Ruth Nettles

From: Ann Bassett [abassett@lawfla.com]
Sent: Friday, March 28, 2008 4:38 PM
To: Filings@psc.state.fl.us
Subject: Docket No. 080089-TP
Attachments: 2008-03-28, 080089, Intrado's Response to Embarq's Motion to Dismiss.pdf

The person responsible for this electronic filing is:

Floyd R. Self
Messer, Caparello & Self, P.A.
P.O. Box 15579
Tallahassee, FL 32317
(850) 222-0720
fself@lawfla.com

The Docket No. is 080089-TP - Petition of Intrado Communications Inc. for Declaratory Statement Regarding Local Exchange Telecommunications Network Emergency 911 Services.

This is being filed on behalf of Intrado Communications Inc.

Total Number of Pages is _____

Intrado Communications Inc.'s Response to Embarq's Florida, Inc.'s Motion to Dismiss or, in the Alternative, Deny Intrado's Petition for Declaratory Statement and amended Petition for Declaratory Statement

Ann Bassett
Messer, Caparello & Self, P.A.
2618 Centennial Place (32308)
P.O. Box 15579
Tallahassee, FL 32317
Direct Phone: 850-201-5225
Fax No. 850-224-4359
Email Address: <abassett@lawfla.com>
Web Address: <www.lawfla.com>

MESSER CAPARELLO & SELF, P.A.

Attorneys At Law

www.lawfla.com

March 28, 2008

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

Re: Docket No. 080089-TP

Dear Ms. Cole:

Enclosed for filing on behalf of Intrado Communications Inc. is are an electronic version of Intrado Communications Inc.'s Response to Embarq Florida, Inc.'s Motion to Dismiss or, in the Alternative, Deny Intrado's Petition for Declaratory Statement and Amended Petition for Declaratory Statement in the above referenced docket.

Thank you for your assistance with this filing.

Sincerely yours,

Floyd R. Self

FRS/amb
Enclosure
cc: Rebecca Ballesteros, Esq.

Regional Center Office Park / 2618 Centennial Place / Tallahassee, Florida 32308
Mailing Address: P.O. Box 15579 / Tallahassee, Florida 32317
Main Telephone: (850) 222-0720 / *Fax:* (850) 224-4359

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of
Intrado Communications Inc.
for Declaratory Statement
Regarding Local Exchange
Telecommunications Network
Emergency 911 Service
_____/

Docket No. 080089-TP
Filed March 28, 2008

RESPONSE TO EMBARQ FLORIDA, INC.'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, DENY INTRADO'S PETITION FOR DECLARATORY STATEMENT AND AMENDED PETITION FOR DECLARATORY STATEMENT

Intrado Communications Inc. ("Intrado"), pursuant to Rule 28-106.204, Florida Administrative Code, hereby files this Response to Embarq Florida, Inc.'s ("Embarq") Motion to Dismiss or, in the Alternative, Deny Intrado's Petition for Declaratory Statement and Amended Petition for Declaratory Statement (the "Motion")[1] and states:

1. Section 120.565, Florida Statutes, provides that "[a]ny substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances." Embarq has moved the Commission to dismiss the Intrado's Petition, on several grounds that will be addressed in order. As will be explained herein, declaratory statements under Section 120.565, Florida Statutes, are intended to be liberally construed to allow persons to seek agency guidance before action is taken. As set forth herein,

[1] As did AT&T and Verizon in this docket, Embarq has filed a combined Motion to Dismiss Intrado's Petition and a "Motion" to deny Intrado's Petition and Amended Petition. The applicable rules of procedure authorize the filing of a motion to dismiss, but do not speak to a motion to deny. The Embarq pleading states that "Intrado's Petition should be denied on the merits" and engages in a substantive discussion of the merits of the Petition and the applicability of its tariff provisions. Embarq Motion at 2, 10-13. Thus, it is clear that Embarq's request that the Commission deny the Petition and Amended Petition is in the nature of a response. Rule 28-105, F.A.C., governs the substantive action that an agency must take in response to a petition for declaratory statement. Therefore, Intrado's response is limited to the Motion to Dismiss. The lack of a reply to Embarq's response/motion to deny Intrado's Petition, to the extent such a motion raises issues substantive issues distinct from its motion to dismiss, should not be misconstrued as acquiescence in the allegations in the responses, which will be substantively addressed as this proceeding progresses.

Embarq's arguments in support of its Motion are based on a narrow and restrictive interpretation of the language and intent of the law authorizing the issuance of such guidance, fail to correctly apply relevant and applicable case law to the Petition for Declaratory Statement and Amended Petition for Declaratory Statement (hereinafter collectively the "Petition"), and should be rejected by the Commission.

Intrado's Petition addresses its particular circumstances

2. As stated in the Amended Petition for Declaratory Statement, this case involves the specific question of whether Intrado, as a competitive local exchange carrier ("CLEC"), or its customers are required by statute, rule, or order of the Commission to pay ILEC tariff charges for local exchange telecommunications 911 services once the ILEC is no longer the 911 service provider. In any event, the payment of unauthorized charges, whether by Intrado or by its customers, directly affects Intrado's substantial interests and its ability to offer telecommunications services at competitive rates. For the reasons set forth in the Petition, Intrado has legitimate questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority, and determined a need for a declaratory statement to resolve questions or doubts as to how the statutes, rules, orders, and tariffs discussed therein may apply to Intrado's particular circumstances.

