BEF

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Intrado Communications Inc. to Provide Competitive Local Exchange Services in the State of Ohio.	))))	Case No. 07-1199-TP-ACE

ENTRY ON REHEARING

The Commission finds:

(1) Pursuant to its February 5, 2008, Finding and Order, as clarified on February 13, 2008, the Commission determined that Intrado Communications Inc. (Intrado) is a telephone company pursuant to Section 4905.03, Revised Code, and Rule 4901:1-7-01(S), Ohio Administrative Code (O.A.C.), and a public utility pursuant to Section 4905.02(B), Revised Code, and certified Intrado to provide competitive emergency telecommunications services in Ohio.

(2) On March 6, 2008, applications for rehearing were filed by AT&T Ohio, Cincinnati Bell Telephone Company LLC (Cincinnati Bell), and the Ohio Telecom Association (OTA). AT&T Ohio, Cincinnati Bell, and OTA (hereafter collectively intervenors) were granted intervention in this proceeding pursuant to an attorney examiner's entry issued December 18, 2007.

(3) On March 14, 2008, Intrado filed a memorandum contra the applications for rehearing.

(4) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days of the entry of the order upon the Commission's journal.

(5) AT&T Ohio alleges that the Commission's Finding and Order effectively establishes new rules without following the required steps for rulemaking under Ohio law and without affording interested parties due process. Specifically, AT&T Ohio asserts that, by creating the emergency services telecommunications carrier designation, the Commission established an entirely new category of certified carrier along with de facto rules without any prior notice and absent any opportunity for public

comments or the stating of objections (AT&T Ohio Application for Rehearing at 2, 7). AT&T Ohio submits that Section 111.15, Revised Code, requires the Commission to follow a series of detailed, specific requirements when considering and establishing rules (e.g., advanced filing with the Joint Committee on Agency Rule Review) (*Id.* at 3, 6). AT&T Ohio avers that the requisite notice and filing requirements are intended to prohibit an agency from adopting industry-wide rules in an adjudicatory proceeding unless the potentially affected parties are afforded a full opportunity to be heard. AT&T Ohio submits that when adopting certification standards in the past, the Commission has always used the rulemaking process and permitted public notice and comment on the proposed rules (*Id.* at 4).

AT&T Ohio considers the Commission's actions in this proceeding to constitute rules inasmuch as Section 111.15(A)(1), Revised Code, defines a rule as "any rule, regulation, bylaw, or standard having a general or uniform operation, adopted by an agency under the authority of the laws governing the agency; any appendix to a rule; and any internal management rule" (*Id.* at 5). AT&T Ohio opines that the Commission's Finding and Order in this proceeding constitutes rules inasmuch as the order extends beyond the limited consideration of Intrado's application and establishes an entirely new framework of presumptions, rights, and obligations for the regulation of all competitive emergency services telecommunications carriers on a going forward basis (*Id.* at 5-7).

AT&T Ohio also believes that the Commission's Finding and Order establishes rules governing incumbent local exchange carriers (ILECs) inasmuch as it requires ILEC interconnection with emergency services telecommunications carriers and sets forth the obligation that ILECs work cooperatively with Intrado to ensure that 9-1-1 calls are completed from end users to public safety answering points (PSAPs). AT&T Ohio asserts that, while the Commission's Finding and Order establishes rules applicable to ILECs, it fails to address generic implementation issues (e.g., compensation) that could have been addressed in the context of a notice and comment period for a rulemaking (*Id.*).

Additionally, AT&T Ohio asserts that it would be inappropriate to apply retroactively the obligations of the Commission's Finding and Order to the parties in this proceeding. Referencing

Retail Wholesale & Department Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972), AT&T Ohio claims that, in determining whether an agency has abused its discretion by retroactively applying a rule announced through adjudication, courts have generally considered the following factors:

(a) whether the particular case is one of first impression,

(b) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law,

(c) the extent to which the party against whom the new rule is applied relied on the former rule,

(d) the degree of the burden which a retroactive order imposes on a party, and

(e) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

(*Id.* at 4).

