State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: February 19, 2009

TO: Office of Commission Clerk (Cole)

FROM: Division of Regulatory Compliance (Barrett)
Office of the General Counsel (Tan)

RE: Docket No. 070736-TP – Petition by Intrado Communications, Inc. for arbitration of certain rates, terms, and conditions for interconnection and related arrangements with BellSouth Telecommunications, Inc. d/b/a AT&T Florida, pursuant to Section 252(b) of the Communications Act of 1934, as amended, and Sections 120.80(13), 120.57(1), 364.15, 364.16, 364.161, and 364.162, F.S., and Rule 28-106.201, F.A.C.

AGENDA: 03/03/09 – Regular Agenda – Motion for Reconsideration – Oral Argument Requested

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: Please place immediately after Docket No. 070699-TP.

FILE NAME AND LOCATION: S:\PSC\RCP\WP\070736_Recon.RCM.DOC

Case Background

On December 21, 2007, Intrado Communications, Inc. (Intrado Comm or the Company) filed its Petition for Arbitration of certain rates, terms, and conditions for interconnection and related arrangements with BellSouth Telecommunications, Inc. d/b/a AT&T Florida (AT&T),

pursuant to Section 252(b) of the Communications Act of 1934, as amended[1] (Act), and Section 364.162, Florida Statutes (F.S.). An evidentiary hearing was held July 10, 2008.

On December 3, 2008, the Florida Public Service Commission (Commission, or FPSC) issued its Final Order in this matter, Order No. PSC-08-0798-FOF-TP. On December 18, 2008, Intrado Comm filed a Motion for Reconsideration (Motion) and a Request for Oral Argument on the Motion for Reconsideration (Request).

On December 24, 2008, AT&T filed its Response in Opposition to the Intrado Comm pleadings (Response). Issue 1 addresses the Request for Oral Argument, and Issue 2 addresses the Motion for Reconsideration.

The Commission is vested with jurisdiction over these matters pursuant to the provisions of Chapters 364 and 120, Florida Statutes.

[1] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151, et seq. (1996)).

Discussion of Issues

Issue 1: Should the Commission grant Intrado Comm's Request for Oral Argument?

Recommendation: No. The Commission should deny Intrado Comm's Request for Oral Argument. (Tan, Barrett)

Staff Analysis: Rule 25-22.0022(3), Florida Administrative Code (F.A.C.), states that granting or denying a request for oral argument is within the sole discretion of the Commission or the Prehearing Officer, whichever presides over the matter to be argued. The respective arguments are summarized below.

Intrado Comm's Request for Oral Argument

Intrado Comm believes the Commission "overlooked or misunderstood" various points of law and fact. (Request at 2) Intrado Comm claims that the Commission has not heard argument on the "threshold issue,[2]" nor has it heard argument relating to its obligation to arbitrate the parties' disputes pursuant to state law. Although its brief contains some information on the "threshold issue," Intrado Comm states that the pre-imposed page limit for the brief hampered its ability to provide a full discourse on this critical legal issue. Intrado Comm seeks the opportunity to "enhance the Commission's understanding of the issues at hand." (Request at 2)

AT&T's Response in Opposition

AT&T asserts that parties are not entitled to oral argument as a right, and notes that Rule 25-22.0022, F.A.C., squarely addresses whether oral argument is granted or not. AT&T states

> The Commission properly grants requests for oral argument when the Commission decides that to do so will be instrumental in resolving complex matters pending before the Commission. No such situation exists in this instance. (Response at 7)

AT&T claims that Intrado Comm is inappropriately attempting to bolster a post-hearing record, and had opportunities that it did not take advantage of to more fully explain the arguments it presents in its Request. (Response at 8) In short, Intrado Comm had the same opportunity as AT&T did to develop its case during the hearing. AT&T believes Intrado Comm's failure in that regard "is not an appropriate basis for oral argument." (Response at 8)

Analysis

In pertinent part, Rule 25-22.0022(1), F.A.C., sets forth the rationale for granting a request for oral argument: The moving party should

[2]The "threshold issue" considered whether Intrado Comm's service offering met the definition of 'telephone exchange service' as defined in 47 U.S.C. § 153(47), and if AT&T was required to provide interconnection pursuant to §§251(a) or 251(c).

