telecom LLC to IDS Telecom Corp.; for waiver of Rule 25-14.118, F.A.C., Local, Local Toll, or Toll Provider Selection in connection with the sale of Customer-Based and other assets from IDS Telecom LLC to IDS Telecom Corp.; and for acknowledgment of registration of IDS Telecom Corp. as intrastate interexchange telecommunications company effective February 8, 2005, Order Granting Motion to Dismiss, Order No. PSC-05-0382-FOF-TP, Issued April 12, 2005 in Docket No. 050111-TP at pp. 8 & 9.*

emergency service infrastructure will evolve to the NG-911 platform. (TR 330, Maples Rebuttal.) As Mr. Maples asserts, “this effort cannot effectively be accomplished through a series of isolated arbitrations and legal disputes between carriers, such as this proceeding.”

By requesting the Commission to resolve these issues in the context of a section 251(c) arbitration, Intrado fundamentally misunderstands how the responsibility for and development of statewide 911/E911 network is allocated in Florida.²⁰ Sections 365.171-365.175, F.S., address the “Florida Emergency Communications Number E911 State Plan Act.” Under those provisions the Technology Program within the Department of Management Services is required to develop, maintain and implement the E911 system plan (s. 365.171, F.S.). The Plan is funded through a fee assessed on all users of voice communications services (s. 365.172, F.S.) The authorized expenditures of the funds collected from this fee are set forth in the statute. (subsection (9) of s. 365.172, F.S.) And the state E911 board created by the statute, in conjunction with the Technology Program, is responsible for the distribution of the fund to PSAPs to implement the E911 network. (s. 365.172, F.S.) Therefore, the types of operational and funding decisions that Intrado is requesting in this proceeding are more appropriately made in the context of that legislation – which contemplates the involvement of all affected parties, including local and state government officials, PSAPs, voice service providers and E911 service providers.

Section 251(c) does not apply when Intrado is the 911 provider to a PSAP.

In the situation where Intrado is the 911 service provider to a PSAP, Embarq is the “requesting carrier” for interconnection on Intrado’s network to fulfill its obligation to provide access to 911 to Embarq’s end user customers. (TR 332, Maples Rebuttal) Intrado agrees that in

²⁰ Intrado’s pleas for resolution of various operational E911 issues and the need for PSAP involvement in this process, advanced by Intrado’s witness Mr. John R. Melcher, serve to emphasize that a section 251(c) arbitration is not the appropriate forum to resolve the issues Intrado seeks to address in this proceeding. (See, TR 207, 208, Melcher Rebuttal; TR 218, Melcher Testimony Summary.)

this scenario Embarq is interconnecting at a point on Intrado's network, as distinguished from Intrado interconnecting at a point on Embarq's network. (Hearing Exhibit 3, Intrado Response to Staff Interrogatory No. 24 at p. 15; Hearing Exhibit 8, Hicks Deposition at pp. 7, 43) By its explicit terms, section 251(c) does not apply when a carrier (such as Embarq) is required to interconnect with the network of a non-incumbent carrier (such as Intrado).²¹ Rather, in this circumstance the general interconnection obligation on all carriers imposed by section 251(a) applies. While litigation to establish the meaning and parameters of section 251(c) has been plentiful over the past 12 years, very little consideration has been given to the nature of the obligations imposed under section 251(a). However, the FCC decisions that interpret section 251(a) make clear that section 251(a), not 251(c), applies to the terms and conditions for Intrado's provision of services to Embarq.²²

Intrado mistakenly assumes that any interconnection between an ILEC and a competitive provider must, ipso facto, be governed by section 251(c). (See, Hearing Exhibit 8, Hicks Deposition at pp. 16, 44; Hearing Exhibit 9, Clugy Deposition at p. 10.) To the contrary, the additional obligations imposed on ILECs apply only under the specific criteria enumerated in section 251(c). The most obvious example of an interconnection arrangement not governed by

²¹ A relevant example of such requirement is the scenario in this case where Embarq is obligated to provide 911 service to its end users and Embarq must interconnect with Intrado when Embarq is not the 911 service provider.

²² *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 96-98 and CC Docket No. 95-185, First Report and Order, Released August 8, 1996, 11 FCC Rcd 15499 ("Local Competition First Report and Order") ¶¶ 220, 997. *In the Matter of In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration; In the Matter of Petition of Cox Virginia Telcom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc. and for Arbitration; In the Matter of Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc.*; Memorandum Opinion and Order in CC Docket No. 00-218; CC Docket No. 00-249; CC Docket No. 00-251 ; Released July 17, 2002, 17 FCC Rcd 27039 (hereafter "Virginia Arbitration Order") at fn 200.

251(c) is interconnection for the purposes of originating or terminating long distance traffic.²³ The terms and conditions for long distance companies to interconnect with ILEC networks are generally contained in federal and state access tariffs. In addition, while recognizing an obligation for carriers to provide a transit function, this Commission determined that interconnection with incumbent local exchange carriers for the purposes of providing transit traffic services may not be required under section 251(c).²⁴ Nevertheless, the Commission ordered that the terms and conditions for transit traffic should be contained in commercial arrangements, without requiring those arrangements to be filed for approval by the Commission.²⁵ A further example of competitive carrier arrangements with incumbent carriers that are not governed by section 251(c) is the provision of the “unbundled network element platform” (“UNE-P”). Since the issuance of the TRRO by the FCC, these types of arrangements have been included in commercial agreements between competitive carriers and incumbents that are not required to be filed with state commissions, since they are not entered into under the provisions of section 251(b) or (c).²⁶

Even if the Commission were to find that section 251(c) applied to the interconnection of Embarq’s and Intrado’s networks when Intrado is the 911 services provider to the PSAP, the requirements imposed on ILECs under that provision do not support the type of interconnection arrangements requested by Intrado. For instance, FCC rules and orders, as well as state

²³ See, Local Competition First Report and Order at ¶¶ 190-191.

²⁴ Transit Traffic Order at p. 44.

²⁵ Transit Traffic Order at p 19.

²⁶ Intrado implies that Embarq should have filed any interconnection arrangements it has entered into, including interconnection arrangements with other ILECs, in accordance with § 252 of the Act. (Tr. 158, Spence-Lens Rebuttal). Intrado also cites *In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*; Memorandum Opinion and Order in WC Docket No. 02-89; Release Number FCC 02-276; Released October 4, 2002, 17 FCC Rcd 19337 for this proposition. While the requirements for filing interconnection agreements are not an issue in this proceeding, Embarq notes that the Eighth Circuit Court of Appeals vacated the relevant provision of the Local Competition First Report and Order requiring ILEC-ILEC agreements to be filed. See, *Iowa Util Board v. FCC*, 219 F. 3d 744, 765 (2000). In addition, the Qwest decision by its express terms applies only to agreements entered into under section 251(b) or (c). See, fn 26.

commission decisions, have made it clear that in a 251(c) interconnection arrangement, the requesting carrier is entitled to select the point of interconnection, which must be within the ILEC's network.²⁷ The FCC and state commissions have also established that each carrier is responsible for its facilities on its side of the POI.²⁸ The type of interconnection Intrado is requesting, that is, requiring Embarq to establish points of interconnection at multiple locations on Intrado's network at Embarq's cost, does not comport in any respect with the rights and obligations established under section 251(c).

