

State of Florida



Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: May 8, 2008

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Bellak, Gervasi)
Division of Competitive Markets & Enforcement (King)

RE: Docket No. 080089-TP – Petition for declaratory statement regarding local exchange telecommunications network emergency 911 service, by Intrado Communications Inc.

AGENDA: 05/20/08 – Regular Agenda – Decision on Declaratory Statement – Parties May Participate at Commission's Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: 06/12/08 (90-day statutory deadline)

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\080089.RCM.DOC

Case Background

On February 8, 2008, pursuant to section 120.565, Florida Statutes (F.S.), and Rule 28-105.002, Florida Administrative Code (F.A.C.), Intrado Communications Inc. (Intrado) filed a Petition for Declaratory Statement seeking a declaration that 1) an incumbent local exchange telecommunications carrier (ILEC) may not charge Intrado and/or a 911 Public Safety Answering Point (PSAP) (usually the county sheriff's office, city police department, fire department, or other local government entity charged with answering 911 calls) for any tariffed 911 local exchange telecommunications network services previously provided to the PSAP unless Intrado or the customer specifically orders such services; 2) the ILEC may not charge Intrado and/or the PSAP for any terminated 911 services through new tariffed or non-tariffed

rates; and 3) the ILEC may not bundle its services in such a manner as to require Intrado and/or the PSAP to pay for any terminated 911 services or otherwise for any 911 services not actually requested or consumed. Notice of the Petition was published in the March 7, 2008 edition of the Florida Administrative Weekly (FAW).

BellSouth Telecommunications Inc. d/b/a AT&T Florida (AT&T) filed a Petition for Leave to Intervene on February 22, 2008, to which Intrado responded on February 29, 2008. On March 7, 2008, AT&T filed a Motion to Dismiss and Response to the Petition, to which Intrado responded on March 14, 2008. Verizon Florida LLC (Verizon) filed a Petition for Leave to Intervene on February 7, 2008, to which Intrado responded on March 5, 2008. On March 12, 2008, Verizon filed a Response in Opposition to Intrado's Response, and on March 14, 2008, Verizon filed a Motion to Dismiss and Response to the Petition, to which Intrado responded on March 19, 2008.

On March 14, 2008, Intrado filed a Motion for Leave to Amend its Petition and an Amended Petition for Declaratory Statement, thereby restarting the 90-day statutory timeclock pursuant to section 120.565(3), F.S. AT&T pointed out in its Motion to Dismiss the Petition that Rule 28-105.001, F.A.C., provides that a declaratory statement is not the appropriate means for determining the conduct of another person. The Amended Petition restates the questions posed in the Petition so as to apply to the actions of Intrado and its customers (the PSAPs), rather than to the actions of the ILECs. AT&T filed a Motion to Dismiss and Response to the Amended Petition on March 25, 2008, to which Intrado responded on April 1, 2008. Verizon filed a Motion to Dismiss and Response to the Amended Petition on April 3, 2008, to which Intrado responded on April 8, 2008.

Embarq Florida, Inc. (Embarq) filed a Petition to Intervene and a Motion to Dismiss, or, in the Alternative, Deny the Petition and Amended Petition on March 21, 2008, to which Intrado responded on March 28, 2008. Windstream Florida, Inc. (Windstream) filed a Petition to Intervene on March 21, 2008, to which Intrado responded on March 28, 2008, and an Amended Petition to Intervene and Motion to Dismiss or, in the Alternative, Deny the Amended Petition on April 1, 2008.

The Commission has jurisdiction pursuant to section 120.565, F.S.

Discussion of Issues

Issue 1: Should the Petitions to Intervene filed by AT&T, Verizon, and Embarq and the Amended Petition to Intervene filed by Windstream be granted?

Recommendation: Yes, the Petitions and Amended Petition to Intervene should be granted. (Gervasi, Bellak)

Staff Analysis: Intrado's Amended Petition seeks a declaration as to the appropriate application of certain of AT&T, Verizon, Embarq, and Windstream's tariffs as well as to a customer's rights and obligations pursuant to certain of those tariffs. This demonstrates that AT&T, Verizon, Embarq, and Windstream are substantially affected persons. Any substantially affected person can intervene in a declaratory statement proceeding before the agency.¹ Therefore, AT&T, Verizon, and Embarq's Petitions to Intervene and Windstream's Amended Petition to Intervene should be granted.

In its responses to the Petitions and Amended Petition to Intervene, Intrado requests that the Commission require any petition to intervene to comply with the Uniform Rules in Chapter 28, F.A.C., and that any such intervention be limited to a determination of the law to Intrado's particular circumstances as set forth in the Amended Petition for Declaratory Statement. The Petitions and Amended Petition to Intervene do so. The remaining arguments contained in Verizon's Response in Opposition to Intrado's Response to Verizon's Petition for Leave to Intervene are more fully set out in its Motion to Dismiss and Response to Intrado's Petition for Declaratory Statement, which is incorporated in its Motion to Dismiss and Response to Intrado's Amended Petition for Declaratory Statement. Those arguments are addressed in Issue 2.