3. The standard with regard to the "particular circumstances" that are to form the basis for a declaratory statement is not intended to be the very specific allegations claimed by Embarq that are necessary in more formal judicial proceedings. When the legislature loosened the requirements for declaratory statements in 1996, it opened the door for entities regulated or affected by the government to determine an agency's position on an issue before having to take action or, as in this case, to determine whether it will be able to operate. An early commentator on the issue noted that:

> Another distinction between declaratory judgments and declaratory statements regards the "case or controversy" requirement applied to declaratory judgment actions. In a declaratory judgment suit, the courts have long held that a matter in controversy must be actually present. . . . Other courts have applied an "injury-in-fact" standard to determine whether a petitioner may bring an action for declaratory statement. Such a test would be similar to the "case or controversy" standard, requiring a real and present injury to the petitioner. However, the Florida Supreme Court in *Investment Corp.* receded from those holdings, suggesting that a relaxed standard should apply based on its interpretation of the "particular circumstances" standard found in the declaratory statement provision, F.S. §120.565.
>
> The Florida Supreme Court's ruling in *Investment Corp.* broadly expands the availability of declaratory statements to those who would seek agency interpretation on a question of law or policy. This revitalization of an integral component of the Administrative Procedure Act can only improve the guidance available to parties affected by state agency action.

Seann M. Frazier, *The Expanded Availability of Declaratory Statements,* 74 Fla. Bar Journal No. 4 (April 2000).

4. More recent commentary has reinforced the fact that declaratory statements are to be broadly construed to allow access to an agency's position on an issue without having to wait until it is too late. In that regard, it has been suggested that the facts forming the basis for a declaratory statement, due to its nature, may be somewhat hypothetical.

> Thus, there can be no question that no longer are declaratory statements simply the agency equivalent of a declaratory judgment. Declaratory statements are generally based upon conduct that has not occurred and are for avoiding litigation, while declaratory judgments adjudicate rights and obligations based upon present, ascertainable, nonhypothetical facts. While it is possible to construct factual scenarios under which either form of relief is proper, declaratory statements are now available in situations in which declaratory judgments most assuredly are not.

Sidney F. Ansbacher and Robert C. Downie, II, *The Evolution of Declaratory Statements*, 77 Florida Bar Journal No. 10 (Nov. 2003).

5. The standards for seeking a declaratory statement under the 1996 amendments to Florida Statutes Section 120.565 first began to be explained by the First District Court of Appeal as follows:

> However, the present case is subject to a less restrictive provision in the Administrative Procedure Act, as revised in 1996. Section 120.565(1), Florida Statutes (Supp.1996), states that "[a]ny substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or any rule or order of the agency, as it applies to the petitioner's particular set of circumstances." The deletion of the word "only" signifies that a petition for declaratory statement need not raise an issue that is unique. While the issue must apply in the petitioner's particular set of circumstances, there is no longer a requirement that the issue apply only to the petitioner.
>
> . . .
>
> The purpose of a declaratory statement is to address the applicability of a statutory provision or an order or rule of the agency in particular circumstances. *See* § 120.565, Florida Statutes (1996). A party who obtains a statement of the agency's position may avoid costly administrative litigation by selecting the proper course of action in advance. Moreover, the reasoning employed by the agency in support of a declaratory statement may offer useful guidance to others who are likely to interact with the agency in similar circumstances.

Chiles vs. Department of State, Division of Elections, 711 So.2d 151, 154-155 (Fla. 1st DCA 1998).

6. In 1999, the Supreme Court expounded on the expanded purpose for a declaratory statement. In *Department of Business and Professional Regulation, Division of Pari-mutuel Wagering v. Investment Corp. of Palm Beach*, 747 So.2d 374 (Fla. 1999), the Court cited, with approval, the late Professor Patricia Dore's authoritative APA article and its analysis of the purpose and effect of a declaratory statement, and held that:

> On this general issue, Professor Dore wrote that "[t]he purposes of the declaratory statement procedure are 'to enable members of the public to definitively resolve ambiguities of law arising in the conduct of their daily affairs or in the planning of their future affairs' and 'to enable the public to secure definitive binding advice as to the applicability of agency-enforced law to a particular set of

> facts.' " Dore, *supra* note 4, at 1052 (footnotes omitted). Professor Dore analogized the procedure to a declaratory judgment action, except that "the administrative substitute [was intended to] be more widely available than the judicial remedy and that its use not be unduly restricted by artificial access barriers that would frustrate its primary purposes." *Id.* at 1053. She elaborated that:
>
> > The procedure was developed to meet the perceived inadequacies of declaratory judgment actions. It was developed to provide a less costly, less lengthy, less complicated, and less technical nonjudicial mechanism for members of the public to secure "binding advice where it is necessary or helpful for them to conduct their affairs in accordance with law." For this executive branch alternative to work properly, great care must be exercised by both agencies and courts to understand it for what it is and not to treat it as a masquerading declaratory judgment action.

Investment Corp. of Palm Beach at 382, citing Patricia A. Dore, *Access to Florida Administrative Proceedings,* 13 Fla. St. U.L.Rev. 965 (1986).

7. Based on the authoritative analysis by the courts and commentators, it is clear that a declaratory statement is intended be widely available to determine the legality of actions before they occur. Embarq's analysis and argument simply ignores the plain language of the statute and its clear intent.