Section 251(c) does not apply to inter-selective routing

Intrado also has indicated that one of the reasons it seeks interconnection with Embarq is to ensure that it can transfer calls from a PSAP it serves to a PSAP Embarq serves when necessary to properly route a 911 call. (Hearing Exhibit 8, Hicks Deposition at pp. 49 & 50.) This type of call transfer involves transfers between each provider's selective router, otherwise known as "inter-selective routing." Inter-selective routing involves a "peering" arrangement between two carriers, each of which is a primary provider of 911 services to PSAPs in different geographic areas. (TR 263, Maples Direct.) Inter-selective routing may also involve ALI steering, that is, data connectivity may be established between each PSAP's ALI database so that the PSAP to which the call is transferred can also obtain ALI information. (TR 263, Maples

²⁷ 47 C.F.R. §51.305. See, also, *In re: Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, Order on Reciprocal Compensation, Order No. PSC-02-1248-FOF-TP; Issued September 10, 2002 in Docket No. 000075-TP (hereinafter "Generic Reciprocal Compensation Order") at p. 25. See, also, *In re: Petition by Global NAPS, Inc. for Arbitration pursuant to 47 U.S.C. 252(b) of Interconnection Rates, Terms and Conditions with Verizon Florida, Inc.*, Order No. PSC-03-0805-FOF-TP, Issued July 9, 2003 in Docket No. 011666-TP (hereinafter "Global NAPs Arbitration Order") at p. 9; *In re: Petition for Arbitration of Unresolved Issues in Negotiation of Interconnection Agreement with Verizon Florida, Inc. by US LEC of Florida Inc.*; Final Order on Petition for Arbitration, Order No. PSC-03-0762-FOF-TP, Issued June 25, 2002 in Docket No. 020412-TP (hereinafter "US LEC Arbitration Order") at p. 13..

²⁸ TR 279, Maples Direct. See, Virginia Arbitration Order at ¶¶ 51, 53; Generic Reciprocal Compensation Order at p. 25.

Direct.) Peering arrangements involve the cooperative efforts of the affected PSAPs, the 911 service providers, public safety authorities and local governments. Mr. Hicks similarly describes these PSAP-to-PSAP peering arrangements in his Rebuttal Testimony (TR 115). These arrangements do not involve interconnection of a competing carrier's network with an ILEC's network. and, therefore, are not governed by section 251(c). (TR 263, Maples Direct.)²⁹

The “equal in quality” requirement does not support the interconnection arrangements Intrado seeks.

Intrado's support for its requested interconnection arrangements appears to be founded solely on section 251(c)(2)(C), which provides that an ILEC must provide interconnection:

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection;

Under this provision Intrado argues that Embarq must provide 1) a POI on Intrado's network (at its RCL gateway); 2) routing of Embarq's end user 911 traffic to Intrado's RCL gateway through the use of end offices trunks and what Intrado dubs “line attribute routing” (better known to Embarq and in the industry as “class marking”); and 3) interselective router trunks to transfer calls between Intrado-served PSAPs and Embarq-served PSAPs. (See, Hearing Exhibit 8, Hicks Deposition at pp. 19, 29; TR 174, Hicks Cross) In each of these instances Intrado's reliance on section 251(c)(2)(C) is misplaced. In fact, Intrado's interpretation of 251(c) turns the Act on its head and is completely contrary to the decisional law of the FCC, this Commission and the courts over the 12 years since Congress enacted the Telecommunications Act.

First, section 251(c)(2) provides four separate and adjunctive criteria, ALL of which apply to the interconnection required of ILECs under section 251(c). These criteria include that

²⁹ The issue of whether inter-selective routing is governed by 251(c) or 251(a) is further addressed under Issue 4, *infra*.

interconnection must be provided by the ILEC: (A) for transmission and routing of telephone exchange and exchange access; (B) at any technically feasible point within the ILEC's network; (C) at least equal in quality to that provided by the ILEC to itself or others; AND (D) on just, reasonable and nondiscriminatory rates, terms and conditions. Under this structure, section 251(c)(2)(C) was clearly intended to encompass the technical configuration and quality of interconnection.³⁰ While Embarq's interconnection with adjacent ILECs may be relevant to how Embarq interconnects with Intrado, it is irrelevant as to where the Parties interconnect. Rather, where the Parties interconnect is governed by paragraph 251(c)(2)(B), which provides for interconnection within the ILEC's network. Further, paragraph (c)(2)(C) cannot serve as a justification for requiring Embarq to interconnect at Intrado's selective router (or RCL gateway) because that requirement would directly contravene the express terms of paragraph 251(c)(2)(B) and the intent of section 251(c) to impose obligations on ILECs to allow interconnection and access to their network.

As far as Intrado's requests for direct end office trunking and class marking that Intrado justifies under this singular "equal in quality" rubric, Intrado itself admits that this type of interconnection is not in use in the 911 environment today. (TR 175, Hicks Cross.) Therefore, these interconnection arrangements would not be required under the "equal in quality" criterion in any event. And, finally, paragraph 251(c)(2)(A), requires interconnection on Embarq's network only for "telephone exchange" and "exchange access" and this provision is not overridden by the "equal in quality" standard. The same is true for section 251(a), which addresses the general obligation for telecommunications carriers to interconnect and is applicable when the more specific criteria of section 251(c) do not apply.

³⁰ The FCC discusses the meaning of the "equal in quality" criterion at ¶ 224 of the Local Competition First Report and Order. It is evident from this discussion that the FCC considers this criterion to encompass "technical and service standards."

Section 251(c) does not support Intrado's request for UNEs

In addition to imposing certain interconnection obligations on ILECs, section 251(c) imposes requirements for ILECs to provide requesting carriers with access to certain unbundled network elements.³¹ Intrado has stated that its need for access to the loop between the PSAP and Embarq's central offices is one of the reasons it seeks an interconnection agreement with Embarq under section 251(c). (Hearing Exhibit 8, Hicks Deposition at pp. 49, 65.) Because Embarq does not agree that 251(c) applies to Embarq's interconnection to Intrado's network when Intrado provides 911 services to a PSAP, Embarq does not believe that it is required to make this facility available to Intrado as a UNE. However, even if section 251(c) applies, under the FCC rules and order implementing section 251 unbundling requirements Embarq would be required to provide access only to any existing copper loops, DS1 loops, DS3 loops, DS1 dedicated transport, DS3 dedicated transport or dark fiber transport to meet its unbundling obligation. (TR 268, Maples Direct.) Embarq accepts Intrado's representations that it seeks these UNE loops for last mile connection to a PSAP it serves. However, Embarq questions the practicality of Intrado's proposal, given the requirements for obtaining UNEs (such as collocation at Embarq's end offices) in comparison to the commercial arrangements that are available and which Embarq has offered to Intrado to accomplish the same purpose. (TR 269, Maples Direct.) And, as discussed above, Embarq's obligation to provide UNE loops is limited to certain specific facilities, none of which appear likely to be appropriate for transporting the NG services Intrado has stated it intends to provide. (TR 267, 268, Maples Direct.)³²

³¹ 47 U.S.C. § 251(c)(3).

³² Embarq does not believe that it has an obligation to unbundle its ALI records for incorporation into the ALI database created and maintained by Intrado when Intrado is the 911 service provider to a PSAP. (TR 268, Maples Direct.) Intrado appears to agree. (Hearing Exhibit 3, Intrado's Response to Staff Interrogatory No. 65 at p. 57.) Embarq addresses Intrado's argument that Embarq is required to provide its subscribers' ALI records for free under Issue 13, *infra*.

Issue 1(c) Of the services identified in (a), for which, if any should rates appear in the ICA?

Embarq's Position: **Rates should appear in the interconnection agreement only for those services provided by Embarq under 251(c).**

Issue 1(d) For those services identified in 1(c), what are the appropriate rates?