Based on these factors, AT&T Ohio asserts that the Commission abused its discretion by applying its decision retroactively, to the detriment of the company. AT&T Ohio explains that there was no indication that the Commission would deviate from its existing rules and create a completely new category of telecommunications carrier. AT&T Ohio also opines that the Commission's decision appears to subject the company to the significant burden of making its network available to a new category of telecommunications carrier (*Id.* at 7, 8).

(6) OTA also objects to the Commission's establishment of the classification of competitive emergency services telecommunications carriers and the associated rules in the context of the Commission's Finding and Order addressing Intrado's application for certification as a competitive local exchange company. OTA contends that no party was given notice of the Commission's intention to consider this new carrier designation and no party was given the opportunity to provide comment.

OTA submits that the Commission failed to comply with Section 111.15, Revised Code, which provides for the legislative review of Commission rules by the Joint Committee on Agency Rule Review and for the central filing and publication of rules by the Secretary of State. OTA asserts that the Commission's directives regarding competitive emergency services telecommunications carriers are subject to Section 111.15, Revised Code, and should be available in the Ohio Administrative Code in order to properly notify the public regarding the new obligations (OTA Application for Rehearing at 11-12).

OTA asserts that the Commission has no authority to establish, *sua sponte*, a classification of emergency service telecommunications carriers absent due process, which would include notice and the opportunity to be heard concerning both the classification and the associated regulatory framework. In support of its position, OTA references that Section 4927.03(A), Revised Code, requires that the Commission afford the public and any affected telephone company the opportunity for comment. OTA states that the Commission's alleged failure to provide notice and an opportunity to be heard are violations of both Ohio law and constitutional guarantees of procedural due process. Additionally, OTA considers the approach taken by the Commission in this proceeding to be inconsistent with the Commission's approach in every other classification established pursuant to the aforementioned statute (*Id.* at 7-10).

(7) Similar to AT&T Ohio and OTA, Cincinnati Bell contends that the Commission erred by creating a new classification (competitive emergency services telecommunications carrier) and establishing corresponding rules absent notice or opportunity for comment by the intervenors. Cincinnati Bell submits that no rules previously existed for competitive emergency services telecommunications carriers. In establishing rules for these entities, Cincinnati Bell asserts that the Commission failed to follow the statutorily required rulemaking process which provides for the opportunity of public notice and comment (Cincinnati Bell Application for Rehearing at 4).

(8) Intrado contends that, because AT&T Ohio, OTA, and Cincinnati Bell were all granted intervention and the Commission considered their arguments seeking dismissal of the certification application, it is inappropriate for these entities to now argue

that they were denied due process. Intrado opines that the Commission has more than satisfied the requirements of due process as required by Section 4927.03, Revised Code, and provided for a greater participatory process than the Ohio Supreme Court deemed sufficient (Intrado Memorandum Contra at 7 citing *Discount Cellular Inc. v. Pub. Util. Comm.*, 112 Ohio St. 3d at 360, 368, 369 [2007]). Furthermore, Intrado points out that the Commission's ruling that Intrado is not a competitive local exchange carrier (CLEC) is precisely what the intervenors argued for in their motions. Thus, to now posit that the intervenors were denied due process, says Intrado, is ludicrous.

Inasmuch as the Commission permitted the intervenors to participate in this case, Intrado believes that the Commission was not required to initiate a formal rulemaking in order to assure due process (*Id.* at 8). In support of its position, Intrado states that, in *Discount Cellular*, the Ohio Supreme Court determined that there is no constitutional right to notice and hearing in utility-related matters if no statutory right to a hearing exists (*Id.* at 9).

Intrado considers the arguments raised by AT&T Ohio and OTA to be misleading and inaccurate inasmuch as it believes that Section 4927.03, Revised Code, grants the Commission the power to establish, by order, alternative regulatory requirements including different classifications, procedures, terms, and conditions without regard to Section 111.15, Revised Code (*Id.* at 2). In support of its position, Intrado states that in *Discount Cellular*, the Ohio Supreme Court determined that the Commission had properly exercised its statutory authority under Section 4927.03(A)(1), Revised Code, and had not engaged in rulemaking subject to the requirements of Section 111.15, Revised Code (*Id. at 6*).

