

1 **BEFORE THE PUBLIC SERVICE COMMISSION**

2 **DOCKET NO. 070699-TP**

3 **DIRECT TESTIMONY OF**

4 **EDWARD "TED" C. HART**

5 **I. Introduction**

6
7 **Q. Please state your name, place of employment and business address.**

8 A. My name is Edward "Ted" C. Hart. I am employed by Embarq Management Company,
9 which provides management services to Embarq Florida, Inc. ("Embarq"). I am
10 employed in the Wholesale Markets Division, as a Business Strategy Manager. My
11 business address is 9300 Metcalf Avenue, Overland Park, Kansas 66212.

12
13 **Q. Generally describe your present responsibilities?**

14 A. I work with various interests in the Wholesale Markets division of Embarq providing
15 input and expertise for intercarrier contract offerings, wholesale business sales and
16 interconnection agreement issues, as well as researching and pursuing increased revenue
17 and expense savings opportunities. I also work with our network subject matter experts
18 analyzing network traffic flows and specific interconnection traffic issues.

19
20 **Q. What is your work experience?**

21 A. I practiced with a public accounting firm for seven and a half years after college
22 specializing in audit and accounting issues for closely-held companies. Subsequent to
23 that, I held senior financial positions with a medium-sized general contractor and with
24 Mobile Radio Communications, Inc., a regional Commercial Mobile Radio Services

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1 ("CMRS") paging telecommunications provider. In my position with Mobile Radio, I
2 spent a good deal of time with the broad scope of issues that were created by the
3 Telecommunications Act of 1996 ("Telecom Act"). Those issues included intercarrier
4 compensation issues, such as reciprocal compensation, proportionate use of facilities, and
5 rights and obligations created by the Telecom Act. I managed several million dollars in
6 annual purchasing of carrier services. I developed and instituted programs that
7 significantly lowered costs related to interconnected networks, connectivity and
8 wholesale services which also led to large increases in company profitability. I initiated
9 and led negotiations with local and long-distance carriers for interconnection agreements
10 and participated in FCC auctions of wireless spectrum, among a host of other financial
11 duties.

12
13 I joined Sprint Wholesale Markets in November 2000 as a Senior Manager charged with
14 negotiation of interconnection agreements with wireless carriers. Since that time I have
15 negotiated interconnection agreements with Competitive Local Exchange Carriers
16 ("CLECs") and have managed intercarrier compensation disputes between Sprint's Local
17 Telephone Division (now dba Embarq) and its CLEC and Wireless vendors and
18 customers. In connection with those disputes I have also become familiar with the
19 special considerations that affect bankrupt telecommunications carriers and have
20 managed the execution of numerous settlement agreements between Embarq affiliates
21 and their wholesale interconnected customers.

22
23 **Q. What is your educational background?**

24 **A.** I graduated from the University of Missouri at Kansas City in 1986 with a Bachelor of
25 Science in Accounting and passed the C. P. A. exam in 1989. To retain the C.P.A.

1 license, I am required to complete approximately 40 hours of continuing education each
2 year. During the course of the past 20 years I have accumulated an estimated 1,100 hours
3 of continuing education on a diverse mix of professional topics, including auditing,
4 taxation, consulting, marketing, business law, telecommunications matters, financial
5 valuation, quality management and ethics courses. In addition, I have taught courses
6 providing training for and building proficiency with specific software applications and
7 other computer-related technology.

8
9 **Q. Have you submitted testimony before an administrative agency?**

10 A. Yes. I have testified in arbitrations and participated in mediations before Public Utility
11 Commissions in Florida, Texas, Ohio and North Carolina. I have also provided expert
12 witness testimony in front of the Missouri Tax Commission.

13
14 **II. Purpose of Direct Testimony**

15
16 **Q. What is the purpose of your Direct Testimony?**

17 A. My Direct Testimony will provide support for Embarq's positions on two issues that are a
18 matter of arbitration between Intrado and Embarq. The first issue my testimony
19 addresses, Issue No. 10 on the preliminary issues list, generally consists of language
20 clarifying the intent of the insurance requirements under the interconnection agreement
21 that Intrado seeks to excise. Deleting the language has the effect of improperly limiting
22 Intrado's liability for any negligent or willful acts or omissions that cause harm to
23 Embarq. The second issue my testimony addresses, Issue No. 14 on the preliminary
24 issues list, involves language Intrado seeks to insert into the interconnection agreement
25 pertaining to the terms under which audits may be or must be performed, when audit

1 rights are invoked under the interconnection agreement. Specifically, the issue is who
2 can or must perform an audit.