Embarq's Position: **The appropriate rates are the rates included on Revised Exhibit JMM-12.**

Argument

Embarq does not agree with Intrado that rates for all of the services encompassed by Intrado's Petition for Arbitration are governed by the processes and parameters of section 251(c). (TR 335, Maples Rebuttal.) When Embarq is the 911 provider to a PSAP and a connecting carrier seeks interconnection for the purposes of terminating its end user customers' 911 calls, section 251(c) applies. In this scenario, the connecting carrier secures transport facilities from its central office to the POI at Embarq's selective router. For this service, carriers typically purchase access service at Embarq's tariffed rates. (TR 270, Maples Direct.) In addition, a port fee for connection to the selective router applies. (Id.) Embarq also charges for MSAG downloads in this scenario in accordance with its obligation to unbundle its 9-1-1 databases. (Id.) A copy of the price list for 251(c) services that accompanies Embarq's standard interconnection agreement can be found at Revised Exhibit JMM-12, attached to Maples Rebuttal Testimony (Hearing Exhibit 47.).³³

³³ Embarq's UNE rates have been previously approved by the Commission. See, *In re: Investigation into Pricing of Unbundled Network Elements (Sprint/Verizon track)*; Docket No. 990649B-TP; Final Order on Rates for Unbundled Network Elements Provided by Sprint-Florida Incorporated; Before the Florida Public Service Commission; Order No. PSC-03-0058-FOF-TP; Issued January 8, 2003.

For peering arrangements, that is, connections between two separate wireline E911 networks, the PSAPs who benefit from these arrangements typically pay for these services. (TR 271, Maples Direct.) When Intrado is the E911 provider, and section 251(a) applies, Embarq would pay Intrado for the services it secures from Intrado to connect to Intrado's network. (TR 272, Maples Direct.) These rates are properly established in a commercial agreement through negotiations between the parties. In the context of this proceeding Intrado has provided Embarq with its proposed rates for ports on Intrado's selective router, but has not provided pricing for any other services, nor do charges appear to be listed in Intrado's Florida tariff. (TR 272, Maples Direct)

Issue 2(a) What trunking and traffic routing arrangements should be used for the exchange of traffic when Intrado is the designated 911/E911 Service Provider?

Issue 2(b) What trunking and traffic routing arrangements should be used for the exchange of traffic when Embarq is the designated 911/E911 Service Provider?

Embarq's Position: **Embarq should be able to use its selective routers to direct 911 calls originated by Embarq's end users. Embarq should not be required to implement "class marking" or "line attribute routing." Neither should Embarq be required to pay Intrado to hand off calls to a secondary 911 provider.**

Argument

Intrado's proposal that Embarq must use one-way trunks to connect to Intrado's selective router reflects an attempt by Intrado to preclude Embarq from using its existing selective router to route calls from Embarq end users when those calls originate from an Embarq end office served by multiple PSAPs. (TR 89, 92, Hicks Direct.)³⁴ Adjunct to this proposed one-way

³⁴ Intrado appears to be confused about whether Embarq has agreed to provide direct end office trunks to terminate its end user 911 traffic to Intrado when Intrado is the only PSAP for that office. (TR 93, Hicks; Hearing Exhibit 3,

trunking requirement is the proposal to require “class marking” to route Embarq’s end users’ 911 calls to a PSAP served by Intrado. (Although Embarq and the industry use the term “class marking,” Intrado dubs its proposed routing method to be “line attribute routing.” TR 212, Melcher Rebuttal.) Intrado’s proposal would require Embarq to implement a more costly and less efficient alternative to allowing Embarq to use its existing selective routers to route calls from Embarq’s end users to Intrado’s selective router. (TR 252, Maples Direct.) In fact, through the interconnection arrangements Intrado is requesting, it is clear that Intrado is “seeking to control the network from the end user to the PSAP.” (Hearing Exhibit 7, Maples Deposition at p. 47.) The particular obligations that are imposed on ILECs under section 251(c) were never intended to, and clearly do not, support the overreaching interconnection arrangements that Intrado is attempting to wrest from Embarq.

The Commission should reject Intrado’s proposed direct end office trunking requirements. First, there is no legal justification for requiring Embarq to route all traffic through direct end office trunks to Intrado’s selective router, regardless of whether the Commission determines that section 251(c) applies to Embarq’s termination of traffic to Intrado when Intrado is the 911 service provider to the PSAP. In addition, Intrado’s proposal would impose substantial, unreasonable and unnecessary administrative and operational costs on Embarq.

Class marking is costly and inefficient

Class marking has been criticized by NENA as an inferior routing methodology. (TR 341, Maples Rebuttal.) Intrado justifies its proposal on the grounds that Embarq’s use of its selective router to route 911 calls from its end offices to Intrado potentially introduces

Intrado’s Response to Staff’s Interrogatory No. 33) Mr. Maples makes clear that Embarq has agreed to use this routing mechanism in that situation. (Hearing Exhibit 7, Maples Deposition at p. 23)

opportunities for failures into the 911 network. (TR 89, Hicks Direct; TR 213, Melcher Rebuttal.) Intrado's fears are not supported by evidence in the record regarding the likelihood of such failures, which according to NENA documentation, as well as Embarq's experience, are rare. (TR 341, Maples Rebuttal.) In addition, the evidence shows that the potential for failure using the alternative of class marking (a/k/a line attribute routing) is at least as great as, and likely greater than, the potential for failure when Embarq's selective router is used. (TR 276, Maples Direct; TR 341, Maples Rebuttal.)

Intrado's proposal for requiring Embarq to use class marking/line attribute routing for routing its end users' 911 calls also would impose significant costs on Embarq. As described in Mr. Maples Rebuttal (TR 345 & 346), implementing "class marking" or "line attribute routing" would involve: 1) the establishment of line attribute tables for each county and city served by an Embarq central office; 2) the engineering and installation of separate trunk groups for each PSAP; 3) manual reprogramming for each of Embarq's 1.7 million access lines in Florida; and 4) modifications of Embarq's ordering and provisioning systems. Mr. Maples estimates that these costs would exceed a million dollars. (TR 310, Maples Rebuttal) As the FCC has stated many times, the requesting carrier is responsible for the costs of interconnection, and must pay the ILEC for any expensive form of interconnection it requests.³⁵ In accordance with these principles, if the Commission deems section 251(c) to apply and to require class marking, Intrado should be responsible for Embarq's substantial implementation costs.³⁶

³⁵ Local Competition First Report and Order at ¶¶ 199, 200, 209, 225, 552.

³⁶ Intrado attempts to compare its proposed requirement for Embarq to use class marking/line attribute routing to the implementation of 1+ toll routing, asserting that ILECs implemented 1+ requirements without cost recovery. (TR 215, Melcher Rebuttal) What Mr. Melcher ignores is that ILECs were provided full cost recovery under federal and state orders addressing the implementation of 1+ toll routing. See, *In the Matter of MTS and WATS Market Structure Amendment of Part 69 of the Commission's Rules for Recovery of Equal Access Costs*; Report and Order in CC Docket No. 78-72; Release Number FCC 89-16 37601; Released February 17, 1989, 4 FCC Rcd 2104; See also, *In re: Investigation into IntraLATA presubscription*, Order No. PSC-95-0203-FOF-TP, in Docket No. 930330-TP, where the Commission imposed the cost of intraLATA toll presubscription on IXCs.

Embarq controls its network on its side of POI.