Intrado submits that the Commission properly determined that the establishment of the alternative regulatory classification (competitive emergency services telecommunications carrier) was in the public interest consistent with Section 4927.03(A)(1), Revised Code, and would provide PSAPs with competitive, reasonably available alternatives. Further, Intrado opines that the associated procedures, terms, and conditions that competitive emergency services telecommunications carriers are

required to comply with are reasonable and do not create any undue economic, competitive, or market advantage to Intrado (*Id.* at 7).

Additionally, Intrado opines that, consistent with Section 4927.02(A)(4), Revised Code, the Commission, in its Finding and Order, specifically considered the state's policy objective of promoting diversity and options in the supply of the public telecommunications services when the Commission authorized Intrado to provide competitive emergency telecommunication services in Ohio (*Id.* at 4).

(9) With respect to AT&T Ohio's, OTA's, and Cincinnati Bell's arguments regarding due process violations and the failure of the Commission to comply with Section 111.15, Revised Code, rulemaking requirements, the applications for rehearing are denied. Despite the intervenors' arguments to the contrary, we conclude that the Finding and Order appropriately considered Intrado's request for certification and, upon determining that the company was not a competitive local exchange carrier (CLEC) but still under our jurisdiction, we established what type of a carrier Intrado actually is. Such a determination is certainly within the Commission's general supervisory powers and is not tantamount to a rulemaking endeavor. Specifically, the Commission has the ability to determine whether a particular applicant falls under the jurisdiction of the Commission and the attending regulatory rights and obligations of such an entity in the context of a request for a certificate to operate in this state. Moreover, given constant advancements in technology, it is not unusual for the Commission to have to consider in certification cases whether and to what extent new and unique telecommunications service offerings fit into our regulatory framework (See, for example, Case No. 93-1370-TP-ACE, *Time Warner AxS of Western Ohio, LP*, Finding and Order issued December 9, 1993). To require the Commission to conduct a rulemaking every time a telephone company proposes a new and unique telecommunications service option would frustrate both the policy of the state to encourage innovation in the telecommunications industry as well as the policy to promote diversity and options in the supply of public telecommunications services and equipment throughout the state (Section 4927.02, Revised Code). We further point out that, with respect to this certification analysis, the Commission not

only considered the viewpoints filed by the intervenors in Intrado's CLEC certification application, but that the Commission also agreed with many of their stated arguments.

While it appears that the intervenors advocate that the Commission's analysis should simply begin and end with the issue of whether Intrado is a CLEC, the intervenors fail to recognize that simply because an applicant is not a CLEC does not signify that it is also not a telephone company subject to the Commission's jurisdiction pursuant to Sections 4905.02, 4905.03(A)(2), and 4905.04, Revised Code. Therefore, upon determining that Intrado is a telephone company that does not fit neatly into the existing carrier classifications, the Commission took the next logical and necessary step of determining the appropriate classification for the telephone company in order to determine the appropriate regulatory framework to apply to Intrado. Intrado requested certification as a CLEC for the purposes of providing Tier 1 noncore services. The Commission determined that Intrado, although providing a component of basic local exchange service, was not a traditional provider of basic local exchange service in the sense that its telephone exchange activities are restricted in scope to competitive emergency telecommunications services. Thus, rather than placing Intrado into a regulatory classification in which it did not neatly fit, we categorized Intrado as an emergency services telecommunications carrier and concluded that the existing regulatory framework for Tier 1 core service should apply.

The Commission asserts that this determination is entirely consistent with the Commission's existing rules. In particular, the Commission highlights the fact that Chapter 4901:1-6, O.A.C., sets forth the regulatory framework for all providers of competitive telecommunications services, not just CLECs (See Rule 4901:1-6-02, O.A.C.). Also, Rule 4901:1-6-06, O.A.C., sets forth the application process which must be followed by any telephone company desiring to offer telecommunications services in the state of Ohio. It was under this process that the Commission considered Intrado's application for certification, and it was the existing rules in Chapters 4901:1-5, 4901:1-6, and 4901:1-7, O.A.C., which we applied to Intrado's operating authority, once we determined what kind of telephone company Intrado is. Therefore, the Commission established no new rules as a result of our Finding and Order in this proceeding.