¹ Rule 28-105.0027, F.A.C.; Chiles v. Department of State, Div. of Elections, 711 So. 2d 151, 155 (Fla. 1st DCA 1997).

Issue 2: Should the Commission grant Intrado's Amended Petition for Declaratory Statement?

Recommendation: No, Intrado's Amended Petition for Declaratory Statement should be denied. (Gervasi, Bellak, King)

Staff Analysis: Section 120.565, F.S., governs the issuance of a declaratory statement by an agency. In pertinent part it provides that:

(1) Any 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.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances.

Rule 28-105.001, F.A.C., Purpose and Use of Declaratory Statement, provides that:

[a] declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

I. Amended Petition

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

Intrado states that it offers its E911 Intelligent Emergency Network local exchange telecommunications services and equipment to PSAPs as a competitive alternative to ILEC bundled offerings. In order to do so, Intrado must interconnect and exchange local exchange telecommunications traffic with ILECs. Intrado is currently negotiating with various ILECs for such interconnection services and traffic exchange, and has filed petitions for arbitration with the Commission to that end. The Intrado petitions for arbitration are being addressed in Docket Nos. 070736-TP (with AT&T), 070699-TP (with Embarq), and 080134-TP (with Verizon). Intrado states that it is not seeking to relitigate or collaterally address the substance of those arbitration proceedings in this declaratory statement, but to answer an entirely independent question of whether an ILEC may charge Intrado or a PSAP for 911 services when the PSAP has ceased to

be a customer of the ILEC's 911 services and has selected Intrado to be the PSAP's provider of 911 services.

Intrado further states that if a PSAP selects Intrado to provide the 911 services, neither Intrado nor the PSAP will be a customer or subscriber of the applicable ILEC's 911 services, and that the selection of Intrado's E911 services is independent of, and has no relationship to, any terminal or other equipment on the PSAP's side that is provided by the ILEC. Nevertheless, one PSAP abruptly terminated negotiations with Intrado because of the uncertainty as to whether the PSAP would continue to be charged, directly or indirectly through Intrado, the ILEC's 911 tariff charges or new charges, thus making Intrado's service offering uncompetitive.

According to Intrado, although it may seem intuitively obvious that once a customer terminates its service with an ILEC neither that end user nor the successive carrier selected by the end user can or should be charged after the effective termination dates, the applicable statutes, rules, orders, and tariffs do not directly or completely address this post-termination status. AT&T's tariff at least recognizes that it may not always be the 911 provider to the PSAP by providing that "[s]ervice may be terminated at any time upon reasonable notice from the subscriber to the Company," but when an order for 911 service is cancelled in whole or in part, the subscriber must reimburse AT&T for expenses incurred before notice of cancellation is received.²

Intrado states that the application of tariff charges to services that have been terminated and which are provided competitively discriminates against competitive providers and is unlawful under section 364.01, F.S. Moreover, to the extent the ILECs continue to charge for terminated services, the resultant rates are not fair, just, or reasonable in violation of Florida and federal law. Intrado is substantially affected by the current regulatory uncertainty regarding the potential application of ILEC 911 tariff charges, untariffed charges, or unfairly unbundled charges to Intrado and/or the PSAPs.

The statutes, rules or orders on which the declaratory statement is sought include certain General Subscriber Services Tariffs of Windstream and AT&T, certain General Exchange Tariffs of Embarq and Verizon, sections 364.01(4)(g), 364.162 and 364.03, F.S., and Chapter 25-9, F.A.C.

II. Motions to Dismiss and Responses

In their Motions to Dismiss and Responses to the Amended Petition, AT&T and Verizon state that Intrado's Amended Petition should be dismissed and/or denied for all of the reasons set forth in their Motions to Dismiss and Responses to the original Petition, and incorporate by reference their first Responses in their second Responses. Verizon further states that it agrees with and adopts the arguments made by AT&T, and files its Response to highlight additional points that may be helpful to the Commission. AT&T and Verizon's arguments, along with the arguments of Embarq, are discussed below by topic.

² AT&T's General Subscriber Service Tariff, Section A24.1.2.Q, Original Page 4.

Windstream states that it is not now in an arbitration proceeding with Intrado before the Commission, but that it has been contacted by Intrado regarding an interconnection agreement and the time for filing a petition for arbitration has not passed. Windstream does not know whether Intrado will file a petition for arbitration. Windstream joins in, adopts and incorporates by reference the legal arguments and positions stated in AT&T, Verizon, and Embarq's filings, except for those arguments relating to pending arbitration proceedings between those ILECs and Intrado, which do not apply to Windstream.