> state with particularity why oral argument would aid the Commissioners . . . in understanding and evaluating the issues to be decided, and the amount of time requested for oral argument.

Staff is not swayed by the notion that additional argument "would aid the Commissioners" in considering the matters that were fleshed out in the hearing and the briefs, and memorialized in Order No. PSC-08-0798-FOF-TP. Staff agrees with AT&T on this point.

Staff does not believe that it would be beneficial for the Commission to hear from the parties. However, should the Commission, in its discretion, allow oral argument, staff recommends that each party be allowed 5 minutes to present its arguments.

Conclusion

Staff recommends that Intrado Comm's Request for Oral Argument be denied.

Issue 2: Should the Commission grant Intrado Comm's Motion for Reconsideration of Order No. PSC-08-0798-FOF-TP?

Recommendation: No. The Commission should deny Intrado Comm's Motion for Reconsideration of Order No. PSC-08-0798-FOF-TP. (Tan, Barrett)

Staff Analysis:

Intrado Comm's Motion for Reconsideration

Intrado Comm asserts that "the Commission has overlooked, misunderstood, and inaccurately interpreted the governing federal law and the relevant facts on the threshold legal issue that . . . [Order No. PSC-08-0798-FOF-TP] decides." (Motion at 3) The Company claims that the Commission

- entirely overlooks Intrado Comm's request for arbitration under Florida law;
- entirely overlooks half of the relevant definition from 47 U.S.C. § 153(47)(A);
- runs afoul of FCC precedent in interpreting 47 U.S.C. § 153(47)(B); and
- misunderstood the record evidence, which resulted in an "erroneous decision."

(Motion at 3-4) In addition, Intrado Comm claims new factual information has come to light that supports its Motion for Reconsideration.[3] Intrado Comm has entered into three contracts to provide 911/E-911 services in Florida. The Company states that it "cannot" provide service to these or any other customers in Florida without a section 251(c) interconnection agreement. Intrado Comm believes the Commission erred in its conclusion that "the parties may negotiate a commercial agreement pursuant to §251(a)." (Order No. PSC-08-0798-FOF-TP at 7; Motion at 5)

Arbitration pursuant to Florida Law

Intrado Comm believes the Commission simply failed to consider state law in its Order. In doing so, it "missed the opportunity . . . to ensure that Florida citizens receive the benefits of a competitive 911/E911 services industry." (Motion at 23) The Company states that its original pleading (to request arbitration) was clear in that it sought relief pursuant to state and federal law. However, in rendering its decision, the Commission relied upon portions of 47 U.S.C. § 153(47) that are not found in Florida law. (Motion at 23) In pertinent part, Section 364.161(1) states that "parties . . . may petition the commission to arbitrate the dispute *and the commission **shall** make a determination within 120 days*." (Motion at 24)(Emphasis in original) Intrado Comm states a three-part litmus test must be met before either party can engage the arbitration procedures pursuant to Florida law:

[3] In Order No. PSC-97-0637-FOF-TL, issued on June 3, 1997, in Docket No. 961153-TL, Intrado Comm asserts that the Commission granted a similar motion based on "substantial pertinent information that was not in the record originally." (Intrado Comm Motion at 5)

- First, a Florida-certified local exchange company must have received a request to unbundle "all of its network features, functions, and capabilities, including access to signaling databases, systems and routing processes;"

- Second, the above-described request must have come from any other telecommunications provider; and

- Third, the parties must demonstrate that they have been unable to reach a resolution within 60 days.

(Motion at 25) Intrado Comm believes it has satisfied these requirements and that "Florida law [has] triggered the Commission's unmitigated duty to arbitrate the parties' disputes." (Motion at 26) In its Motion, Intrado Comm states that in other cases, this Commission has asserted its state-law authority over interconnection matters. (See footnotes 75-82, Motion at 27-29)

Consideration of 47 U.S.C. § 153(47)

Order No. PSC-08-0798-FOF-TP states that Intrado Comm is not entitled to arbitration under Section 251(c) of the Act since it will not be providing "local exchange service." Intrado Comm believes that when the Commission considered the definition in 47 U.S.C. § 153(47), it only considered a portion of the full definition stated below:

> **SEC. 3. [47 U.S.C. 153] DEFINITIONS.**
> (47) TELEPHONE EXCHANGE SERVICE.--The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

Intrado Comm believes the word "or" means that it is only required to satisfy one of the "parts" from this definition. The Company contends that the Commission "misconstrued section 153(47)(B) and altogether failed to consider the definition of telephone exchange service under section 153(47)(A)." (Motion at 7) Intrado Comm believes the Commission erred and contends that it satisfies both parts of the definition.