In our Finding and Order, we established specific additional conditions for Intrado's operating authority, due to the high level of public interest in ensuring uninterrupted 9-1-1 service to the public. AT&T Ohio maintains that the Commission clearly intended these findings to apply generally and uniformly to all emergency services telecommunications carriers and, therefore, by definition, they constitute new rules (AT&T Ohio Application for Rehearing at 5). The Commission grants AT&T Ohio's request for rehearing on this ground. The Commission agrees with AT&T Ohio that it would be improper to apply the determinations made in this case generally and uniformly to any future applicant for a certificate to provide competitive emergency telecommunications services. Thus, to the extent that our findings appeared to apply to all providers of the type of competitive emergency telecommunications services proposed by Intrado, we clarify that our findings are limited to the unique business plan and operation of Intrado, as set forth in its application in this case. The specific requirements we imposed on Intrado in its certification case apply only to Intrado, and are a condition of it receiving a certificate to operate in Ohio. Should other applicants request similar authority in the future, the Commission will consider those requests based on the individual facts and merits of any such applications and will allow interested persons an opportunity to intervene and express their views regarding the applications in those cases.

(10) As another ground for rehearing, AT&T Ohio asserts that the Commission's Finding and Order unlawfully creates discriminatory pricing in violation of Ohio's statutes (AT&T Ohio Application for Rehearing at 9). Specifically, AT&T Ohio points out that while the Commission has now determined that competitive emergency services telecommunications carriers can provide 9-1-1 services on an individual contract basis (Intrado Order at ¶13), the Commission previously stated in *In the Matter of the Adoption of Guidelines Governing the Disclosure or Use of the Emergency 9-1-1 Database in Accordance With House Bill No. 344*, Case No. 94-1965-TP-ORD (94-1965), Finding and Order, June 6, 1996, at 13, that "[t]o allow market pricing for 9-1-1 database service . . .would essentially allow LECs to profit from State and subscriber-funded investment" (*Id.* at 9, 10). AT&T Ohio asserts that if Intrado is providing the same or similar emergency services to that of another carrier, the same pricing standards should apply to both entities. AT&T Ohio submits that to do

otherwise would be a violation of Section 4927.02(A)(7), Revised Code (AT&T Ohio Application for Rehearing at 10).

(11) Similar to AT&T Ohio, OTA contends that the Commission's Finding and Order unlawfully and unreasonably discriminates between ILECs and competitive emergency services telecommunications providers regarding the pricing of emergency services and unreasonably imposes costs for which recovery is ordered. In support of its petition, OTA represents that, consistent with the policy set forth in 94-1965, Finding and Order, June 6, 1996, at 13, ILECs in Ohio have developed, filed, and implemented tariffs for 9-1-1 services that are based on the incremental costs alone (OTA Application for Rehearing at 15). In contrast, OTA submits that, pursuant to the Commission's Finding and Order in this proceeding, competitive emergency services telecommunications carriers are allowed to recover whatever the market will bear. OTA avers that such an outcome violates Section 4927.02(A)(7), Revised Code, which reflects that it is the policy of the state of Ohio to "not unduly favor or advantage any provider and not unduly disadvantage providers of competing and functionally equivalent services." Additionally, OTA objects to the Commission imposing costs on ILECs for the purpose of assisting in the migration of 9-1-1 traffic to a competitive emergency services telecommunications carrier while not providing a cost recovery mechanism subsequent to the migration of traffic (*Id.* at 16).

(12) In response to AT&T Ohio's and OTA's arguments that the Commission's Finding and Order results in discriminatory pricing standards relative to the pricing constraints applicable to ILECs, Intrado responds that the pricing structure set forth in 94-1965 was intended to address how traditional 9-1-1 services should be tariffed according to incumbent regulatory requirements and was not intended to apply to all new competitive services. In support of the Commission's decision to allow Intrado to offer service to counties pursuant to contract, Intrado references Section 4927.03(B), Revised Code, and asserts that the Commission may prescribe different classifications for different telephone companies and the services they provide (Intrado Memorandum Contra at 17).