A. Vagueness/Failure to Comply with Legal Requirements

1. AT&T

AT&T argues that the Petition should be dismissed because it is so vague as to both the operative facts and the law for which Intrado seeks a declaration that it would be impossible for the Commission to properly issue a responsive declaratory statement. AT&T states that a petition seeking a declaratory judgment (or statement) can only be deemed sufficient if it contains allegations sufficient to establish, if proven, five separate elements, as follow: 1) there is a bona fide, actual, present practical need for the declaration; 2) the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; 3) some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; 4) there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; and 5) the antagonistic and adverse interest are all before the court by proper process or class representation and the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.³ AT&T argues that Intrado's request fails to satisfy at least three of the five elements required. First, Intrado's vague recitation of facts suggested by an unidentified third party is insufficient to establish that there is a "bona fide, actual, present practical need for the declaration." Intrado's Amended Petition also fails to satisfy this element because it does not identify with specificity the portions of the referenced tariffs that might apply. Second, the vague allegations of the Amended Petition fail to meet the requirement that the declaration must deal with a "present, ascertained or ascertainable state of facts." Third, Intrado has failed to serve all the potentially affected ILECs and PSAPs, in contravention of the requirement that "the antagonistic and adverse interests are all before the [tribunal] by proper process or class representation."

AT&T further argues that Intrado has failed to comply with subsections 120.565(1) and (2), F.S., which require that a Petition seeking declaratory relief set forth the petitioner's circumstances with particularity, and that the petitioner specify the particular statutory provision, rule or order (or, in this case, tariff provision) about which a declaration is sought. Intrado requests that the Commission interpret three statutes, one section of the F.A.C., and seven tariffs that relate to services provided by four ILECs. The AT&T tariffs alone have almost 50 pages of provisions, none of which Intrado specifically identifies as being potentially applicable. Adding

³ City of Hollywood v. Florida Power & Light Co., 624 So. 2d 285, 286-87 (Fla. 4th DCA 1993) (citing May v. Holley, 59 So. 2d 636, 639 (Fla. 1952)).

these to the tariffs of the other ILECs, Intrado has placed before the Commission hundreds of pages of tariffs without identifying any specific sections that it believes may or may not apply.

2. Verizon

Verizon argues that the Commission should reject Intrado's position that the Commission must take its version of the facts at face value. The Commission should evaluate the facts as presented by the parties and apply its own judgment to ensure that it makes a sound decision. Rule 28-105.003, F.A.C., provides that the Commission "may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts." The Rule does not provide that the Commission must do so.

Verizon states that Intrado does not point to any interconnection agreements it has executed with ILECs, nor does it assert that it is providing E911 service to any Florida PSAPs. Moreover, Intrado does not allege that any ILEC has attempted to charge tariffed rates for 911 services it does not provide. Finally, Intrado lists several ILEC tariff sections, three statutory provisions and one administrative rule as to which it seeks a declaratory statement, but does not specify what language from these sources is at issue here, or how such language might be applied to the factual circumstances it describes. Verizon states that based on the allegations Intrado makes, and fails to make, its request should be dismissed or, alternatively, denied.

Verizon argues that the Petition fails to state in sufficient detail Intrado's particular set of circumstances as to which it seeks an opinion or to specify the tariff provisions it believes may apply to those circumstances. The petitioner bears the burden of identifying any statutory provisions, rules, or orders upon which the declaratory statement is sought.⁴

Verizon states that Intrado does not allege that it is uncertain about the interpretation of any of the tariffs or the statutory or administrative rule provisions that it cites, or that it intends to change its course of action depending on how the Commission resolves the Petition. Rather, Intrado alleges that it is moving forward with efforts to obtain interconnection agreements with the ILECs and to negotiate E911 service agreements with PSAPs, and does not suggest that its plans hinge on how the Commission will resolve this case. The Commission has stated that "a basic requirement for a declaratory statement is that there is uncertainty on the part of the petitioner about a provision of [a] statute, rule or order of the agency, or that a declaratory statement will resolve a controversy." Moreover, "the purpose of a declaratory statement is to resolve an ambiguity in the law, to enable the petitioner to select a proper course of action in advance, thus avoiding costly administrative litigation."⁵ Intrado fails to meet this test.

⁴ Order No. PSC-06-0306-DS-TL, pp. 12-13, issued April 16, 2006, in Docket No. 060049-TL, In Re: Petition by Board of County Commissioners of Broward County for declaratory statement regarding applicability of BellSouth Telecommunications, Inc. tariff provisions to rent and relocation obligations associated with BellSouth switching equipment building ("Maxihut") located at Fort Lauderdale-Hollywood International Airport on property leased by BellSouth from Broward County's Aviation Department.

⁵ Order No. PSC-02-1459-DS-EC, p. 5, issued October 23, 2002, in Docket No. 020829-EC, In Re: Petition for declaratory statement concerning urgent need for electrical substation in North Key Largo by Florida Keys Electric Cooperative Association, Inc., pursuant to section 366.04, Florida Statutes (Florida Keys).