Intrado's proposal to require Embarq to use one-way trunks and class marking (or line attribute routing) does not comply with the FCC's and this Commission's decisions regarding the responsibility of each carrier for its network on its side of the POI. If the Commission accepts that 251(c) applies to Embarq's termination of its end user 911 calls to Intrado, then it must accept the corollary requirement that the POI for the exchange of such traffic must be on Embarq's network.³⁷ If the POI is located on Embarq's network, and if Intrado's proposed language requiring one way trunks from Embarq's end office to Intrado's selective router is accepted, then the POI necessarily would be at Embarq's end office. The FCC has determined that the responsibility for the network is assigned to each carrier on its side of the POI.³⁸ Consequently, Intrado would be responsible for the interconnection facilities (i.e., the trunks) from Embarq's end office to Intrado's selective router.³⁹ Since direct end office trunking (accompanied by class marking or line attribute routing) is a far costlier alternative for Embarq (or for Intrado if section 251(c) is deemed to apply), there is no practical basis for requiring Embarq to use end office trunking.

If the POI for the termination of Embarq's end user traffic is established on Intrado's network (which Embarq has agreed to under a 251(a) commercial arrangement when Intrado is the 911 service provider), then Intrado's proposed language should be rejected because it is an inappropriate attempt by Intrado to *dictate* how Embarq engineers its own network on its side of the POI. (Hearing Exhibit 7, Maples Deposition at p. 39.) Intrado acknowledges that a carrier responsible for transporting its end user 911 traffic to Intrado for termination to the PSAP served

³⁷ See discussion at Issue 3, *infra*.

³⁸ Virginia Arbitration Order at ¶53. See, also, Generic Reciprocal Compensation Order at xx.

³⁹ Since such trunks would be used to backhaul Intrado's traffic to its switch, they are in the nature of entrance facilities, which the FCC has found are not impaired and, therefore, not subject to TELRIC pricing.

by Intrado could control the method of transport up to Intrado's selective router. (TR 120, Hicks Rebuttal) Intrado's proposed language violates Embarq's right to make these decisions regarding its network.

Class marking is not "equal in quality" to interconnection arrangements Embarq has with itself or others

Intrado also attempts to legitimize its trunking and routing proposal by arguing that it is asking Embarq to undertake the same activities and incur only the same costs incurred by other carriers who must route their end user 911 calls to Embarq when Embarq provides the 911 service to the PSAP. (TR 91, Hicks Direct.) According to Intrado, this interconnection arrangement is "equal in quality" to the arrangements Embarq provides to itself or others. (TR 174, Hicks Cross.) However, neither Embarq nor any other ILEC that Embarq is aware of uses class marking, or line attribute routing, in Florida. (Hearing Exhibit 7, Maples Deposition at p. 67.) Intrado itself admits that neither class marking nor line attribute routing is used in the 911 environment today. (TR 174-175, Hicks Cross.)

Embarq has agreed to connect to Intrado's network under a commercial agreement.

As Mr. Maples states in his testimony, Embarq has agreed to interconnect at a POI on Intrado's selective router, under the provisions of section 251(a). (TR 281, Maples Direct.) Both Intrado and Embarq agree that the law allows carriers to mutually agree to these types of commercial arrangements, even though the FCC has declined to require points of interconnection on a competing carrier's network.⁴⁰ To the extent that Embarq establishes a POI on Intrado's emergency services network, Intrado has no authority to dictate the means or manner by which Embarq transports its traffic to Intrado. Therefore, Intrado may not demand that Embarq use

⁴⁰ Local Competition First Report and Order at ¶ 220; Virginia Arbitration Order at ¶ 71 and fn 200.

direct, end office trunks or require that Embarq use class marking (or line attribute routing) to route its traffic to the POI at Intrado's selective router. The law is also clear that Embarq is solely responsible for its facilities on its side of the POI, so that if Embarq interconnects at Intrado's selective router, Embarq has sole responsibility for determining the method and manner of routing the call to that POI. (Hearing Exhibit 7, Maples Deposition at p. 47.)

Embarq has also agreed that it will not charge Intrado or the PSAP for the selective routing function used by Embarq to route its end user calls to the Intrado-served PSAP in split wire centers. (TR 343, Maples Rebuttal.) It appears that this concern about selective router charges is one of the primary reasons for Intrado's insistence that ILECs use direct trunks rather than selective routers to deliver their traffic to Intrado. (TR 116, 120-121, 122, 123, 126, Hicks Rebuttal.) Therefore, as Mr. Maples notes in response to the Commission staff attorney's question during his deposition, Embarq's agreement not to charge for the use of its selective router in these situations should resolve Intrado's concerns. (Hearing Exhibit 7, Maples Deposition at pp. 23-24.)

The Commission should approve Embarq's position on this issue and order the parties to include the applicable terms in a separate commercial agreement or in a separately delineated section of any 251(c) agreement.

Intrado should not charge for handing off Embarq end user calls

Also in dispute under Issue 2 are certain rates that Intrado has proposed to charge Embarq for interconnecting to Intrado's network when Intrado provides the 911 service to a PSAP. (TR 276-277, Maples Direct.) First, Embarq does not believe Intrado's charges are appropriately included in a 251(c) interconnection agreement. Second, Embarq objects to Intrado's attempt to assess a charge on Embarq to reimburse Intrado when Intrado is the primary provider to a PSAP

but must hand off a 911 call (originated from an Embarq end user) to a secondary provider. (TR 276-277, Maples Direct.) As Mr. Maples states in his Direct Testimony, “[p]rimary and secondary providers recover their costs from the PSAPs that are involved instead of billing connecting companies.” Furthermore, while Intrado’s proposed terms mandate that Embarq pay Intrado for these charges it does not identify what or how much the charges would be. Finally, such charges are inconsistent with the “agnostic” nature of 911 traffic, for which no intercarrier compensation or interexchange access charges has been previously charged within the industry.

The Commission should approve Embarq’s position on this issue and reject Intrado’s attempts to charge Embarq for costs that are properly recovered from PSAPs through the funding they receive from the 911 fee.

Issue 3 What terms and conditions should govern points of interconnection (POIs) when:

(a) Intrado is the designated 911/E911 service provider?

Embarq’s Position: **Section 251 (c) requires a competitive carrier to establish a POI on the incumbent carrier’s network. Embarq is not required to establish a POI on Intrado’s network for the delivery of 911 traffic. Nevertheless, Embarq has agreed to establish a POI at Intrado’s selective router under a 251(a) commercial arrangement.**

(b) Embarq is the designated 911/E911 Service Provider?

Embarq’s Position: **When Embarq is the 911/E911 service provider, the POI should be established on Embarq’s network at Embarq’s selective router.**

Argument

As discussed previously, section 251(c) contemplates a POI established within the ILEC’s network and allows the interconnecting carrier to choose the POI. When Embarq is the

911 Service Provider and Intrado is interconnecting to Embarq's Wireline E911 Network, the parties appear to agree that the POI would be at Embarq's selective router. (Hearing Exhibit 8, Hicks Deposition at pp. 19 & 20.)

The continuing dispute between the parties under Issue 3 is whether Embarq can be required to establish multiple POIs on Intrado's network under section 251(c).⁴¹ Intrado has indicated that under 251(c) a requesting carrier is required to establish only a single POI on the ILEC's network. (TR 97, Hicks Direct.) Even so, in this arbitration Intrado is demanding that the Commission require Embarq to establish a minimum of two POIs on Intrado's network. (TR 94, Hicks Direct.)

Section 251(c) requires a POI on the ILECs network.

Contrary to Intrado's request that Embarq establish multiple POIs on Intrado's network, it is well-established law that under section 251(c) the CLEC may choose a point of interconnection which must be within the ILEC's network.⁴² Intrado recognizes this law for non-911 purposes, but appears to believe that it does not hold equally true for 911 traffic, though Intrado cites no support for that position. (TR 95, Hicks Direct) Intrado twists the well-established law relating to ILEC interconnection obligations under 251(c) to imply that interconnection on the ILEC's network only applies when such a requirement benefits the requesting carrier, but that applicable rules can be disregarded or distorted whenever it is convenient for the CLEC. (TR 173, Hicks Cross; Hearing Exhibit 8, Hicks Deposition at p. 57.)