8. Embarq argues that Intrado has failed to allege facts pertaining to its "particular circumstances. A review of the Petition demonstrates that Intrado, as a certificated CLEC, is attempting to enter the competitive marketplace for the provision of E-911 services. Due to representations made by one or more ILECs, Intrado's ability to compete is being stifled by the threat that, due to ILEC charges that Intrado and its customers will be forced to pay, the net cost of E-911 service provided by Intrado will be greater to the PSAPs than if the PSAPs stay with

the ILEC.[2] Thus, Intrado has alleged facts sufficiently pertaining to its "particular circumstances" with regard to the competitive provision of E-911 service.

9. Embarq argues that Intrado failed to set forth facts and tariff provisions in sufficient detail for the Commission to develop a declaratory statement. (Motion pp. 4-5) Intrado asserts that it included all of the facts necessary for the Commission to determine whether Intrado or its customers must continue to pay ILEC tariff charges after the customer has transferred service to Intrado.[3] However, if the Commission determines that further facts are necessary in order for it to enter a declaratory statement, the remedy is not dismissal of the Intrado petition. Rather, "[t]o the extent the agency did not have enough facts to make a decision, it could have requested those facts from Appellant, . . . it also could have held a hearing to determine those facts." *Adventist Health System/Sunbelt, Inc. v. Agency for Health Care Administration*, 955 So.2d 1173, 1176 (Fla. 1st DCA 2007). To the extent the Commission needs such information, Intrado stands ready to cooperate and comply.

---

[2] There has been an intimation that, with regard to such alleged statements, Intrado is just "making it up." In order to demonstrate the basis for those allegations, see the letters attached hereto from the Martin County and Charlotte County E-911 administrators. Intrado does not submit these letters as substantive evidence of the truthfulness of the statements contained therein. Rather, the letters are being submitted at this stage to rebut the intimation that Intrado's concerns are somehow wholly speculative at best, or false at worst. They are not.

[3] Embarq's case citations are inapplicable. In *National Association of Optometrists and Opticians v. Florida Department of Health*, 922 So.2d 1060 (Fla. 1st DCA 2006), the Court determined that a declaratory statement was not appropriate when the lease provisions for which the declaration was sought had, by the **admission** of both of the parties, been removed prior to the declaratory statement. That is not the case here, where the anti-competitive action of the ILEC(s) is ongoing. As to *Tampa Electric Company v. Florida Department of Community Affairs*, 654 So.2d 998 (Fla. 1st DCA 1995), it must be kept in mind that the Court's opinion was issued before the 1996 amendments to Chapter 120, Florida Statutes and the corresponding expansion of the availability of declaratory relief, and thus has marginal applicability to post-1996 Petitions. In addition, the nature of the declaratory statement issued in that case was such that it reached across regulatory and statutory lines to address issues of constitutional home-rule powers (which are not within the jurisdiction of the DCA) and the effect of growth management laws administered by the DCA statewide to, in effect, supersede the regulatory jurisdiction of all other agencies (including but not limited to the DEP under the Transmission Line Siting Act, and this Commission) over the siting of power lines. In that case, the Court rightfully found the DCA's declaratory statement to be overly broad. That is not the situation in this docket, in which the Commission's jurisdiction to determine issues of competition on the telecommunications industry is undisputed given the "exclusive jurisdiction" granted by the Legislature in Section 364.01(2), Florida Statutes.

Intrado's Petition does not address issues being litigated in another docket

10. Embarq next argues that the Petition should be dismissed because Intrado and Embarq are engaged in an arbitration proceeding for an interconnection agreement. However, the issues involved in the arbitration are not those for which a declaratory statement is sought. Intrado agrees that the interconnection agreement will cover those issues subject to the agreement. However, the issues to be addressed by the declaratory statement are whether Intrado or its customers must pay additional charges[4] not covered under the interconnection agreement. It is those additional charges that serve to stifle competition by increasing the net cost of E-911 service to the customer, and concentrating the market in the hands of the incumbent LECs.

11. For the reasons set forth herein, the Petition in this case does not address issues being arbitrated, and this case should not be dismissed based on that basis. [5]

Intrado's Petition does not improperly determine the conduct of others

12. As to Embarq's argument that the Petition for Declaratory Statement must be dismissed because it may affect the rights of others, (Embarq Motion, pp. 6-9) such an effect does not form the basis for a dismissal. The fact that the requested declaratory statement may also affect the rights of others is no bar to Intrado's right to request and receive a declaratory statement. *Department of Business and Professional Regulation, Division of Pari-Mutual*

---

[4] As set forth in the Martin County and Charlotte County letters attached hereto as Exhibits "A" and "B," the Petition does not seek a declaratory statement as to contractual obligations for which early termination or liquidated damage clauses might apply, nor does it concern services that are specifically requested from an ILEC, with an agreement to pay. Rather, the Petition addresses tariffed charges or rate elements that are being forced on a CLEC and its current and potential customers outside of any arbitration or interconnection agreement. The ILECs, who currently control the vast majority of E-911 service have a vested, economic interest in keeping competition out. The payment of charges outside of the interconnection agreement would result in double charges for certain E-911 services by the CLEC or its customers and the restriction of competition.

[5] Of course, if Embarq will state on the record here that it will not impose any charges outside the interconnection agreement unless specifically requested by Intrado or the PSAPs, that would go a long way toward resolving this declaratory statement. The fact that Embarq, like AT&T and Verizon, has failed to state that this Declaratory Statement is unnecessary because there are no other charges other than those specifically purchased under tariff or obtained via an interconnection agreement demonstrates that this Declaratory Statement is in fact necessary to declare that Intrado and the PSAPs are not required to pay such non-requested or non-agreed to charges.