Further, Verizon argues that the Commission has held that “an entity seeking a declaratory statement must show that there is an ‘actual, present and practical need for the declaration,’ and that the declaration addresses a ‘present controversy.’”⁶ Intrado has failed to allege that it has an interconnection agreement in place that would enable it to offer E911 service, that it has installed facilities that would enable it to do so, that it currently provides E911 service to any PSAP in Florida, that it has an E911 services agreement with any PSAP in Florida, or that it or a PSAP has a current dispute with any ILEC concerning the ILEC’s provision of 911 services. Rather than seeking to resolve a current controversy, Intrado is asking for an advisory opinion to address a hypothetical dispute that may arise in the future. A request for a declaratory statement is not allowed in this situation.

3. Embarq

Embarq argues that the Petition fails to comport with the essential requirements for declaratory statements set forth in section 120.565, F.S., and Rules 28-105.001 through 28-105.004, F.A.C. Similar to AT&T and Verizon, Embarq argues that Intrado’s Petition fails to describe with particularity the circumstances that are the basis for its request for relief or to identify with specificity the statutes, rules or orders that support the relief it seeks.

B. Continued Provision of Compensable 911 Service by ILECs

1. AT&T

AT&T argues that Intrado’s request is based on the false premise that if Intrado provides service to a PSAP, then the PSAP would under no circumstances require further service from the ILEC. AT&T describes numerous situations in which the ILEC’s services would continue to be required by the PSAP, and the ILEC should be paid for the services it provides. AT&T states that Intrado has so insufficiently described the situation in question that AT&T cannot comment as to whether any portion of its tariffs might apply in these particular circumstances. AT&T agrees that a provider should not charge for services that it does not render. However, Intrado relies on the false premise that once a PSAP purchases services from Intrado, it necessarily ceases to use ILEC services in every instance.

AT&T states that for example, a 911 call cannot exist without an end user who originates the call. This end user is the customer of the ILEC. Given this, 911 service will not function without the ILEC delivering the Automatic Number Identification (ANI) digits to the PSAP for the database correlation between the telephone number and the location of the end user which is required to dispatch a first responder. Intrado cannot provide this function and there are no facts alleged in the Amended Petition from which the Commission could conclude otherwise. When an ILEC performs the ANI functionalities to deliver the ANI to the PSAP, the ILEC is entitled to charge for this service. Also, if a PSAP selects Intrado’s 911 service, there will be times when it is necessary for the ILEC to perform a Selective Router (SR) function to direct the call to the

⁶ Order No. PSC-04-0063-FOF-EU at p. 9, issued January 22, 2004, in Docket No. 031017, In Re: Request for declaratory statement by Tampa Electric Company regarding territorial dispute with City of Bartow in Polk County (quoting Sutton v. DEP, 654 So. 2d 1047, 1048 (Fla. 5th DCA 1995)).

correct PSAP based on the street address of the end user. If the ILEC is performing the SR functionalities required to steer 911 calls to the correct PSAP, then a SR charge should apply. On pages 11-13 of its first Response, AT&T further describes four scenarios in which a PSAP could choose to purchase services from Intrado but would also require services from AT&T for which AT&T should be paid.

2. Verizon

Verizon argues that the Petition rests on the conclusory allegation that once a PSAP selects Intrado to provide E911 service, the ILEC is not providing tariffed 911 services to either the PSAP or Intrado. Intrado does not describe the network architecture it intends to use, how it intends to interconnect and exchange traffic with the ILECs, what E911 services it would provide, what 911 services ILECs would need to provide when Intrado serves a PSAP, or how the ILECs would be compensated for those services. According to Verizon, without this information, it is impossible to judge the extent to which Intrado's services would displace those of the ILECs and thus whether the declaratory statement requested could be factually or legally correct.

Verizon further states that AT&T demonstrates that ILECs inevitably will provide some 911 services after a PSAP elects to receive E911 services from an alternative provider such as Intrado. In Verizon's case, such services could include, for example, dedicated transport (with ANI transmission capability), selective routing, and database management services. Because Intrado has not described a specific set of circumstances, Verizon does not know exactly which services Intrado or the PSAP may still be using from Verizon's tariffs. Verizon argues that it will clearly still provide some services and when it does, it will be entitled to be compensated for them.

3. Embarq

Embarq argues that even if the Commission were to determine that Intrado's Petition were procedurally sufficient, it should be denied on the merits because it ignores the reality that Embarq continues to provide compensable 911 services even when another provider serves as the primary 911 provider to a PSAP.