Intrado submits that the Commission has continuously set forth different regulatory structures for ILECs, CLECs, and other

telecommunications providers. With respect to 9-1-1 service, Intrado believes that the disparity in regulatory treatment is appropriate in light of the fact that ILECs are providing service over ubiquitous legacy facilities, while Intrado does not have the benefit of embedded legacy facilities and a legacy cost structure (*Id.* at 18). In particular, Intrado submits that most of the ILEC facilities used to provide the traditional 9-1-1 services have been in place for many years and that the ILECs have likely recovered the cost of these facilities in full (*Id.* at 19). Intrado states that the pricing requirements implemented by the Commission in 94-1965 were applied to prohibit ILECs from "profit(ing) from State and subscriber-funded investment" (*Id.* at 17). Contrastingly, Intrado represents that it is financing this new technology, without ratepayer funding (*Id.* at 19). Thus, argues Intrado, it is only appropriate and reasonable that the Commission made a distinction in the pricing structure applicable to Intrado.

(13) In regard to AT&T Ohio's and OTA's arguments that the Commission's Finding and Order results in discriminatory pricing standards relative to the pricing constraints applicable to ILECs, the applications for rehearing are denied. Contrary to AT&T Ohio's and OTA's contention that the Commission's Finding and Order results in discriminatory pricing, the Commission determines that the arguments raised do not engage in a comparison of similar services. Specifically, whereas the Finding and Order in 94-1965 was limited in scope to the disclosure of the legacy 9-1-1 database information by the ILECs, the Finding and Order in this case addresses the pricing of an enhanced, next generation 9-1-1 system, which incorporates new costs not previously contemplated by the Commission and not currently being recovered by State and subscriber-funded investment. Based on the facts of this case, we believe that it is appropriate to allow Intrado a pricing structure for its proposed service different from the legacy service. To the extent that any ILEC seeks to similarly provision enhanced, next generation 9-1-1 service, the Commission would consider in the context of such application, the appropriateness of affording the same pricing flexibility as Intrado for those costs not already accounted for under its legacy 9-1-1 costs.

(14) As further grounds for rehearing, AT&T Ohio submits that the Commission unnecessarily decided issues not relevant to the issue of certification. Specifically, AT&T Ohio states that there

was no reason for the Commission to address the issue of the applicability of Sections 251 and 252 of the Telecommunications Act of 1996 (1996 Act) or Intrado's eligibility for pseudo automatic number identification (pANI) resources when the only issue before it was to determine whether Intrado was entitled to certification pursuant to Ohio law (AT&T Ohio Application for Rehearing at 11, 12). AT&T Ohio submits that the issue of the applicability of Sections 251 and 252 is more appropriate in the context of Intrado's pending arbitration cases with AT&T Ohio and Embarq (*Id.*). To the extent that the Commission's Finding and Order is also intended to unequivocally give Section 251 and Section 252 rights to other competitive emergency services telecommunications carriers, AT&T Ohio believes that such treatment is inappropriate in light of the fact that each individual competitive emergency services telecommunications carrier may have its own business plan and network architecture and may not offer services that are functionally equivalent to that offered by Intrado (*Id.* at 12-14).

At a minimum, AT&T Ohio seeks clarification that, pursuant to the Commission's Order, Intrado or any future competitive emergency services telecommunications carrier is not automatically granted greater rights than an actual CLEC or any other carrier under Sections 251 or 252 of the 1996 Act. For example, AT&T Ohio submits that, pursuant to the 1996 Act, interconnection is only available to a requesting carrier if it is used to provide exchange access or local exchange service and only if it is used for the mutual exchange of traffic. AT&T Ohio opines that decisions regarding the reasonableness of individual company requests for interconnection should occur on an individual case-specific basis in the context of a Section 252 proceeding (*Id.* at 13).