Mr. Hicks states multiple times that Intrado anticipates having two routers in the state. (TR 94, Hicks Direct; TR 178, Hicks Cross; Hearing Exhibit 8, Hicks Deposition at pp. 59-60)

⁴¹ Embarq has agreed to establish a POI on Intrado's network under a commercial arrangement.

⁴² 47 CFR § 51.305. The Florida Commission has confirmed that the POI must be on the ILEC's network in the Generic Reciprocal Compensation Order at p. 25. See, also Global NAPS Arbitration Order at p. 9; US LEC Arbitration Order at p. 13.

He explains that Intrado has not yet determined where those routers will be located, but that the decision will be based on several factors, including where Intrado's PSAP customers are located and the need to geographically diversify the locations. (TR 181-182, Hicks Cross) Consistent with those parameters, Mr. Hicks stated there will likely be one RCL gateway in the southern part of the state and another in the northern part of the state with maybe one in between. (Hearing Exhibit 8, Hicks Deposition at p. 62) Mr. Hicks also indicates that Intrado is intending to offer services "statewide." (TR 179, Hicks Cross) It is a matter of public record that Intrado is engaged in arbitrations with AT&T and Verizon for interconnection agreements to provide service in their respective territories. (See, Docket Nos. 070736-TP, 080134-TP.) Intrado apparently takes the position that 251(c) requires Embarq to provide facilities to achieve this interconnection from Embarq's network to Intrado's network regardless of where Intrado places its RCL Gateways in relation to the location of Embarq's customers or the facilities serving those customers. (TR 181-182, Hicks Cross) This is directly contrary to the Commission decisions regarding POI obligations under the Act.⁴³

Under Intrado's view, Congress intended to make the ILECs lackeys of competitive carriers, that is, required not only to open their own networks, but also required to construct networks for the competing carriers. The scope and intent of the Act have never been interpreted to extend this far. Over the years, the courts, the FCC and state commissions have consistently confirmed that the requirements placed on ILECs by the Act are not unlimited. For instance, the list of UNEs that ILECs must make available has been revisited and pared down over time to

⁴³ In addition to the requirement that the POI be on the ILEC's network, the Commission has determined that the POI be within the LATA where the call originates and terminates. See, Generic Reciprocal Compensation Order at p. 25; Global NAPs Arbitration Order at p. 9; US LEC Arbitration Order at p. 13. Intrado apparently also believes that this requirement is inapplicable to 911 traffic, as evidenced by Mr. Hicks statement during cross examination that section 251(c) would require Embarq to establish trunks from an end office serving end users in Tallahassee to an Intrado RCL Gateway in Miami. (TR 81-182, Hicks Cross; Hearing Exhibit 8, Hicks Deposition at p. 65).

ensure that the obligation applies only to those UNEs that are truly necessary to ensure that competition is not impaired.⁴⁴ CLECs are restricted in the manner they may use UNE combinations that constitute EELs.⁴⁵ ILECs, are allowed to determine where on their premises collocation may occur.⁴⁶ CLECs may not pick and choose the provisions of an existing interconnection agreement they wish to adopt, but must adopt the entire agreement.⁴⁷ And, reciprocal compensation has been determined not to apply for ISP-bound traffic.⁴⁸ These decisions make clear that while the Act imposes significant obligations on ILECs to ensure that they don't impede the advent of competition through their dominant market presence, these obligations are limited. Indisputably, they do not extend to allowing competing carriers to unilaterally demand that ILECs build facilities or incur expense solely for the benefit and convenience of the requesting carrier without any compensation or reimbursement for the ILEC.

As discussed previously, section 251(c) addresses requirements related to interconnection *on the ILEC's network*. The FCC has declined requests to rule that section 251(c) requires the ILEC to interconnect on the requesting carrier's network. In paragraph 220 of the Local Competition First Report and Order, the FCC determined that this issue was best left to negotiations and arbitrations between the parties. And, in the Virginia Arbitration Order at

⁴⁴ *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*; Order on Remand in WC Docket No. 04-313; CC Docket No. 01-338, Release Number FCC 04-290; Released February 4, 2005, 20 FCC Rcd 2533 (hereafter "TRRO"); *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*; Report and Order and Order on Remand and Further Notice of Proposed Rulemaking in CC Docket No. 01-338; CC Docket No. 96-98; CC Docket No. 98-147; Release Number FCC 03-36; Released August 21, 2003; 18 FCC Rcd 16978 (hereafter "TRO").

⁴⁵ 47 CFR §51.318.

⁴⁶ 47 CFR §51.323.

⁴⁷ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*; CC Docket No. 01-338; Second Report and Order; Released July 13, 2004; 19 FCC Rcd 13494.

⁴⁸ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*; Order on Remand and Report and Order in CC Docket No. 96-98; CC Docket No. 99-68; Release Number FCC 01-131; Released April 27, 2001, 16 FCC Rcd 9151 (hereafter "ISP Remand Order").

footnote 200, the FCC recognized that interconnection within the ILEC network is governed by 251(c) while interconnection on a competing carrier's network is governed by section 251(a). Therefore, any interconnection by Embarq to points on Intrado's network should be governed by the provisions of section 251(a).

There is nothing in section 251 that supports Intrado's request that the Commission require Embarq to establish multiple POIs on Intrado's network. Intrado admits that there are no regulatory requirements mandating multiple POIs. (Hearing Exhibit 8, Hicks Deposition at p. 21; Hearing Exhibit 3, Intrado's Response to Staff Interrogatory No. 27, at p. 32.) Instead, the terms and conditions for placing multiple POIs should be mutually agreed to and acceptable to both parties, not mandated for inclusion in a 251(c) interconnection agreement. (TR 337, Maples Rebuttal.)

Embarq has agreed to a POI on Intrado's Network under a commercial agreement.

While Embarq does not agree that it has an obligation to interconnect at Intrado's selective router, for 911 traffic or otherwise, Embarq has agreed to interconnect to Intrado's network under the terms of a section 251(a) commercial agreement. (TR at 281, Maples Direct.)⁴⁹ As part of this agreement, Embarq contemplates that it will incur the costs of transporting its traffic to Intrado's network. (TR 352, Maples Rebuttal.) Embarq's reasons for agreeing to this in a commercial context are two-fold. First, Embarq recognizes that under FCC rules Embarq is required to provide 911 calling to its end users. It is an essential point of Embarq's position in this arbitration that this requirement means that Embarq must seek to

⁴⁹ Mr. Maples indicates that Embarq agrees that it would transport its traffic to Intrado's POI, without regard for geographical concerns. (Hearing Exhibit 7, Maples Deposition at p. 21.) However, it made clear that Embarq's obligation to do this is not governed by section 251(c) and should be established on commercial terms. (Hearing Exhibit 7, Maples Deposition at p. 66.)

interconnect with Intrado if Intrado is chosen to provide the 911/E911 network to a PSAP, although this does not necessarily mean that Embarq has an obligation to interconnect at Intrado's selective router, for 911 traffic or otherwise. Second, because this scenario involves Embarq interconnecting with a carrier that is not an ILEC, Embarq believes this arrangement is governed by section 251(a), as Embarq consistently has argued throughout the presentation of its case and elsewhere in this Brief. Embarq's agreement to interconnect with Intrado on Intrado's network is predicated on this understanding of the relevant law and regulations.

The Commission should approve Embarq's position on this issue and order the parties to include the applicable terms in a separate commercial agreement or in a separately delineated section of any 251(c) agreement.