In addition, Embarq argues that the relief sought by Intrado is contrary to established industry practice and Embarq's lawful tariffs. According to Embarq, AT&T has accurately captured the various scenarios that can occur and that may necessitate charges to the primary 911 provider (*i.e.*, Intrado) or the PSAP for services rendered by Embarq, even when Embarq is not the primary 911 provider for a PSAP. Embarq provides a specific example of when it is not the primary 911 provider, but still provides compensable services to the PSAP. In Leon County, the County has its own selective 911 router, and Embarq provides direct trunks to those end offices that do not overlap with the County. The end offices that overlap go to Embarq's 911 selective router first. Then, if a call is for the County, it is sent via a dedicated trunk group. The County pays Embarq \$93 per 1000 ANI/ALI queries Embarq provides for its end user customers and \$40 per 1000 for selective routing performed by Embarq in the overlapping areas, in accordance with Embarq's 911 tariffs.

C. Issues May Be Addressed In Pending Arbitration Proceedings

1. Verizon

Verizon states that Intrado seeks a declaratory statement that would address matters it has raised in the arbitration petition it filed against Verizon. That arbitration petition states that the parties dispute the rates that Verizon may charge for its 911 and E911 services, and notes Intrado's objection to being required to pay tariffed rates for those services.⁷ Verizon argues that the Commission has ruled that "[a] declaratory statement should not be issued where another proceeding is pending that addresses the same question or subject matter."⁸

2. Embarq

Similarly, Embarq argues that established case law and prior Commission decisions have held that a declaratory statement is not appropriate when the issues that are the subject of the request are being considered in other court or administrative proceedings.⁹ Intrado's request for a declaration regarding its obligation to pay Embarq for certain 911 services raises issues that are in dispute in the proceedings initiated by Intrado to arbitrate an interconnection agreement between Intrado and Embarq.¹⁰ Specifically, the proposed issues to be resolved in that docket include issues related to the specific terms and conditions applicable to inter-selective router trunking, PSAP-to-PSAP call transfer with automatic location identification (ALI), access to 911/E911 data bases, and appropriate rates under the interconnection agreement.

D. The Petition Improperly Seeks to Determine the Conduct of Third Parties

1. AT&T

AT&T argues that in its Amended Petition, Intrado continues to make an improper request in that it asks the Commission to find that PSAPs, third parties not involved in the case that have not filed a petition for declaratory relief, do not have to make payment for tariffed ILEC 911 services, that the PSAP is not required to pay for terminated ILEC 911 services, and that the PSAP is not required to pay for any bundled ILEC services in such a manner as to require the PSAP to pay for any terminated 911 services. Intrado's request regarding PSAPs should be denied as improper because it does not conform to Rule 28-105.001, F.A.C., in that it asks the Commission to state that PSAPs in Florida are not required to pay ILECs for certain tariffed services.

⁷ Petition for Arbitration at 64-65, filed March 5, 2008, in Docket No. 080134-TP, In Re: Petition by Intrado Communications, Inc. for arbitration to establish an interconnection agreement with Verizon Florida LLC, pursuant to Section 252(b) of the Communications Act of 1934, as amended, and Section 364.162, F.S.

⁸ Florida Keys, *supra*, note 5, at page 6.

⁹ Gopman v. DOE, 908 So. 2d 1118, 1123 (Fla. 1st DCA 2005); Florida Keys, *supra*, note 5, at pages 4, 6 and 9.

¹⁰ Docket No. 070699-TP, In Re: Petition by Intrado Communications, Inc. for arbitration of certain rates, terms, and conditions for interconnection and related arrangements with Embarq Florida, Inc., pursuant to Section 252(b) of the Communications Act of 1934, as amended, and Section 364.162, F.S.

2. Verizon

Verizon similarly argues that by seeking an interpretation of the ILEC's tariffs, Intrado is asking for a determination of the terms and conditions of the existing contractual arrangements between the ILECs and PSAPs and the prospective contractual arrangement between the ILECs and Intrado. Verizon points out that Rule 28-105.001, F.A.C., provides that "[a] declaratory statement is not the appropriate means for determining the conduct of another person." Verizon argues that Intrado violates that requirement by requesting a declaratory statement concerning the amounts ILECs may charge, and that PSAPs may be required to pay, under the ILECs' tariffs. Intrado thus inappropriately asks for the Commission's opinion on the legal rights of two sets of third parties between each other.

3. Embarq

Embarq also argues that Intrado requests the Commission to determine the conduct of other persons, contrary to the governing rules and despite its attempt to mask this deficiency in its Amended Petition. To provide the relief Intrado has requested, the Commission must first determine that Embarq and other ILECs' charges have been or will be applied improperly. That determination amounts to determining the conduct of another person, exactly what is prohibited by Rule 28-105.001, F.A.C. If Intrado believes that Embarq or any other ILEC is violating the law or its tariffs, or is engaging in anticompetitive behavior in violation of applicable law or rules, the proper procedural forum to pursue these claims is a complaint under Rule 25-22.0036, F.A.C., or a Petition under Rule 28-106.201, F.A.C.

Moreover, Embarq states that in addition to requesting that the Commission declare that ILECs may not impose certain charges on Intrado, Intrado asks the Commission to declare that ILECs may not impose certain charges on PSAPs. Embarq argues that Intrado has no authority to assert the interests of its customers (*i.e.*, the PSAPs), whether actual or potential. Intrado seeks relief on behalf of PSAPs that it has no standing to request.