Regarding section 153(47)(A), Intrado Comm believes its service provides subscribers the ability to intercommunicate, and the Commission's Order is silent on this matter. Intrado Comm contends that the Commission restricted its analysis to the "B-part," wherein its Order stated that "Intrado Comm's service is incapable of originating calls and is therefore not a telephone exchange service." (Motion at 7) However, Intrado Comm argues that the Commission failed to acknowledge that PSAP served by Intrado Comm could "hookflash" to obtain a dial tone in order to originate a bridged call to a third party – essentially connecting the

originating caller to the 3rd party by using more modern technology than what other providers currently offer. (Motion at 7-8)

Intrado Comm notes that its service compares favorably with a scenario the FCC faced in 2001. In its *Provision of Directory Listing information under the Telecommunications Act of 1934, as Amended,* 16 FCC Rcd 2736 (DA Call Completion Order), the FCC examined the service directory assistance providers offered – specifically whether call completion services were providing a "telephone exchange service" pursuant to 47 U.S.C. § 153(47). Intrado Comm states:

> The FCC held that the call-completion service allows a 'local caller to connect to another local telephone subscriber and, in that process, through a system of either owned or resold switches, enables the caller to originate and terminate a call.' It was irrelevant that the originated call did not start with an ordinary telephone call. The same should be said of the fact that Intrado Comm does not originate calls in the form of an ordinary telephone call. (Motion at 9)

In addition, Intrado Comm argues that the Commission failed to consider what the FCC's Advanced Services Order said regarding "telephone exchange service." Intrado Comm claims that this Commission erred because it took such a narrow posture in considering 47 U.S.C. § 153(47), whereas the Advanced Services Order advocates a broader view. (Motion at 12-13) The Company states "nothing in 153(47)(B) supports the conclusion that the meaning of 'originate a call' was locked in and keyed to the ways in which older technologies have operated." (Motion at 13-14) Intrado Comm states that its product offering "bridges the gap between the inferior, antiquated telephone exchange services of the past and those of the future." (Motion at 12) Intrado Comm contends that the decision rendered in Order No. PSC-08-0798-FOF-TP hampers it in providing safe and accurate 911/E911 service to the citizens of Florida.

The Commission misunderstood evidence

Intrado Comm believes the Commission erred in its understanding that a Commercial Agreement under §251(a) is a viable alternative for Intrado Comm. (Motion at 18) Intrado Comm claims its witness Hicks addressed this, and the Company's brief did as well. (Motion 18-22) The Company believes it needs to negotiate pursuant to §251(c) in order to obtain interconnection with AT&T that is "at least equal in quality to that provided to itself, an affiliate, or [to] other carriers." (Motion at 20) According to Intrado Comm, testimony that explained this viewpoint was not adequately considered by the Commission.

AT&T's Response in Opposition

According to AT&T, the information Intrado Comm presents in its Motion for Reconsideration is "little more than a regurgitation of the [prior] arguments . . .." (Response at 2) AT&T states Intrado Comm raises identical or analogous arguments throughout its Motion. (Id. at 4) AT&T believes the claims Intrado Comm makes are "spurious" and "unsubstantiated." (Id. at 1-2) AT&T believes

- it is "patently clear from the record and the four corners of the Commission's Order that the Commission did not fail to consider each . . . [argument];"

- Intrado Comm offers no proof that the Commission failed to afford witness Hick's testimony the weight it deemed appropriate;

- the "new fact" that Intrado Comm presents has no relevance to Order No. PSC-08-0798-FOF-TP, and even if it did, it would constitute "new argument," which cannot be properly considered within a motion for reconsideration; and

- the "state law" argument is a red herring because Intrado Comm cannot point to anything demonstrating that the Commission failed to consider this request.