Issue 4(a) Should specific terms and conditions be included in the ICA for inter-selective router trunking? If so, what are the appropriate terms and conditions?

Issue 4(b) Should specific terms and conditions be included in the ICA to support PSAP-to-PSAP call transfer with automatic location information ("ALI")? If so, what are the appropriate terms and condition?

Embarq's Position: ** Inter-selective routing (that is, PSAP-to-PSAP call transfer) is not governed by 251(c) and should not be included among the mandatory provisions of a 251(c) interconnection agreement. Embarq has agreed to include these terms in a commercial agreement under section 251(a) or in a separately delineated section of any 251(c) agreement.**

Argument

The primary dispute concerning Issue 4 is whether the terms for inter-selective router trunking should be included in a 251(c) interconnection agreement. (TR 286 & 287, Maples Direct.) Embarq has made it abundantly clear that it does not oppose the implementation of inter-

selective routing between PSAPs served by Intrado and PSAPs served by Embarq. (TR 352, Maples Rebuttal.) The only dispute between Embarq and Intrado regarding inter-selective routing is whether Embarq has an obligation to provide such inter-selective routing under section 251(c) or whether it is a mutual and equal obligation of Intrado and Embarq, as peers, governed by section 251(a). Embarq believes these trunking arrangements are governed by section 251(a) rather than section 251(c).

Inter-selective routing is not governed by section 251(c).

Inter-selective router trunking arrangements are not between two carriers who are competing to provide service to multiple PSAP customers within the same geographic territory at the same time. Rather, these arrangements are between PSAPs located in two separate geographic areas and which have each selected an exclusive 911 service provider for their respective areas. (TR 263, Maples Direct.) Mr. Hicks' representation of Intrado's proposed network and his responses to cross-examination questions regarding the likely locations of Intrado's selective routers confirm that the inter-selective routing Intrado is seeking from Embarq does not involve the mutual exchange of "telephone exchange" traffic and is not required by interconnection provisions under section 251(c). (TR 181-182, Hicks Cross.)

Given the location of Embarq's selective routers (identified by Mr. Maples in his Deposition at p. 23 as Ft. Myers, Leesburg and Tallahassee) and the likely location of Intrado's RCL Gateways, it is more than likely that interselective routing trunking between Embarq and Intrado will cross not only Embarq's local exchange areas but the local exchange areas of other ILECs in the state. Mr. Hicks admits as much under cross examination. (TR 181-182) In addition, the end points of the calls (i.e., the originating end point from an Embarq-served PSAP and the terminating end point to an Intrado-served PSAP) may extend outside of Embarq's local

calling areas, the calling areas which define “telephone exchange service” under the Telecommunications Act.⁵⁰

Even disregarding the jurisdictional issues raised by the geographic location of Intrado’s inter-selective routers and the routing services Intrado is requesting, the particular networks that are connected by inter-selective routing are two Wireline E911 Networks and the PSTN is never involved. (TR 262, Maples Direct.) In addition, inter-selective routing is only implemented at the request and with the cooperation of both carriers’ respective PSAP customers; it is not an arrangement unilaterally dictated by interconnecting carriers for the purposes of facilitating ongoing competition after the respective PSAPs have selected an exclusive provider for their areas, as Intrado seems to suggest. (TR 100, Hicks Direct; TR 128, Hicks Rebuttal.) For these reasons, 251(a) rather than 251(c) applies to these arrangements.

Embarq has agreed to inter-selective routing under a commercial arrangement.

Embarq has agreed to establish inter-selective routing arrangements with Intrado under a commercial agreement and the parties do not dispute the terms and conditions applicable to these arrangements. (TR 352, 354, Maples Rebuttal.) The Commission should approve Embarq’s position on this issue and the applicable terms and conditions should be included in a separate commercial agreement or in a separately delineated section of any 251(c) agreement.

⁵⁰ 47 USC §153(47). For instance, Intrado has been selected to provide selective routing services to Charlotte County. Therefore, a likely inter-selective routing scenario would be the transfer of a call from an Embarq-served PSAP in Lee County to an Intrado-served PSAP in Charlotte County.

Issue 5 **Should the interconnection agreement include the terms and conditions under which Embarq orders services from Intrado? If so, what are the appropriate terms and conditions?**

Embarq's Position: **Section 251(c) does not govern the terms and conditions under which Embarq orders services from a competitive carrier (in this case Intrado). These terms and conditions should be included in a separately negotiated commercial agreement.**

Argument

The primary dispute between the parties on this issue is whether the terms and conditions for Embarq to order services from Intrado are properly included in a 251(c) interconnection agreement. (TR 287, Maples Direct; TR 58, Clugy Rebuttal.) It is Embarq's position that they are not.

Intrado's witness Cynthia Clugy supports its argument for including these terms in a 251(c) interconnection agreement by arguing that they are a necessary aspect of the "mutual exchange of traffic." (Hearing Exhibit 9, Clugy Deposition at p. 8.) This argument fails because in the scenario where Intrado is the 911/E911 service provider to a PSAP, there is no "mutual exchange" of traffic. Intrado has acknowledged that it does not have, and does not intend in the foreseeable future to have, dial tone end users who will be calling 911. (See, e.g., Hearing Exhibit 3, Intrado's Response to Staff Interrogatories No. 9, 35 and 57.) Rather, the traffic "exchange" by Embarq and Intrado will only go one way, i.e., from Embarq's end users calling 911 to the PSAP served by Intrado. (Intrado's Response to Staff Interrogatory No. 9 at p. 8; TR 295, Maples Direct.) As discussed at length earlier in this Brief, this arrangement involves Embarq's interconnection with and procurement of services from Intrado, arrangements which are not and were never intended to be governed by the 251(c) requirements applicable to the ILECs'

obligations to provide access to their networks and services. While Intrado obliquely attempts to make an argument that a mutual exchange of traffic is involved when inter-selective routing is employed to transfer calls from an Intrado-served PSAP to an Embarq-served PSAP, such a call is still originated by the Embarq end user (or the end user of an ILEC or CLEC other than Intrado) and, therefore, does not constitute origination of a call by Intrado, as even Mr. Hicks acknowledges. (Hearing Exhibit 8, Hicks Deposition Transcript at pp. 41 and 67.)

Clearly, Embarq's purchase of interconnection and related services from Intrado is not governed by the requirements of section 251(c). Embarq has agreed to negotiate these terms and conditions with Intrado in the context of a commercial arrangement and does not dispute the specific terms Intrado has provided in the course of this arbitration. (TR 37, Maples Direct.) The Commission should approve Embarq's position on this issue and require the Parties to negotiate these provisions as commercial arrangements to be included in a separate 251(a) agreement or in a separately delineated section of any 251(c) agreement the parties enter into as a result of this arbitration.

Issue 6(b) What terms and conditions should be included in the ICA to address access to 911/E911 database information when Intrado is the designated 911/E911 service provider?

Embarq Position: **Section 251 (c) does not govern the terms and conditions for access to the 911/E911 database when Intrado is the designed 911/E911 service provider. These terms and conditions should not be included in a 251(c) interconnection agreement but should be included in a separately negotiated commercial agreement.**

Argument

The parties agree that the only outstanding issue with respect to access to Intrado's database involves Embarq's position that it is not appropriate to include these terms and conditions among the mandatory provisions of a section 251(c) interconnection agreement. (TR 59, Clugy Rebuttal; TR 288, Maples Direct) While the Parties have no dispute concerning the technical terms and conditions for Embarq's access to the Intrado database, in addition to the issue regarding application of section 251(c) the Parties also dispute whether Embarq is entitled to be compensated for the subscriber ALI records that it provides to Intrado to enable Intrado to create the ALI database it will provide to PSAPs. This latter issue is discussed under Issue 14, *infra*.