III. Intrado's Responses to Motions to Dismiss and Responses

Intrado's Responses to AT&T and Verizon's Motions to Dismiss and Responses are virtually the same. They are summarized below by topic, along with Intrado's Response to Embarq's Motion to Dismiss or Deny Petition and Amended Petition.

A. Compliance with Legal Requirements

Intrado argues that AT&T has moved for dismissal of the Petition primarily on the basis that it does not meet standards applicable to judicial declaratory judgments. Declaratory statements and declaratory judgments are not the same and are not to be measured by the same standards. "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."¹¹ A declaratory statement under section

¹¹ Sidney F. Ansbacher and Robert C. Downie, II, The Evolution of Declaratory Statements, 77 Florida Bar Journal No. 10 (Nov. 2003).

120.565, F.S., is intended to be far more widely available to determine the legality of actions before they occur than a declaratory judgment.¹²

Moreover, Intrado attaches two letters from the Martin County and Charlotte County Sheriff's Offices as E911 administrators, to support that there is a genuine question as to the legal obligations of Intrado and the PSAPs once ILEC service has been terminated. The language of the letters are identical to one another and urge the Commission to find that an ILEC may not charge Intrado and/or the PSAP for any ILEC 911 tariff charges, untariffed charges, or bundled charges for terminated 911 services. According to Intrado, the fact that these Counties have been awarded grants by the State 911 Board so that they can purchase Intrado's network services and terminate the ILEC tariff services further demonstrates the present necessity for an answer to the legal questions presented by Intrado and show that Intrado's concerns are not speculative.

Regarding whether Intrado improperly failed to serve its Petition on other substantially affected persons, Intrado argues that section 120.565(3), F.S., and Rule 28-105.0024, F.A.C., require the agency to file a notice in the FAW containing information sufficient to place interested persons on notice and that the Commission filed the notice as required. There is no requirement in statute or rule that a petitioner serve anyone other than the agency.

Further, Intrado argues that Rule 28-105.0027, F.A.C., does not authorize the filing of a "responsive pleading," but only allows a substantially affected person to file a petition to intervene. Section 120.565, F.S., provides that a declaratory statement is to be an agency's opinion of the law "as it applies to the petitioner's particular set of circumstances," and Rule 28-105.003, F.A.C., 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, according to Intrado, the intervenors' role is limited to arguing the law as applied to the facts presented by Intrado or as developed pursuant to a request by the Commission.

B. Continued Provision of Compensable 911 Service by ILECs

Intrado argues that it included all 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. If the Commission determines that further facts are necessary in order for it to enter a declaratory statement, it could request those facts from Intrado or hold a hearing to determine them.¹³

With respect to Embarq's example of how it will continue to provide compensable 911 service after the customer has transferred service to Intrado, Intrado argues that Embarq's

¹² Intrado cites to DBPR, Div. of Pari-mutuel Wagering v. Investment Corp. of Palm Beach, 747 So. 2d 374 (Fla. 1999), and to Chiles v. Department of State, Div. of Elections (*supra*, note 1, at pages 154-155) (finding that the 1996 amendments to Chapter 120, F.S., make it clear that there is no longer a requirement that the issue apply only to the petitioner and that 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), among other authorities concerning the scope of a declaratory statement.

¹³ Adventist Health System/Sunbelt, Inc. v. AHCA, 955 So. 2d 1173, 1176 (Fla. 1st DCA 2007).

reliance on its role as a vendor to Leon County is misplaced because the operational situation when Intrado is serving as the CLEC 911 provider will be entirely different. Neither Leon County nor 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.

C. Pending Arbitration Proceedings

In its Response to Embarq's Motion, Intrado argues that the issues involved in the arbitration are not those for which a declaratory statement is sought. The issues to be addressed by the declaratory statement are whether Intrado or its customers must pay additional charges not covered under the interconnection agreement, which additional charges serve to stifle competition by increasing the net cost of E911 service to the customer and concentrate the market in the hands of the ILECs.

D. Determination of Third Party Conduct

Intrado argues that the notice required by Rule 28-105, F.A.C., is an explicit recognition that a declaratory statement may affect others.¹⁴ The notice, as described by the First District Court of Appeal (First DCA), "accounts for the possibility that a declaratory statement may, in a practical sense, affect the rights of other parties."¹⁵ The Supreme Court, citing the First DCA's opinion with approval, has found that "the procedural safeguards inherent in a petition for declaratory statement are sufficient to protect the rights of any other concerned parties."¹⁶ Intrado argues that therefore, the ILECs' argument that the Petition should be dismissed because it requests the Commission to determine the conduct of other persons is unfounded.