3

4 **Issue 10: What limitation of liability and/or indemnification language should be**
5 **included in the ICA?**

6

7 **Q. Please explain the differences in positions regarding the parties' proposed language**
8 **on limitation in liability.**

9 A. Intrado seeks to limit the amount of its potential liability for its own negligent acts or
10 omissions to the extent of the liability insurance that Intrado is required to carry under the
11 terms of the interconnection agreement. Although the parties have every right to have
12 their liabilities underwritten by normal or even extraordinary insurance policies, and the
13 interconnection agreement requires Intrado to maintain certain levels of insurance, the
14 parties to the contract still remain liable for their own actions or negligence. The central
15 question is one of culpability. Embarq's language ensures that the liability remains with
16 the Party that causes the loss, notwithstanding the amount of insurance coverage carried
17 by the Parties for underwriting such potential loss.

18

19 **Q. How would Intrado's shift liability from Intrado to Embarq?**

20 A. The language in section 12.7 that Intrado has deleted states "Nothing contained in this
21 section shall limit Intrado Comm's liability to Embarq to the limits of insurance certified
22 or carried." This provision merely makes explicit within the context of the agreement
23 what is a standard business principle. That principle is that the party that causes the loss
24 remains responsible for the loss. The effect of Intrado's deletion of the language would
25 negate Intrado's liability above the limits to which Intrado is insured. The unreasonable

1 outcome of this deletion can be foreseen with a few presumed facts. Let's presume for
2 purposes of argument that Intrado causes an event that produces a \$1.5 million loss for
3 Embarq and Intrado carries the insurance required by the interconnection agreement with
4 liability limitations stated at \$1.0 million. That produces a half million dollar loss arising
5 from Intrado's negligent acts or omissions that Embarq would be asked to absorb.

6
7 **Q. What is wrong with Intrado's position?**

8 A. Culpability needs to remain with the Party causing harm. That is the standard business
9 principle noted above and it would be a very questionable legal outcome for the
10 Commission to approve language that precludes a party from recovering its actual losses
11 resulting from the negligent or willful acts or omissions of another party, in the absence
12 of a voluntary waiver, which Embarq is not prepared to give.

13
14 **Q. What causes the differences in views?**

15 A. I think Intrado is combining two or more risk management functions into one concept.
16 The first assessment involves the measurement of the business risks you have. The
17 second assessment involves how those risks are underwritten by, or offloaded onto, an
18 insurance carrier. Assessing or otherwise managing the risks involved in your business
19 and procuring insurance coverage for the risks are two separate functions. In the absence
20 of the insurance, the risks and responsibilities still exist and must still be managed.

21 **Q. Why is Embarq's position superior to Intrado's?**

22 A. We are not talking about a "no-harm, no-foul" situation here. In this case the need for
23 insurance to indemnify the other Party is real, but we must keep in mind that irrespective
24 of the level insurance put into place, any losses that would be subject to indemnity would
25 only be those which arise from Intrado's negligent or willful acts or omissions.

1

2 **Q. How is this issue addressed in Embarq's interconnection agreement with other**
3 **carriers.**

4 A. Embarq has negotiated hundreds of interconnection agreements with carriers seeking
5 interconnection in the past 12 years since the Telecom Act was passed and the standard
6 language as it exists now contains the language that Embarq has proposed; i.e. language
7 that would hold the responsible party culpable for its actions notwithstanding limits of
8 insurance coverage. I'm not aware of a prior situation where a carrier has attempted a
9 limitation of liability change of this type.

10

11 **Q. How should the Commission resolve this issue?**

12

13 A. The Commission should approve the language proposed by Embarq to ensure that
14 Embarq is adequately protected against losses caused by Intrado's negligent or willful
15 acts and omissions, regardless of the limits of Intrado's liability insurance.

16

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

18

19 **Q. Please briefly restate what audit language Intrado is seeking in the interconnection**
20 **agreement.**

21 A. The language proposed by Intrado's states that audits of the companies' bills or services
22 must be performed by independent third parties.

23

24 **Q. Why does Embarq object to this language?**

1 A. First, it's unworkable. It essentially mandates that EVERY audit would be performed by
2 an outside independent party, without any regard for a cost benefit analysis or the reasons
3 why one Party might need to audit the other Party's bills.

4

5 **Q. Please describe the typical situations in which one Party might initiate an audit of**
6 **the other Party under the interconnection agreement.**

7 A. Often, an "audit" might simply consist of nothing more extensive than one Party
8 requesting that the other Party provide certain types of information or documentation to
9 substantiate or corroborate charges on a billing statement or network configurations and,
10 if any disagreement arose between the Parties about the accuracy or adequacy or right to
11 receive such information, then the Dispute Resolution provisions of the ICA could be
12 invoked.