Wagering v. Investment Corp. Of Palm Beach, 747 So.2d 374 (Fla. 1999); *1000 Friends of Florida, Inc. v. Department of Community Affairs*, 760 So.2d 154 (Fla. 1st DCA 2000). Obviously, if the Commission determines that Intrado and the PSAPs do not have to pay ILEC tariff rates when service from the ILEC is terminated that is going to impact the ILEC, but the attempt to recover illegal charges by the ILECs does not undermine the need for this declaratory statement by Intrado or the PSAPs.

13. In addition, the notice that is required to be filed pursuant to Rule 28-105, F.A.C. is an explicit recognition that a declaratory statement may affect others. The notice, as described by the First District Court, "accounts for the possibility that a declaratory statement may, in a practical sense, affect the rights of other parties." *Chiles vs. Department of State, Division of Elections*, 711 So.2d 151, 155 (Fla. 1st DCA 1998). The Supreme Court, citing *Chiles* with approval, has held that "[w]e also find that the procedural safeguards inherent in a petition for declaratory statement are sufficient to protect the rights of any other concerned parties." *Investment Corp. of Palm Beach, supra* at 385. Thus, Embarq's argument that the Petition should be dismissed because it affects an ILEC's ability to collect unauthorized charges, and in so doing stifle competition, is unfounded.

14. Despite Embarq's efforts to dismiss the case, the First District's opinion in *1000 Friends of Florida, Inc. v. State, Dept. of Community Affairs*, 760 So.2d 154, 155 (Fla. 1st DCA 2000) shares substantive and procedural similarities to this proceeding that cannot be discounted. In that case, the statewide environmental organization, 1000 Friends of Florida, and several other similar parties filed a petition for declaratory statement with the Department of Community Affairs ("DCA") arguing that the Department of Transportation ("DOT") applied for, and was granted, a permit from the Department of Environmental Protection to install sewer and water lines to two rest stops maintained by the DOT. 1000 Friends alleged that St. Johns County failed

to comply with applicable law by allowing DOT to construct the lines, and by agreeing to pay for them, without first processing an amendment to its Comprehensive Plan. The Petition did not allege that 1000 Friends did take or was supposed to take any action on the project whatsoever. Rather, it argued that the actions of the agencies and county, and the expenditure of funds, was contrary to certain growth management standards.

15. As has Embarq in this proceeding, St. Johns County complained that the petition substantially affected the rights of others and argued that:

> A declaratory statement may only be issued on "the applicability of a statutory provision or of any rule or order of the agency *as it applies to the petitioner's particular set of circumstances*" (emphasis added) Section 120.565(1), Florida Statutes (1997). The primary focus and purpose of the Petition in this case is to determine the applicability of laws and rules to St. Johns County, not the Petitioners. The issue of the applicability of laws and rules to the Petitioner is peripheral and secondary at best. Therefore the subject Petition for Declaratory Statement should be denied because the requested Declaratory Statement is sought for a purpose not permitted by the authorizing statute.

1000 Friends of Florida, Inc., supra at 156.

16. The Department of Community Affairs referred the matter to the DOAH with the following referral:

> In light of the recent *Chiles* decision, the Department is unable to determine whether the Petition, which seeks the determination of laws and rules **as they apply primarily to the Florida Department of Transportation and St. Johns County**, is a proper request upon which the Department may issue a declaratory statement. In the matter currently before the Department, Petitioners seek relief that appears to directly affect the rights of another party, or parties, not named in this action. (e.s.)

1000 Friends of Florida, Inc. at 156.

17. The DOAH dismissed the petition, in part based on the ALJ's conclusion that the petition did not meet the requirements of Rule 28-105 because 1000 Friends sought a declaration

concerning the conduct of St. Johns County and the DOT, rather than their own particular circumstances. The DCA Final Order dismissed the petition on that basis.

18. The First District Court reversed the Department of Community Affairs' dismissal of the petition. In its opinion, the Court rejected St. Johns County's argument that the petition should be dismissed because it sought a declaration concerning the application of a statute or rule to the circumstances of St. Johns County and the Florida Department of Transportation, and held:

> Moreover, the supreme court acknowledged with approval this court's determination that declaratory statements may help parties avoid costly administrative litigation, while simultaneously providing useful guidance to others who may find themselves in the same or similar situations. *See Investment Corp.*, 747 So.2d at 384. The court has long recognized that contemporary society requires that administrative agencies be accorded flexibility in the use of their authority. *See id.* In light of the foregoing principles and the more liberal language of the amended declaratory judgment statute, we conclude the Department improperly dismissed appellants' petition for declaratory statement.

1000 Friends of Florida, Inc. v. State, Dept. of Community Affairs, 760 So.2d 154, 158 (Fla. 1st DCA 2000)

19. In a more recent analysis of the scope of a declaratory statement, the First District Court considered the issue of a health service provider seeking a declaratory statement from the Agency for Health Care Administration on whether a future company that was to be created to handle certain aspects of the company's medical practice would be able to conduct business consistent with Florida law. Without conducting a hearing, the AHCA dismissed the petition for declaratory statement on the following grounds:

> 1. Petitioner's Petition consists of a hypothetical scenario which has not yet occurred. Therefore, Petitioner is not substantially affected . . .
>
> 2. In the instant case, Petitioner's described set of circumstances are purely hypothetical, having not yet taken place. Petitioner acknowledges this, stating that it is interested in forming and owning, in large part, the Oncology Group, and that if it **were**

> formed, Petitioner **would** have a significant interest and **would** be at **risk** of being prohibited from billing for radiation services rendered. Because the circumstances Petitioner predicts have not yet occurred, and may never occur, Petitioner cannot demonstrate that it will be substantially affected should the declaratory statement not issue. Therefore, Petitioner lacks standing to bring the Petition. (emphasis in original)

Adventist Health System, supra, at 1176.