IV. Analysis and Recommendation

Regarding AT&T's argument that Intrado improperly failed to serve its Petition on other substantially affected persons, Intrado argues that section 120.565(3), F.S., and Rule 28-105.0024, F.A.C., require the agency to file a notice in the FAW containing information sufficient to place interested persons on notice and that the Commission filed the notice as required. Staff agrees with Intrado on this point. There is no requirement in statute or rule that a petition for declaratory statement be served on anyone other than the agency.

Staff disagrees with Intrado's argument that Rule 28-105.0027, F.A.C., does not authorize the filing of a "responsive pleading," but only allows a substantially affected person to file a petition to intervene. Rule 28-105.0027, F.A.C., provides that intervention shall be allowed of persons meeting the intervention requirements of Rule 28-106.205, F.A.C. Rule 28-106.205, F.A.C., provides that petitions to intervene must demonstrate that the intervenor's

¹⁴ Rule 28-105.0024, F.A.C., requires the agency to file a notice of the Petition for Declaratory Statement in the next available F.A.W.

¹⁵ Chiles v. Department of State, Division of Elections (*supra*, note 1, at page 155).

¹⁶ DBPR, Div. of Pari-mutuel Wagering v. Investment Corp. of Palm Beach (*supra*, note 12).

substantial interests will be affected by the proceeding, or that the intervenor has a legal right to participate in the proceeding. There would be no point to intervention if not for the intervenor to participate in the proceeding in some fashion. The Commission routinely considers the arguments of intervenors in declaratory statement proceedings.¹⁷

Staff recommends that Intrado's Amended Petition for Declaratory Relief should be denied on the merits for all of the following reasons, any one of which, standing alone, provides sufficient grounds to deny the Petition.

A. Vagueness/Failure to Comply with Legal Requirements

Section 120.565(2), F.S., requires that "[t]he petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances." Accordingly, Rule 28-105.002(4), F.A.C., requires that a petition seeking a declaratory statement shall provide "[t]he statutory provision(s), agency rule(s), or agency order(s) on which the declaratory statement is sought," and Rule 28-105.002(5), F.A.C., requires "[a] description of how the statutes, rules, or orders may substantially affect the petitioner in the petitioner's particular set of circumstances."

The Petition fails to describe with particularity the circumstances that are the basis for Intrado's request for relief. Intrado has provided speculative allegations of circumstances that may have occurred or may some day occur and that might result in certain actions by an ILEC that might impact Intrado or unspecified PSAPs. As set forth in Embarq's Motion, Florida courts have rejected these types of general and speculative allegations to support a petition for a declaratory statement by an administrative agency.

Moreover, in addition to sections 364.01(4)(g), 364.162, 364.03, F.S., and Chapter 25-9, F.A.C., in its entirety, Intrado states that the statutes, rules or orders on which the declaratory statement is sought include Windstream's General Subscriber Services Tariff Sections 1 and 24, AT&T's General Subscriber Service Tariff Sections A1 and A24, Embarq's General Exchange Tariff Sections A1 and A10, and Verizon's General Service Tariff Section A24. As AT&T points out, the AT&T tariffs alone have almost 50 pages of provisions, none of which Intrado specifically identifies as being potentially applicable. Adding these to the tariffs of the other ILECs, Intrado has placed before the Commission hundreds of pages of tariffs without identifying any specific sections that it believes may or may not apply to its particular set of circumstances.

¹⁷ See, e.g., Order No. PSC-03-1063-DS-TP at pp. 7-12, issued September 23, 2003, in Docket Nos. 030346-TP and 030413-TP, In Re: Petition for declaratory statement that NPCR, Inc. d/b/a Nextel Partners, commercial mobile radio service provider in Florida, is not subject to jurisdiction of Florida Public Service Commission for purposes of designation as "eligible telecommunications carrier."; In re: Petition for declaratory statement that ALLTEL Communications, Inc., commercial mobile radio service provider in Florida, is not subject to jurisdiction of Florida Public Service Commission for purposes of designation as "eligible telecommunications carrier."

B. Continued Provision of Compensable 911 Service by ILECs

Rule 28-105.003, F.A.C., provides that the Commission “may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts.” As Verizon points out, the Rule does not provide that the Commission must do so. In consideration of the alternative facts presented by intervenors, the Commission should decline to rely on Intrado’s statements of fact in this case.

Intrado either assumes that once it becomes the primary E911 provider to a PSAP, all ILEC 911 services to that PSAP will necessarily cease or it fails to consider the possibility that the ILECs may have to continue to provide certain ancillary 911 services to Intrado or the PSAP in order for Intrado’s primary E911 service to properly function, for which the ILECs are entitled to compensation pursuant to their tariffs. AT&T provided four examples of when it would arguably have to continue to provide compensable 911 service to PSAPs when Intrado is the primary E911 provider. Intrado’s Response to AT&T’s Motion to Dismiss and Response is silent with regard to that assertion.