(15) Similar to AT&T Ohio, OTA asserts that the Commission's framework misconstrues the law and erroneously confers rights on Intrado to which it is not entitled. Specifically, OTA states that Intrado is not entitled to interconnection under either state or federal law (OTA Application for Rehearing at 10). First, OTA opines that the Commission should not have addressed this issue at all inasmuch as no party raised it for consideration (*Id.* at 13). Next, OTA submits that Intrado is not entitled to Section 251 interconnection due to the fact that the company is not engaged in the routing of telephone exchange service as defined

by 47 U.S.C. 153(47) or involved in the provisioning of exchange access (*Id.* at 13, 14). OTA also avers that the Commission may not lawfully extend interconnection rights as a matter of state law. In support of this position, OTA notes that Section 4905.041, Revised Code, provides that:

> (a) The public utilities commission shall not establish any requirements for the unbundling of network elements, for the resale of telecommunications services, or for network interconnection that exceed or are inconsistent with or prohibited by federal law, including federal regulations.
>
> (b) The commission shall not establish pricing for such unbundled elements, resale, or interconnection that is inconsistent with or prohibited by federal law, including federal regulations, and shall comply with federal law, including federal regulations, in establishing such pricing.

(*Id.* at 14, 15).

(16) Cincinnati Bell also asserts that the Commission erred in declaring that competitive emergency services telecommunications carriers are entitled to all rights and obligations of a telecommunications carrier pursuant to Sections 251 and 252 of the 1996 Act. In support of its position, Cincinnati Bell asserts that this issue was irrelevant to the certification issue pending before the Commission in this proceeding. In particular, Cincinnati Bell states that it is not necessary to resolve these federal law issues when determining whether Intrado is qualified as a CLEC under Ohio law and that Intrado's status under Ohio law is not determinative of its rights under Sections 251 and 252 of the 1996 Act (Cincinnati Bell Application for Rehearing at 5, 6). Similar to AT&T Ohio, Cincinnati Bell asserts that it is inappropriate for the Commission to have determined that all companies designated as competitive emergency services telecommunications carriers are automatically entitled to all rights and obligations under those sections. Rather, Cincinnati Bell believes that it would have been more appropriate for the Commission to determine that such issues should be addressed in the individual arbitration proceedings (*Id.* at 6, 7).

(17) Intrado submits that it is a telephone company pursuant to Section 4905.03(A)(2), Revised Code, and that, consistent with Section 4905.041, Revised Code, the Commission must afford Intrado with the same rights and benefits under Ohio law that it enjoys under federal law, including the granting of the same interconnection rights as Ohio CLECs (Intrado Memorandum Contra at 3). Additionally, Intrado believes that telephone exchange service is not limited to voice communications provided over the public circuit-switched network (*Id.* at 11 citing *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11830 [1998]). Intrado states that its services have the same qualities as other telephone exchange services recognized by the Federal Communications Commission (FCC) including the communicating of information within a local area and the intercommunication among subscribers within a local exchange area (*Id.* at 9, 10 citing *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385 [1999]).

Intrado believes that the Commission was well within its statutory authority to determine the company's interconnection rights pursuant to Sections 251 and 252 of the 1996 Act. In support of its position, Intrado asserts that Section 252 specifically designates state commissions as the proper entity to address issues concerning interconnection (*Id.* at 16). Further, Intrado avers that the Commission is not required to limit its discussion of interconnection issues solely in the context of interconnection agreement disputes or arbitration. Intrado believes that it was particularly appropriate for the Commission to address the issue of interconnection rights in light of the fact that AT&T Ohio and OTA, in this proceeding, had raised issues relating to Intrado's rights under Sections 251 and 252 (*Id.*).