20. The First District Court reversed the AHCA's narrow construction of the scope of a declaratory statement. In a reasonably comprehensive recitation of the purpose and intent behind a petition for declaratory statement, the First District offered the following primer:

> "The purpose of a declaratory statement is to address the applicability of a statutory provision or an order or rule of the agency in particular circumstances." *Chiles v. Div. of Elections,* 711 So.2d 151, 154 (Fla. 1st DCA 1998). Florida courts have repeatedly noted that one of the benefits of a declaratory statement is to "avoid costly administrative litigation by selecting the proper course of action in advance." *See id.; Nat'l Ass'n of Optometrists & Opticians v. Fla. Dep't of Health,* 922 So.2d 1060, 1062 (Fla. 1st DCA 2006). Thus, a party should seek a declaratory statement from the agency "in advance" of selecting and taking a course of action. *See Novick v. Dep't of Health, Bd. of Med.*, 816 So.2d 1237, 1240 (Fla. 5th DCA 2002) ("The purpose of a declaratory statement is to allow a petitioner to select a proper course of action in advance."); *Fla. Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering v. Inv. Corp. of Palm Beach*, 747 So.2d 374, 382 (Fla.1999). In fact, a declaratory statement is not available when seeking approval of acts which have already occurred. *See Novick,* 816 So.2d at 1240.

Adventist Health System, supra at 1176.

21. In reversing the AHCA's dismissal of Adventist Health System's petition, the court held that:

> Thus, a declaratory statement will allow Appellant to plan its future conduct regarding the formation of the Group. This is precisely the type of situation for which the declaratory statement was designed. *See Fla. Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering,* 747 So.2d at 382 ("'[T]he purposes of the declaratory statement procedure are to enable members of the public to definitively resolve ambiguities of law arising in the

> conduct of their daily affairs *or in the planning of their future affairs.*' ") (emphasis added) (quoting Patricia A. Dore, *Access to Florida Administrative Proceedings,* 13 Fla. St. U.L.Rev. 965, 1052 (1986)). Thus, AHCA erred when it refused to issue a declaratory statement on the grounds that the issue raised by Appellant was "purely hypothetical" and Appellant was not substantially affected.

Adventist Health System, supra at 1176.

22. In this case, the declaratory statement affects the "rights" of others only to the extent that the exercise of such rights has the effect of impermissibly stifling competition and the ability of CLECs to provide telecommunications services to its customers without having to pay excessive and unauthorized charges imposed by the ILECs to keep competition at bay. A declaratory statement is, in that case, fully warranted and legally authorized.

Intrado's reference to its PSAP customers is necessary to determine whether Intrado can provide competitive services

23. Embarq objects to Intrado seeking a declaratory statement as to whether an ILEC can charge for services beyond those negotiated in an interconnection agreement through its tariff. It is clear that by levying unauthorized tariff or other charges either on Intrado or its customer when Intrado is the 911 provider, an ILEC can effectively stifle the ability of Intrado, as a CLEC, from being able to fairly and effectively compete with an ILEC.

24. Embarq asserts that "Intrado has no authority to assert the interests of its customers (i.e., PSAPs), whether actual or potential," and then cites to cases that it asserts restricts a party from seeking a declaration as to the very ability of the party to competitively operate. As set forth herein, it is that situation, i.e., allowing a person operating under the jurisdiction of an agency "to plan its future conduct" that "is precisely the type of situation for which the declaratory statement was designed." *Adventist Health System, supra* at 1176. It is the foreseen but currently unrealized threat of additional fees and charges that serve to eliminate

the incentive for a PSAP to sign on with Intrado, restrict competition and affect Intrado's substantial interests.

25. The cases cited by Embarq do not stand for any proposition that calls for dismissal of the Petition:

- In PSC Order No. 05-0354-PCO-WU, the Commission was dealing with a proposed agency action case regarding the removal of a portion of Aloha Utilities' service area for failure to provide adequate service, **and not a declaratory statement**, designed specifically to seek guidance on matters that might come about in the future and for which a regulated entity has a right to determine the agency view. In addition, the Commission allowed the intervenors to participate, with the only "analysis" being that "Mr. Mitchell is granted intervention only to represent himself in this proceeding." Without more, there is little to glean from this ruling, and little precedential effect that can be drawn.

- In PSC Order No. 01-0628-PCO-EI, the Commission was again dealing with a proposed agency action case, this time regarding the merger of entities and the effect on electric rates, **and not a declaratory statement**. In its Order, the Commission engaged in a lengthy analysis of the "injury in fact" standard for standing in a proposed agency action case, which is not the standard for a declaratory statement. The Commission denied standing to the corporate parent because it determined that the parent had not alleged sufficient "injury in fact" but granted party status to the corporate subsidiary. Thus, the Order has no effect on the issues in this proceeding.