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

C. Issues May Be Addressed In Pending Arbitration Proceedings

Verizon and Embarq argue that Intrado’s Petition concerns issues that are being litigated in other Commission dockets. Docket No. 080134-TP involves Intrado’s petition for arbitration to establish an interconnection agreement with Verizon. By Order No. PSC-08-0236-PCO-TP, issued April 11, 2008, in that docket, Intrado and Verizon’s agreement to stay the arbitration for 60 days was approved. Therefore, no hearing has as yet been scheduled in that docket. Docket No. 070699-TP involves Intrado’s Petition for Arbitration of its interconnection agreement with Embarq. The hearing in that docket has been set for July 9, 2008. Docket No. 070736-TP involves Intrado’s Petition for Arbitration of its interconnection agreement with AT&T. The hearing in that docket has been set for July 10, 2008. The proposed issues to be resolved in all three of those dockets include issues related to the specific terms and conditions applicable to inter-selective router trunking, PSAP-to-PSAP call transfer with ALI, access to 911/E911 data bases, and appropriate rates under the interconnection agreements at issue.

Direct testimony was prefiled on April 21, 2008, in Docket Nos. 070699-TP and 070736-TP. Along with direct testimony filed in both dockets, Intrado witness Carey F. Spence-Lens attached a copy of the Amended Petition at issue here as Exhibit CSL-6 and copies of letters from various PSAPs supporting the Amended Petition as Exhibit CSL-5. In direct testimony filed in both dockets, Intrado witness Thomas W. Hicks discusses the Amended Petition generally. Embarq witness James M. Maples discusses the Amended Petition on pages 7, 47, 60 and 75 of his direct testimony filed in Docket No. 070699-TP. AT&T’s witnesses also discuss the

Amended Petition in direct testimony filed in Docket No. 070736-TP. Witness Mark Neinast discusses the Petition on page 17 of his testimony and witness Patricia H. Pellerin discusses the Petition on pages 7 and 9 of her testimony.

Intrado argues that if the Commission determines that further facts are necessary in order for it to enter a declaratory statement in this docket, it could request those facts or hold a hearing to determine them. However, it is unnecessary to conduct a hearing in this docket when the controverted facts presented here may be determined through the hearings to be held in the arbitration dockets. More importantly for the Commission's consideration here, established case law and prior Commission decisions have held that a declaratory statement is not appropriate when another proceeding is pending that addresses the same question or subject matter.¹⁸

D. The Petition Improperly Seeks to Determine the Conduct of Third Parties

The intervenors argue that Intrado asks the Commission to determine the conduct of third parties, contrary to Rule 28-105.001, F.A.C. Rule 28-105.001, F.A.C., provides that “[a] declaratory statement is not the appropriate means for determining the conduct of another person.” To provide the requested relief, the Commission must determine whether the ILECs’ charges have been or will be applied improperly. Moreover, in addition to requesting the Commission to declare that the ILECs may not impose certain charges on Intrado, Intrado asks the Commission to declare that ILECs may not impose certain charges on PSAPs. As argued by Embarq, that determination amounts to determining the conduct of another person.

Intrado’s reliance on Chiles v. Department of State, Division of Elections¹⁹ is misplaced. In that case, the Court concluded that the petition for declaratory statement at issue was properly limited to a single candidate for statewide office (namely Commissioner Brogan), and that the statement was not rendered invalid merely because other candidates were in the same position. The Court found that “[t]he Division [of Elections] was authorized to reach the merits of the issues raised by the petition even though other statewide candidates might have also raised the same issue.”²⁰ In the Petition at issue here, Intrado asks the Commission to determine the conduct of the ILECs and certain PSAPs in addition to its own interests, which is prohibited by Rule 28-105.001, F.A.C.

Disputes determining the substantial interests of parties are typically handled through formal hearings held under sections 120.569 and 120.57, F.S. As Embarq argues, if Intrado believes that an ILEC is violating the law or its tariffs or is engaging in anticompetitive behavior in violation of applicable law or rules, the proper procedural forum to pursue such claims is a complaint under Rule 25-22.0036, F.A.C., or a formal hearing under Rule 28-106.201, F.A.C.

¹⁸ Florida Keys, supra, note 5, at page 6 (citing Suntide Condominium Ass’n. v. Division of Land Sales, Condominiums and Mobile Homes, Dept. of Business Regulation, 504 So. 2d 1343 (Fla. 1st DCA 1987); Couch v. State, 377 So. 2d 32 (Fla. 1st DCA 1979); Novick v. DOH, Board of Medicine, 816 So. 2d 1237 (Fla. 5th DCA 2002); and Fox v. State Board of Osteopathic Medical Examiners, 395 So. 2d 192 (Fla. 1st DCA 1981)).

¹⁹ Supra, note 1.

²⁰ Id.

Docket No. 080089-TP

Date: May 8, 2008

Issue 3: Should this docket be closed?

Recommendation: Yes, the docket should be closed.

Staff Analysis: If the Commission acts to either grant or deny the petition, no further action will be necessary and the docket should be closed. (Gervasi, Bellak)