Issue 7 Should 911/E911 Service calls be included in the type of traffic to be exchanged by the Parties over local interconnection trunks?

Embarq's Position: **No. Intrado does not provide local exchange service to end users and therefore no 9-1-1 calls will be originated from Intrado's network.**

Argument

Intrado has proposed to insert 911 Service and 911 Service calls into the section related to reciprocal termination of local traffic. (TR 294, Maples Direct.) Intrado's proposed language is inappropriate because this section of the agreement is intended to apply to non-emergency traffic that would be routed and exchanged in either direction, i.e., from Embarq to Intrado, or Intrado to Embarq (thus the use of the term "reciprocal"). (TR 295, Maples Direct.) Intrado will not be sending any traffic to Embarq. It will not have any end users other than PSAPs, as it has acknowledged repeatedly in the course of this arbitration. (TR 62, Clugy Rebuttal; TR 67, Clugy Testimony Summary; TR 69, Clugy Cross; TR 141, Spence-Lenss Direct; Hearing Exhibit 3,

Intrado's Response to Staff Interrogatory No. 8 at p. 7; Hearing Exhibit 9, Clugy Deposition at p. 18.) As the provider of 911 service to PSAPs, Intrado will only terminate 911 calls it receives from Embarq's end users; it will not originate any traffic for termination to Embarq. In any event, emergency calls are jurisdictionally "agnostic" and are not subject to reciprocal compensation. (TR 258 & 259, Maples Direct) Therefore, it is inappropriate to include this type of traffic in the reciprocal termination provisions of the interconnection agreement.⁵¹

Issue 11 How should the term "End User" be defined and where should it be used in the ICA?

Embarq's Position: **The term "end user" should be defined as "the individual that makes the 9-1-1 call or the PSAP receiving the call for the purpose of initiating the emergency or public safety response."**

Argument

Intrado suggests adding a formal definition of the term "End User" to the interconnection agreement, ostensibly on the grounds that it "articulates the implied usage of the term throughout the agreement." (TR 60, Clugy Direct.) Embarq's template agreement and hundreds of existing contracts do not include a definition of the term, but rely on the context for the meaning as it used in the interconnection agreement. Intrado has stated, both in the testimony of its witnesses and during cross-examination at the hearing, that the only end users it foresees as purchasers of its tariffed services will be PSAPs. (TR 62, Clugy Rebuttal; TR 67, Clugy Testimony Summary; TR 69, Clugy Cross; TR 141, Spence-Lenss Direct; Hearing Exhibit 3, Intrado's Response to

⁵¹ Although Embarq disagrees that this language is appropriate for a section 251(c) interconnection agreement, Mr. Maples has acknowledged that Embarq would not object to this language in a 251(a) commercial agreement. (Hearing Exhibit 7, Maples Deposition at p. 54) Still, Embarq does not believe this language is necessary in any event. (Hearing Exhibit 5, Embarq's Response to Staff Interrogatory No. 28, p. 19)

Staff Interrogatory No. 8 at p. 7; Hearing Exhibit 9, Clugy Deposition at p. 18.) But Intrado has proposed an overly broad and ambiguous definition that is inconsistent with the end users it purportedly plans to serve. (TR 359, Maples Rebuttal.) In addition, Intrado has proposed to insert this overly broad and ambiguous definition in multiple places throughout the interconnection agreement, substituting the term “End User” for the terms “customer” or “subscriber” in several places, including several instances where the substitution is clearly inappropriate.⁵²

Embarq is concerned that the breadth and ambiguity of Intrado’s proposed definition, combined with the way in which the term is used in the interconnection agreement, will confer rights to Intrado and impose obligations on Embarq that are not justified by the applicable law. (TR 299, Maples Direct.) Intrado’s proposal to substitute the term “End User” for additional terms, such as “customer” and “subscriber” compound Embarq’s concerns.⁵³

In any event, the Commission need not go that far to resolve this issue. Intrado has said that it has no retail end users other than PSAPs and that it will have no wholesale end users (TR 113, Hicks Rebuttal) and Embarq has agreed to amend its proposed definition of “End User” to include PSAPs. (TR 362, Maples Rebuttal) Given Intrado’s stated intent and rationale for its need for a definition of “End User,” as well as its reasons for finding Embarq’s original proposed definition insufficient, the Commission should adopt Embarq’s revised definition proposed by Mr. Maples in his Rebuttal Testimony, as follows:

1.54 For the purpose of this agreement, “End User” means the individual that makes the 9-1-1 call or the PSAP receiving the call for the purpose of initiating the emergency or public safety response.

⁵² See, Hearing Exhibit 45, Exhibit JMM-10.

⁵³ Embarq’s Response to Staff Interrogatory No. 21 provides an example of where Intrado’s substitution of the term “End User” for the term “subscriber” creates a nonsensical result. (Hearing Exhibit No. 5, p. 14) Exhibit JMM-10 details Intrado’s use of the term “End User” throughout the agreement and why it is objectionable to Embarq.

To the extent Intrado expands its services in the future and is willing to describe other types of end users that should be included, the parties can revisit the definition and amend it appropriately at that time.

Issue 13 Should the term “designated” or the term “primary” be used to indicate which Party is serving the 911 Authority?

Embarq’s Position: ** The concept of primary and secondary providers is well established in the 911 industry. The use of term “designated” in the interconnection agreement should not preclude Embarq from receiving compensation for the 911 services it continues to provide.**

Argument

Intrado has stricken Embarq’s reference in the agreement to the “primary” provider of 911 services to a PSAP and replaced it with the term “designated” provider. (TR 304, Maples Direct.) Intrado explains its rationale for this change as addressing a concern that the term “primary” provider implies a “secondary” provider, which Intrado says may not exist. (TR 107, Hicks Direct.) Embarq disagrees with Intrado’s use of the word “designated” for several reasons. First, the terms “primary” and “secondary” provider are well established in the 911 industry. (TR 305, Maples Direct.) In common industry usage, a primary provider has overall responsibility for providing the 911 service to a PSAP and generally provides the routing and/or database services to the PSAP. (TR 305, Maples Direct.) The secondary provider provides support services to the primary provider to allow end users or subscribers served by the secondary provider to be integrated into the 911 system provided by the primary provider. (TR 305, Maples Direct.)

The motivation for Intrado’s substitution of the word “designated” for the word “primary” appears to be an attempt to preclude Embarq from assessing PSAPs Embarq’s tariffed charges for providing the subscriber ALI records that will populate Intrado’s ALI database. (TR

116, 117, 127, Hicks Rebuttal.) That this is Intrado's intent is particularly evident from its mischaracterization of the Order Denying Intrado's Request for a Declaratory Statement in a separate proceeding.⁵⁴ Although Intrado cites to the Commission declaratory ruling as if it were favorable to Intrado, in fact the Commission categorically denied Intrado's declaratory request in all respects.⁵⁵ Intrado provides only a partial quote from the Declaratory Order as support of its position. The relevant provision of the Order, which reflects language that Intrado omitted for obvious reasons, is set forth below:

If Intrado's intention is to request a declaration that the ILECs may not charge for any ancillary 911 services that they do not and need not provide in conjunction with Intrado's E911 service in order for Intrado's E911 service to properly function, such a declaration is unnecessary. The law is clear that telecommunications companies may not charge for services they do not provide. Section 364.604(2) provides that "[a] customer shall not be liable for any charges for telecommunications or information services that the customer did not order or that were not provided to the customer." Declaratory Order at p. 14 (emphasis added)

Whether or not a service provided by the ILEC meets these criteria is to be decided in further Commission proceedings.⁵⁶