- In PSC Order No. 96-0768-PCO-WU, the Commission was once again dealing with a proposed agency action case, this time a cost recovery action by a water utility, **and not a declaratory statement**. More importantly, the decision that the intervening municipality could not represent its residents was based solely on the application of Section 120.52(12)(d), Florida

Statutes, which defines a "party" as "[a]ny county representative, agency, department, or unit funded and authorized by state statute or county ordinance to represent the interests of the consumers of a county." Since the statute did not allow a municipality to represent consumers, the Commission applied principles of statutory construction to conclude that the municipality could intervene on its own but could not represent the interests of consumers. The representation in that case was "representative" since the municipality was not alleging that the effect of the action on customers would directly affect the municipality. This proceeding is not "representative" since the action of the ILECs in seeking payment of unwarranted and anti-competitive charges, whether by Intrado or its customers, does directly affect Intrado's ability to compete as a CLEC in the telecommunications marketplace. Since Order No. 96-0768-PCO-WU did not deal with a declaratory statement, and was specific to a statutory provision that is not applicable here, the Order has no effect on this proceeding.

- Finally, in PSC Order No. 96-0416-FOF-WS, the Commission was dealing with a water and wastewater rate case, **and not a declaratory statement**. More importantly, the decision that the intervening Water Control District could not represent taxpayers in the District was again based on a statutory construction of Chapter 298, Florida Statutes, and, as with the previous case, on the application of Section 120.52(12)(d), Florida Statutes. Since the statute did not allow a Water Control District to represent consumers or taxpayers, the Commission applied principles of statutory construction to conclude that the District could intervene on its own but could not represent the interests of consumers. The representation in that case was "representative" since the District was not alleging that the effect of the action on the taxpayers would directly affect the District. This proceeding is not "representative" since the action of the ILECs in seeking payment of unwarranted and anti-competitive charges, whether by Intrado or its customers, does directly affect Intrado's ability to compete as a CLEC in the

telecommunications marketplace. Since Order No. 96-0416-FOF-WS did not deal with a declaratory statement, and was specific to a statutory provision that is not applicable here, the Order has no effect on this proceeding.

26. In this case, Intrado seeks a declaratory statement because the payment of unwarranted tariff or other charges when an ILEC is no longer the 911 service providers directly affects Intrado's rights as a CLEC. Thus a declaratory statement is appropriate.

27. As evidence of the adequacy of the facts alleged by Intrado, Intrado submits the attached letters from the Martin County E-911 Coordinator and the Charlotte County E-911 Administrator.[6] In those letters, the E-911 personnel confirm Intrado's allegations that:

> we have been told that if we choose Intrado as our network services carrier that Intrado and/or the PSAP may still be subject to certain ILEC tariff charges, or that the ILEC may create new tariff or other rate elements, or that other services we receive may be bundled with services we no longer receive resulting in the payment for unnecessary services.

The "established practice and Embarq's tariffs" are substantive issues to be determined in the proceeding

28. Embarq responds to the Petition by asking for denial of the Petition on substantive grounds. Such an action is premature at this time, and should not be taken up by the Commission pending the conduct of a full proceeding as envisioned by Section 120.565, Florida Statutes and Chapter 28-105, Florida Administrative Code. [7]

---

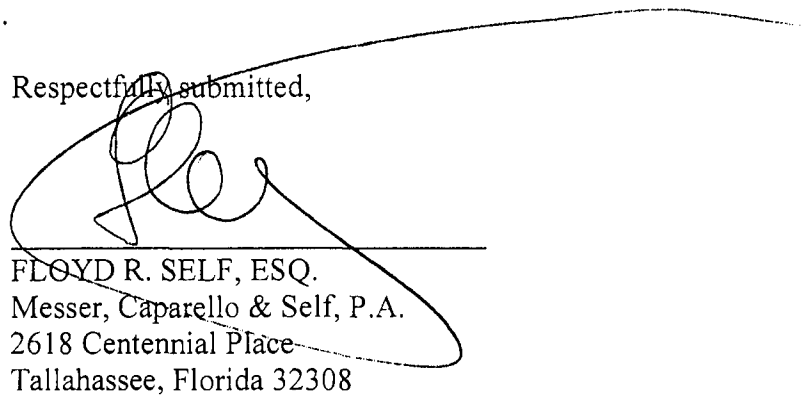
[6] *See* Exhibits "A" and "B" attached hereto. As indicated previously, Intrado does not submit these letters for substantive purposes at this point in the proceeding. Rather, these letters are being submitted at this stage solely to demonstrate that Intrado's allegations are not hypothetical or speculative.

[7] Embarq references its role as a vendor to Leon County, Florida as support of its position. It must be noted that neither Leon County or its equipment vendor are CLECs, and the situation described does not involve an interconnection agreement. Moreover, Embarq appears to be providing network services, and any services purchased are done so at the request of Leon County. Therefore, the reliance on that example is totally misplaced and misleading when Intrado is serving as the CLEC 911 provider, as the operational situation will be entirely different.

29. By filing this Response, Intrado does not waive the argument that Rule 28-105.0027, Florida Administrative Code does not authorize the filing of a "responsive pleading." Rather, the Rule only allows a substantially affected person to file a petition to intervene in a form that meets the requirements of subsection 28-106.201(2). F.A.C. At that point, Rule 28-105.003, Florida Administrative Code provides that "the agency may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts." Thus, Embarq's role is limited to arguing the law as applied to the facts presented to the Commission by Intrado or as developed pursuant to request by the Commission. The introduction of new or different facts is entirely unauthorized and inappropriate.

30. For the reasons set forth herein, Intrado requests that the Commission deny Embarq's Motion to Dismiss, and proceed with the development and entry of a declaratory statement on the issues identified by Intrado.

Respectfully submitted,



FLOYD R. SELF, ESQ.
Messer, Caparello & Self, P.A.
2618 Centennial Place
Tallahassee, Florida 32308
Telephone: (850) 222-0720
Facsimile: (850) 558-0656

and

Rebecca Ballesteros
Associate Counsel
Intrado Communications Inc.
1601 Dry Creek Drive
Longmont, CO 80503
(720) 494-5800 (telephone)
(720) 494-6600 (facsimile)

Counsel for Intrado Communications, Inc.