13

14 **Q. Why does Embarq believe it would be inappropriate to use a third party for these**
15 **types of audits?**

16 A. A standard business principle is that one does not spend twenty thousand dollars to chase
17 a five thousand dollar problem. Audits have many costs, including direct dollar outlays,
18 as well as indirect costs, such as time, travel, accommodations and assignment of other
19 resources. I recently inquired about the billing rates at a local CPA firm for performing
20 audits of the type contemplated in the interconnection agreement. The managing partner
21 told me that beginning hourly rates for personnel assigned to the audit would likely be in
22 the range of \$100 – \$150 per hour and increasing for reviewing and supervisory
23 personnel. Moreover the likely fee he would envision would produce minimum
24 aggregate fees starting at \$20,000 to \$30,000 perhaps increasing from there depending on
25 the complexity.

1 **Q. Is increased cost Embarq's only concern with requiring an outside auditor?**

2 A. No, if the increased cost were likely to produce better quality or more timely results, then
3 even some nominal increase in cost might be justified. However, cost is not the only
4 issue that arises with the use of a third party auditor. Other concerns include the potential
5 that the parties to the contract may have difficulty agreeing to the terms under which an
6 auditing firm must be engaged. In addition, depending on the issue giving rise to the
7 audit, the parties may not be able to find mutually agreed upon firms that have the
8 requisite technical or telecommunications background or expertise to perform such
9 audits.

10

11 **Q. Would a third party necessarily be more effective at performing the audits
12 contemplated by the interconnection agreement?**

13 A. No. Often, if not always, the engagement of third parties involves bringing the "experts"
14 up to speed on the matters of dispute. This consumes valuable time that could otherwise
15 be spent studying or settling the matter. The representatives of Embarq and, likely,
16 Intrado, know their respective businesses better than an outside firm. It's simply a fact
17 that the parties know their own billing systems, how to extract the data, and how best to
18 present or share the relevant information better than outside individuals that would have
19 to be trained for the task at hand. Having to explain to auditors the critical issues, train
20 them what to look for, where to find the data, what constitutes an exception, etc., and
21 then to be billed \$150 per hour by these newly minted "experts" for the training, is a slap
22 in the face of reasonableness. In such cases, the engagement of outside parties would
23 cause inefficient use of time and money and leave the parties no closer to resolution of
24 the underlying dispute. Again, the parties would be devoting inordinate resources in an
25 attempt to quantify a problem that may not be all that large to begin with. The parties

1 ought to be free to make those initial assessments with internal resources. If the parties
2 then determine that outside resources are needed to augment internal resources, these
3 resources can be engaged at that time.

4

5 **Q. What do you think Intrado is attempting to accomplish with its proposed language?**

6 A. I think there are two possibilities. One possibility is that Intrado just does not want any
7 audits to occur. If someone can put enough obstacles in the way of a process, then that
8 process is unlikely ever to be utilized, cost considerations notwithstanding. The second
9 possibility may be that Intrado is attempting to safeguard its company's trade secrets and
10 proprietary information. I can respect that goal; however, the information subject to audit
11 would be information that would form the basis for an invoice. That's hardly secret
12 information. Embarq personnel would have to have some understanding of this type of
13 information sufficient to authorize payment of Intrado's bills to Embarq. Most if not all
14 audits or customer bills happen without a site visit to the company rendering the bills.
15 Data is traded back and forth via CD or e-mail and there is no further risk of the release
16 of proprietary or sensitive information than would be contained in any other common
17 business functions. In addition, undisputed terms of the interconnection agreement
18 provide for maintaining the confidentiality of information exchanged between the parties
19 under the agreement.

20

21 **Q. What is Intrado failing to consider in its proposal?**

22 A. Practical reality. Not every auditable event or potential billing situation subject to audit
23 requires the involvement of third parties. Regardless of one's employer, there are
24 objective facts that almost always form the basis for resolving billing disputes, and those
25 facts can be determined by competent, trained professionals who work for the Parties.

1 **Q. What language has Embarq proposed regarding audits?**

2 A. Embarq's language in section 8.1 as proposed simply states the following: "...either
3 Party, at its own expense, may audit the other Party's books, records and other documents
4 directly related to billing and invoicing..." This language appears in hundreds of
5 interconnection agreements that Embarq has entered into with other CLECs, and has
6 worked very well for all parties involved. On occasion, some Parties propose that audit
7 costs be reimbursed by the audited Party if a billing discrepancy is identified that
8 involves charges that are overstated by more than 5% from the amount billed, but the
9 performance of the audit itself is not something that other CLECs have taken issue with.
10 The language that we propose and have in place in hundreds of agreements on file with
11 the Florida Commission is not something novel, hotly contested, or that typically ever has
12 been or becomes an issue in these numerous agreements.

13

14 **Q. How should the Commission resolve Issue 14?**

15 A. For all of the reasons articulated above, Intrado's proposal is unworkable and will lead to
16 increased costs or decreased ability to effectively audit services and bills, should that
17 need arise. Embarq asks the commission to accept Embarq's contract language without
18 the added complexity of requiring the parties to hire outside firms.

19

20 **Q. Does this conclude your Direct Testimony?**

21 A. Yes it does.

22

23

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25