It is important to understand this arbitration issue within the context of the Florida statutory provisions for the funding of the wireline 911 network. Section 365.172, F.S., sets forth the manner, amount and appropriate uses of the end user surcharge to be assessed by all

⁵⁴ *In re: Petition for Declaratory Statement regarding Local Exchange Telecommunications Network Emergency 911 Service, Intrado Communications, Inc.*; Order Denying Amended Petition for Declaratory Statement before the Florida Public Service Commission, Order No. PSC-08-0374-DS-TP; Issued June 4, 2008 in Docket No. 080089-TL (hereinafter "Declaratory Order."). Specifically, Intrado asked the Commission to declare that:

1) Intrado and/or the PSAP is not required to pay for any tariffed ILEC 911 local exchange telecommunications network services previously provided to the PSAP unless Intrado or the customer specifically orders such services; 2) Intrado and/or the PSAP is not required to pay for any terminated ILEC 911 services through new tariffed or non-tariffed services; and 3) Intrado and/or the PSAP is not required to pay for any ILEC bundled services in such a manner as to require Intrado and/or the PSAP to pay for any terminated 911 services or otherwise for any 911 services not actually requested or consumed. Declaratory Order at p. 3

⁵⁵ Declaratory Order at p. 13.

⁵⁶ Declaratory Order at p. 16.

voice providers and distributed by the E911 Board to PSAPs to fund 911 services. As Mr. Maples states, the statutes recognize that the ILECs' costs to provide 911 services may be recovered from the PSAPs through these user fees. (TR 273, Maples Direct.) And, as Mr. Maples notes, in defining the costs that can be recovered from the state E911 fee, *the statute specifically includes the components of the Wireline E911 Network*, which include the ALI records that make up the ALI database. (TR 280, Maples Direct.)

It is also important to understand that Intrado will likely charge PSAPs for providing the ALI records that it obtains from Embarq, while attempting to preclude Embarq from being compensated for providing those records. In his Rebuttal Testimony, Mr. Maples describes how the ALI database is created when Intrado provides the database to a PSAP. "Intrado is not the entity that inputs or creates the records to that database. ILECs bear the cost of creating those records as well as maintaining their accuracy." (TR 310, Maples Rebuttal.) There are situations today where an entity other than Embarq provides the ALI database to a PSAP, and in those circumstances, Embarq charges its tariffed rates only for the ALI records that Embarq provides. (TR 372, Maples Cross; Hearing Exhibit 5, Embarq's Response to Staff Interrogatory No. 2e., p. 4.)

While Issue 14 may appear to be a dispute over semantics, it disguises a material dispute over compensation. By substituting the word "designated" for the word "primary" Intrado hopes to accomplish what it failed to achieve through its Request for Declaratory Statement In Docket No. 080089-TL. Intrado's devious machinations should be rejected by the Commission. Embarq is entitled to continue to recover the costs it incurs to provide its subscriber ALI records to populate the ALI data base, through the tariff charges it currently applies today.

Issue 14 What are the appropriate terms and conditions regarding audits?

Embarq's Position: **Embarq's language regarding the terms and conditions for audits should be approved by the Commission. Requiring all audits to be conducted by independent third-party auditors imposes unnecessary expense and the potential for dissension and delay on the audit process.**

Argument

Intrado wants the Commission to approve language that would *require* each party to hire an independent third-party auditor whenever a party wishes to conduct an audit of the other party. This requirement is unreasonable and should be rejected for numerous reasons. Intrado's proposed requirement of independent, third-party auditors is a "solution" in search of a problem. Intrado's expressed concern is purely speculative. The required use of third-parties is contrary to industry practice and would result in unnecessary expense. And use of third-parties will be less effective than audits performed by the parties themselves.

Intrado attempts to defend the requirement of expensive, third-party audits by citing concerns over confidentiality and abuse of power. (Hearing Exhibit 3, Intrado's Response to Staff Interrogatory No. 8, p. 12.) But Intrado's concerns are utterly speculative or easily handled without the inefficient and expensive mandate for using independent third-party auditors. Although Ms. Clugy claims that the use of audits can be easily abused and may be used to stifle competition, these claims should be rejected because her stated concerns are completely speculative and not grounded in real world examples.

The purely speculative nature of Ms. Clugy's concern about audits is also demonstrated by several factors. First, although Ms. Clugy refers to parties that do not hold "equal positions in the emerging competitive market," Intrado's own testimony demonstrates that Intrado is a very

large and significant player in the national 911 telecommunications market. For example, Intrado Comm. is a subsidiary of Intrado Inc. and the two companies support over 200 million 9-1-1 calls to over 6,000 PSAPs and manage over 350 million subscriber records for 11 ILECs and 41 CLECs according to Intrado's witness Carey F. Spence-Lenss. (TR 135, Spence-Lenss Direct.) According to Ms. Spence-Lenss, Intrado Inc. has been the nation's premier provider of integrated data and emergency communications solutions for 25 years. (TR 134, Spence-Lenss Direct.) This demonstrates that Intrado is not some "mom and pop" operation that would be easily intimidated by an audit from Embarq. And even if Embarq wished to harass Intrado through the use of an audit, that would be impossible for two other reasons. Notably, the agreed-upon language of the interconnection agreement limits audits to one audit per year.⁵⁷ And, if Intrado believed that it were being harassed through the use of audits, Intrado could simply invoke the dispute resolution process of the agreement. (Hearing Exhibit 5, Embarq's Response to Staff Interrogatory No. 10, p. 8.) Mandated audits by independent third-parties should not be required because they are both expensive and inefficient. As Mr. Hart testified, his investigation with a local CPA firm indicated that the minimum aggregate fees for an independent audit could range from \$20,000 to \$30,000. (TR 36, Hart Direct.) The expensive nature of the audit would discourage a party from pursuing an audit if the amount in question was less than the predicted audit cost. (TR 36, Hart Direct.) And independent audits are not necessarily more effective than an audit conducted by one of the parties. As Mr. Hart testified, the representatives of Embarq know Embarq's business better than an outside firm. (TR 37, Hart Direct.) Embarq employees are familiar with telecommunications billing systems, know how to extract the data, and are familiar with the critical issues. Educating outside auditors in these

⁵⁷ Interconnection agreement at section 8.1. See, also Hearing Exhibit 9, Clugy Deposition at p. 15).

areas is expensive and would result in an inefficient use of time and money. (TR 37-38, Hart Direct.)

Finally, to the extent Intrado is concerned that an audit conducted by Embarq representatives would jeopardize the confidential nature of information belonging to Intrado, that concern is unfounded. The undisputed terms of the interconnection agreement between the parties provide for maintaining the confidentiality of information exchanged between the parties. (TR 38, Hart Direct.)

Intrado fails to rebut, or even address, Embarq's point that mandated third-party audits would inevitably preclude an audit if the amount in dispute was less than the predicted audit cost. Nor did Intrado even address Embarq's point that independent audits are not necessarily as effective as an audit conducted by the parties' own employees. (TR 37, Hart Direct.) Intrado has also failed to show that its desired language is consistent with industry practice in Florida. Embarq has negotiated dozens of agreements in Florida that contain the language Embarq has proposed here. No CLEC has ever felt the need to arbitrate that provision.

Independent third-party audits should not be required, but should be optional with the parties. If the Commission does require independent third-party audits, the Commission should also require an equitable sharing of the third party auditor's expenses.

CONCLUSION

Embarq's positions on the disputed issues in this arbitration are fair, reasonable and consistent with section 251 and with Commission and FCC precedent. The Commission should approve Embarq's position on each of these issues as stated in this Post-hearing Statement and Brief.

Respectfully submitted this 7th day of August 2008.

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