Robert L. Crowder
Sheriff

(772) 220-7000

Office of the Sheriff
Martin County, Florida

www.sheriff.martin.fl.us

March 25, 2008

Ms. Ann Cole, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 080089, Intrado Petition for Declaratory Statement

Dear Ms. Cole:

On February 8, 2008, Intrado Communications Inc. ("Intrado") filed its petition for declaratory statement requesting that the Florida Public Service Commission ("Commission") address whether Intrado or a 911 Public Safety Answering Point ("PSAP") would bear any obligation to an incumbent local exchange telecommunications carrier ("ILEC") to pay an ILEC's 911 tariff charges when the PSAP has selected Intrado to provide the PSAP with its 911 services. On March 14, 2008, Intrado filed its amended petition substantively raising the same issue as the February 8th petition, but rephrasing the specific questions this Commission should address. As the E-911 Manager and the E-911 Coordinator for Martin County Primary Public Safety Answering Point.(PSAP), I strongly urge the Commission to consider the issues raised by Intrado and find that an ILEC many not charge Intrado and/or the PSAP for any ILEC 911 tariff charges, untariffed charges, or bundled charges for terminated 911 services.

Since the first deployment of emergency 911 services in the 1960s, the technology to receive and respond to 911-dialed calls has evolved from a wireline ILEC telephone network perspective. Today, traditional landline telephone callers rely upon a system that can effectively route calls to the appropriate PSAP and provide location data that is highly accurate and secure.

Over the last ten years, the demands upon the 911 system have grown and changed significantly because of the widespread use of wireless telephones and the increasing acceptance of new calling technologies such voice over Internet protocol ("VoIP"). While the Federal Communications Commission ("FCC") has mandated certain technological obligations on the wireless and VoIP carriers, it has been up to the local PSAPs to deploy the necessary equipment that can receive and process these calls. Our county government, along with additional funding opportunities made available through the Florida Legislature, has committed significant resources to be able to handle these non-traditional, non-ILEC network calls, but it is going to take the deployment of next generation network services to enable PSAPs to be able to receive, process, and respond to these callers.

The issue with wireless and VoIP calls is especially acute. Under the best of circumstances location accuracy is far less accurate than if the call originated at a traditional landline phone. In addition, consumers increasingly desire the ability to text message a PSAP or to send real time photographs and video during an emergency situation, but PSAPs are unable to receive these messages using ILEC network services.

EXHIBIT "A"

Outside the wireless and VoIP environment, PSAPs face other challenges. During a hurricane, for example, the ability to seamlessly transfer an entire 911 center's calls to another 911 center would enable people to continue to reach first responders. In addition, it is not uncommon during a single event, such as a major traffic accident or other large event, for a 911 center to become overloaded with calls associated with that event, which may result in callers elsewhere in the county with other needs being blocked. The ability to "on the fly" reconfigure the 911 network to reroute calls originating from a specific geographic area that is overloading the system so that other callers can get through would be a life saving benefit to everyone. The network services that would enable this functionality can only be done through the deployment of next generation network services.

While as stewards of the 911 system, PSAP administrators have been moving forward with plans to deploy next generation network services such as are being offered by Intrado, we are constrained by some of the information we are receiving from the ILECs regarding alleged continuing obligations once the ILEC is no longer the network services provider. For example, as is related in Intrado's petition for declaratory statement, we have been told that if we choose Intrado as our network services carrier that Intrado and/or the PSAP may still be subject to certain ILEC tariff charges, or that the ILEC may create new tariff or other rate elements, or that other services we receive may be bundled with services we no longer receive resulting in the payment for unnecessary services.

To be sure, I want to be clear that we do not have any issue with ILEC charges associated with services or rates for which there is a continuing legal duty, nor are we contesting any previously contractual for early termination or liquidated damages. These types of contractual obligations are not the subject of the declaratory statement request.

The consumers of Florida require a more robust emergency 911 system that serves all callers, whether from a traditional landline phone, a wireless phone, or over a VoIP network. Only through the deployment of next generation 911 services such as are being offered by Intrado will our county be able to receive and effectively serve 911 callers. However, in order to make this technology transition, we must be free from any legacy ILEC charges other than those for which those we have clear, specific obligations.

I strongly urge you to issue the requested declaratory statement. Feel free to contact me if there are any questions or the Commission needs additional information from us. Thank you for your consideration.

Sincerely,
Robert L. Crowder, Sheriff

by: Joseph J. Laviano

Joseph J. Laviano, ENP
Martin County E-911 Manager/E-911 Coordinator

cc: Parties of Record

Office of the Sheriff

John Davenport
Sheriff of Charlotte County

7474 Utilities Road
Punta Gorda, Florida 33982
(941) 639-2101

March 25, 2008

Ms. Ann Cole, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 080089, Intrado Petition for Declaratory Statement

Dear Ms. Cole,

On February 8, 2008, Intrado Communications Inc. ("Intrado") filed its petition for declaratory statement requesting that the Florida Public Service Commission ("Commission") address whether Intrado or a 911 Public Safety Answering Point ("PSAP") would bear any obligation to an incumbent local exchange telecommunications carrier ("ILEC") to pay an ILEC's 911 tariff charges when the PSAP has selected Intrado to provide the PSAP with its 911 services. On March 14, 2008, Intrado filed its amended petition substantively raising the same issue as the February 8th petition, but rephrasing the specific questions this Commission should address. As the E911 Administrator for the Charlotte County PSAP, I strongly urge the Commission to consider the issues raised by Intrado and find that an ILEC many not charge Intrado and/or the PSAP for any ILEC 911 tariff charges, untariffed charges, or bundled charges for terminated 911 services.