(18) With respect to the arguments raised by the intervenors regarding the determination that Intrado is entitled to interconnection pursuant to Sections 251 and 252, the Commission finds that the applications for rehearing should be granted in part and denied in part. As discussed *supra*, the Commission certainly has the ability to determine whether a particular applicant falls under its jurisdiction and to set forth the attending regulatory rights and obligations of such an entity. Issues such as whether Intrado, as a telephone company, is generally subject to Sections 251 and 252 are encompassed within these attending regulatory obligations. Thus, the

Commission's determination that Intrado is a telephone company pursuant to Section 4905.03, Revised Code, and Rule 4901:1-7-01(S), O.A.C., for purposes of Chapter 4901:1-7, O.A.C., and Sections 251 and 252 was proper and appropriate. However, consistent with our conclusion above, we grant rehearing to clarify that the Commission makes no determination in this proceeding as to the general applicability of Chapter 4901:1-7, O.A.C., and Sections 251 and 252 to other providers of competitive emergency telecommunications services. Our findings in this case are limited to the business plan and operation of Intrado, as set forth in its application in this case. Should other applicants request similar authority as Intrado in the future, the Commission will consider those requests based on the individual facts and merits of any such applications and will allow interested persons an opportunity to intervene and express their views in the context of those cases.

Furthermore, the Commission clarifies that we are not deciding in this case the issues pending in Intrado's arbitration proceedings. While the Commission recognizes its determinations that (a) Intrado is entitled to the rights and obligations of a telecommunications carrier pursuant to Sections 251 and 252 of the 1996 Act, (b) ILECs are obligated to negotiate with Intrado in good faith and (c) Intrado is entitled to access pANI resources (Finding and Order at 5, 6), these determinations address ONLY the fundamental question as to Intrado's right, as a telephone company under Rule 4901:1-7-01(S), O.A.C., to request AN interconnection agreement pursuant to Chapter 4901:1-7, O.A.C., and Sections 251 and 252 of the 1996 Act. Our decision does not address the appropriateness and scope of any specific request for interconnection. Such decisions are to be addressed in the context of Intrado's ongoing arbitration proceedings, based on the case-specific facts of Intrado's actual proposal.

(19) AT&T Ohio asserts that Intrado is not a telecommunications carrier pursuant to federal law inasmuch as it does not provide telecommunications as defined by 47 U.S.C. 153(43). In support of its position, AT&T Ohio states that 47 U.S.C. 153(43) requires that a telecommunications carrier provide "the transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received." Since Intrado's customer is

the county PSAP, and not the end user, AT&T Ohio contends that Intrado is not engaged in the provision of telecommunications. Additionally, AT&T Ohio submits that the FCC has held that E911 services are not telecommunications services and, instead, are information services (AT&T Ohio Application for Rehearing at 14 citing *In the Matter of Bell Operating Companies, Petitions for Forbearance From the Application of Section 272 of the Communications Act of 1934, as Amended, to Certain Activities*, 13 FCC Rcd. 2627, ¶17 [1998]).

(20) Intrado submits that the Commission properly determined that the company is a telecommunications carrier offering telephone exchange service. Specifically, Intrado argues that its service provides PSAPs and municipalities with transmission between or among points specified by the user (the PSAP or municipality) of information of the user's choosing without change in the form or content of the information as sent and received. Intrado explains that when the PSAP receives an emergency call it directs the call to the appropriate entity without a change in the form or content of the communication (Intrado Memorandum Contra at 12).

In response to AT&T Ohio's claim that E9-1-1 services are information services, rather than telecommunications services, Intrado states that the FCC has distinguished between a separately-stated, separately-priced storage and retrieval function being offered as an information service on a stand-alone basis to an end user and an automatic location identification database function being offered for the management, control, or operation of telecommunication systems or telecommunications services by a carrier to provide an integrated comprehensive 9-1-1 service (*Id.* at 13 citing *Bell Operating Companies: Petitions for Forbearing from the Application of Section 272 of the Communications Act of 1934, as Amended, to Certain Activities*, 13 FCC Rcd 2627, ¶¶17, 18 [1998]). In light of the fact that its services are marketed to end users (municipalities and PSAPs) as a single integrated offering, Intrado asserts that the Commission has properly classified its services as a telecommunications service (*Id.* at 13).

Additionally, Intrado asserts that the PSAPs and the municipalities that it serves are the end users of such services just as PSAPs or municipalities that purchase services from the ILECs at retail rates via a retail tariff are considered as holding

end user status. Intrado highlights that the FCC has determined that "wholesale" means a service or product that is an input to a further sale to an end user, while a retail transaction is for the customer's own personal use or consumption (*Id.* citing *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 5318, ¶298 [1997]).