Since the first deployment of emergency 911 services in the 1960s, the technology to receive and respond to 911-dialed calls has evolved from a wireline ILEC telephone network perspective. Today, traditional landline telephone callers rely upon a system that can effectively route calls to the appropriate PSAP and provide location data that is highly accurate and secure.

Over the last ten years, the demands upon the 911 system have grown and changed significantly because of the widespread use of wireless telephones and the increasing acceptance of new calling technologies such voice over Internet protocol ("VoIP"). While the Federal Communications Commission ("FCC") has mandated certain technological obligations on the wireless and VoIP carriers, it has been up to the local PSAPs to deploy the necessary equipment that can receive and process these calls. Our county government, along with additional funding opportunities made available through the Florida Legislature, has committed significant resources to be able to handle these non-traditional, non-ILEC network calls, but it is going to take the deployment of next generation network services to enable PSAPs to be able to receive, process, and respond to these callers.

The issue with wireless and VoIP calls is especially acute. Under the best of circumstances location accuracy is far less accurate than if the call originated at a traditional landline phone. In addition, consumers increasingly desire the ability to text message a PSAP or to send real time photographs and video during an emergency situation, but PSAPs are unable to receive these messages using ILEC network services.

EXHIBIT "B"

Outside the wireless and VoIP environment, PSAPs face other challenges. During a hurricane, for example, the ability to seamlessly transfer an entire 911 center's calls to another 911 center would enable people to continue to reach first responders. In addition, it is not uncommon during a single event, such as a major traffic accident or other large event, for a 911 center to become overloaded with calls associated with that event, which may result in callers elsewhere in the county with other needs being blocked. The ability to "on the fly" reconfigure the 911 network to reroute calls originating from a specific geographic area that is overloading the system so that other callers can get through would be a life saving benefit to everyone. The network services that would enable this functionality can only be done through the deployment of next generation network services.

While as stewards of the 911 system, PSAP administrators have been moving forward with plans to deploy next generation network services such as are being offered by Intrado, we are constrained by some of the information we are receiving from the ILECs regarding alleged continuing obligations once the ILEC is no longer the network services provider. For example, as is related in Intrado's petition for declaratory statement, we have been told that if we choose Intrado as our network services carrier that Intrado and/or the PSAP may still be subject to certain ILEC tariff charges, or that the ILEC may create new tariff or other rate elements, or that other services we receive may be bundled with services we no longer receive resulting in the payment for unnecessary services.

To be sure, I want to be clear that we do not have any issue with ILEC charges associated with services or rates for which there is a continuing legal duty, nor are we contesting any previously contractual for early termination or liquidated damages. These types of contractual obligations are not the subject of the declaratory statement request.

The consumers of Florida require a more robust emergency 911 system that serves all callers, whether from a traditional landline phone, a wireless phone, or over a VoIP network. Only through the deployment of next generation 911 services such as are being offered by Intrado will our county be able to receive and effectively serve 911 callers. However, in order to make this technology transition, we must be free from any legacy ILEC charges other than those for which those we have clear, specific obligations.

I strongly urge you to issue the requested declaratory statement. Feel free to contact me if there are any questions or the Commission needs additional information from us. Thank you for your consideration.

Sincerely yours,

Janet Hamilton

Janet Hamilton
Charlotte County E911 Administrator

cc: Parties of Record

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Electronic Mail and U.S. Mail this 28th day of March, 2008.

Richard Bellak, Esq.
Rosanne Gervasi, Esq.
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Earl Edenfield
Tracy Hatch
c/o Mr. Gregory Follensbee
AT&T Florida Inc.
150 South Monroe Street, Suite 400
Tallahassee, FL 32303-1556

Dulaney L. O'Roark III
Verizon Florida LLC
5055 North Point Parkway
Alpharetta, GA 30022

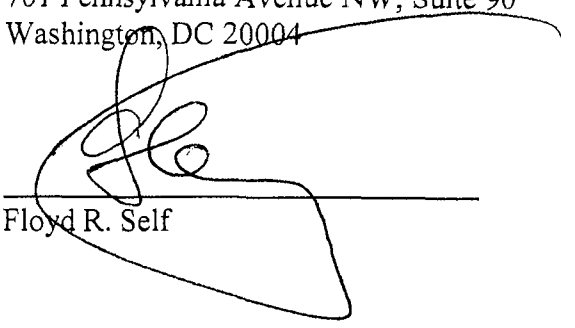
J. Jeffry Wahlen, Esq.
Ausley & McMullen
P.O. Box 391
Tallahassee, FL 32302

Ms. Bettye J. Willis
Windstream Florida, Inc.
4001 Rodney Parham Road
Mailstop 1170-B1F03-53A
Little Rock, AR 72212

Susan S. Masterton, Esq.
Embarq Florida, Inc.
1313 Blair Stone Road
Tallahassee, FL 32301

Rebecca Ballesteros
Intrado, Inc.
1601 Dry Creek Drive
Longmont, CO 80503

Chérie R. Kiser
Angela F. Collins
Mintz Law Firm
701 Pennsylvania Avenue NW, Suite 90
Washington, DC 20004



Floyd R. Self