(21) In regard to AT&T Ohio's argument that the Commission incorrectly determined that Intrado is a telecommunications carrier pursuant to federal law, AT&T Ohio's application for rehearing should be denied. As we stated above, we found that Intrado is a telephone company pursuant to Section 4905.03, Revised Code, and Rule 4901:1-7-01(S), O.A.C. Under Chapter 4901:1-7, O.A.C., "telephone company" includes the definition of "telecommunications carrier" incorporated in 47 U.S.C. 153(44), and the obligations found in Chapter 4901:1-7, O.A.C., including interconnection, are generally applicable to telephone companies as defined by Section 4905.03, Revised Code.

(22) Finally, Cincinnati Bell questions the intent of the Commission's requirement that a provider of competitive emergency telecommunications services must carry all calls throughout the county for the designated types of telecommunications services (Cincinnati Bell Application for Rehearing at 7 citing Finding and Order at ¶11). Specifically, Cincinnati Bell states that if it were the intent to create exclusivity for types of telecommunications traffic, such a conclusion is unreasonable and unlawful. Cincinnati Bell submits that it is beyond the jurisdiction of the Commission to dictate how counties will provision 9-1-1 services. Additionally, Cincinnati Bell believes that just because a county may authorize a particular competitive emergency services telecommunications carrier, there is no reason why a county cannot authorize multiple 9-1-1 providers, even for the same class of service (*Id.* at 8).

Similarly, Cincinnati Bell contends that a given wireless carrier should not be forced to redirect all of its traffic to the competitive emergency services telecommunications carrier if it is content to continue using the existing connections (*Id.*). Cincinnati Bell also points out that ILEC telephone boundaries extend beyond county boundaries. Therefore, Cincinnati Bell believes it would be inequitable to force a wireless provider to interconnect with a competitive emergency services telecommunications carrier for a

county's 9-1-1 service, while continuing to have to interconnect with the ILEC for the provision of 9-1-1 service in other counties. In support of its position, Cincinnati Bell asserts that the Commission's determination will actually result in less, rather than more competition for the provisioning of emergency services (*Id.* at 9, 10).

(23) In response to Cincinnati Bell's contention that the Commission erred in its determination that the county-designated competitive emergency services telecommunications carrier will be the exclusive provider of 9-1-1 service in the county, Intrado points out that competitive emergency services telecommunications carriers will still compete with the ILEC to provide 9-1-1 services (Intrado Memorandum Contra at 19). Intrado also asserts that Cincinnati Bell lacks standing to raise its arguments in light of the fact that, to the extent that there is an aggrieved entity, it would be a county or another competitive emergency services telecommunications carrier,, and not Cincinnati Bell (*Id.* at 20).

(24) With respect to the Commission's requirement that Intrado must carry all calls throughout the county for the designated types of telecommunications services, the Commission finds that the application for rehearing should be denied. First, the Commission agrees with Intrado and finds that Cincinnati Bell lacks standing with respect to this assignment of error inasmuch as Cincinnati Bell does not argue that the Commission's order invades its rights or aggrieves its interests. Second, we note that the ILEC's right to provide 9-1-1 services remains intact, although there will now be a competitor for these services. Additionally, the Commission emphasizes that the requirement that there be no more than one additional competitive emergency services telecommunications carrier designated by the county for specific types of traffic is necessary and limited in scope at this point in time in order to ensure that the public interest is protected and the chance of a 9-1-1 system error is reduced. The Commission will continue to monitor the development of the competitive emergency services telecommunications market and will take whatever future action that it deems necessary.

It is, therefore,

07-1199-TP-ACE

ORDERED, That the applications for rehearing are granted in part and denied in part consistent with the above findings. It is, further,

ORDERED, That the Commission's February 5, 2008, Finding and Order is clarified in accordance with the above findings. It is, further,

ORDERED, That to the extent not specifically addressed herein, all other arguments raised in the applications for rehearing are denied. It is, further,

ORDERED, That a copy of this Entry on Rehearing be served upon all parties and interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

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