(Response at 2, 4-6)

AT&T states that the Diamond Cab Co. v. King[4] case is one the Commission has examined before in considering the standard of review for this type of motion. Diamond Cab Co. v. King is the first of several cases that AT&T references in arguing that Intrado Comm fails to meet the standard for granting reconsideration:

- In Sherwood v. State, 111 So. 2d 96, 97 (Fla. 3rd DCA 1959)(citing State ex. Rel. Jaytex Realty Co v. Green, 105 So. 2d. 817 (Fla. 1st DCA 1958), the courts found that it is not appropriate to reargue matters that have already been considered;

- Sentinel Star Express Company v. Florida Public Service Commission, 322 So. 2d 503, 505 (Fla. 1975), states that reconsideration is not appropriate when the moving party "only seeks a second hearing on the same contentions" and alleged errors "were major issues which were fully argued before the Commission . . .;"

- Diamond Cab Co., 394 So. 2d at 891 adds that a motion for reconsideration is not intended to be "a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment or the order;" and

- the Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974) case states that a motion for reconsideration "should not be granted upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review."

(Response at 3)

AT&T believes the Commission should deny Intrado Comm's Motion for two reasons. First, the Motion fails to meet the standard of review, and second, it is an attempt to improperly raise new arguments.[5] (Response at 3) AT&T believes that Order No. PSC-08-0798-FOF-TP

[4] 146 So. 2d 889, 891 (Fla. 1962) (Response at 3)
[5] By Order No. PSC-96-1024-FOF-TP, issued on August 7, 1996, in Docket No. 950984-TP, *In re: Establish Nondiscriminatory Rates, Terms, and Conditions*, the Commission stated at 3, "it is not appropriate, on reconsideration, to raise new arguments not mentioned earlier."

should not be reconsidered. AT&T contends that the Commission has considered and rejected Intrado Comm's arguments. (Response at 3-6)

Analysis

The Commission has looked on numerous occasions[6] to the Stewart Bonded Warehouse, Inc. v. Bevis and to the Diamond Cab Co. v. King cases for guidance in reviewing motions for reconsideration. Relevant portions of these cases are summarized below:

- In Stewart Bonded Warehouse, Inc. v. Bevis, the primary consideration was "whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order." See, Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981).

- In the Diamond Cab case, the court stated, in part: "The purpose of a petition for rehearing is merely to bring . . . [out] some point which . . . [the Commission] overlooked or failed to consider when it rendered its order in the first instance . . . It is not intended as a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment or order . . .." (Diamond Cab, 146 So. 2d at 891.)

The Commission has also looked to State ex. rel. Jaytex Realty Co. v. Green (Jaytex) to consider the scope of its review for motions for reconsideration, and whether it is necessary for a respondent to answer every argument and fact raised by each party. In Jaytex, the court found

> the sole and only purpose of a petition for rehearing is to call to the attention of the court some fact, precedent or rule of law which the court has overlooked in rendering its decision . . . (Jaytex, 105 So. 2d at 818.)
>
> . . .
>
> An opinion should never be prepared merely to refute the arguments advanced by the unsuccessful litigant. For this reason it frequently occurs that an opinion will discuss some phases of a case, but will not mention others. Counsel should not from this fact draw the conclusion that the matters not discussed were not considered. (Id. at 819)

---

[6] See In re: Notice of adoption of existing interconnection agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P., by Nextel South Corp. and Nextel West Corp., Order No. PSC-08-0817-FOF-TP, issued on December 18, 2008, in Docket No. 070369-TP, and In re: Complaint and request for emergency relief against Verizon Florida, L.L.C. for anticompetitive behavior in violation of Sections 364.01(4), 364.3381, and 364.10, F.S., and for failure to facilitate transfer of customers' numbers to Comcast Phone of Florida, L.L.C. d/b/a Comcast Digital Phone, Order No. PSC-08-0549-PCO-TP, issued on August 19, 2008, in Docket No. 080036-TP, and In re: Petition on behalf of Citizens of the State of Florida to require Progress Energy Florida, Inc. to refund customers $143 million, Order No. PSC-08-0136-FOF-EI, issued on March 3, 2008, in Docket No. 060658-EI.

In considering the standard of review for motions for reconsideration, staff believes the Intrado Comm Motion falls short. Specifically, staff believes the Motion fails because:

- The information in Intrado Comm's Motion was reargument of facts previously considered. Reargument in a Motion for Reconsideration is procedurally improper;

- Intrado Comm never made a demonstrative "state law argument" in the case it built through testimony and exhibits. In this proceeding, both parties cited more to "federal law" than to "state law" to support their respective positions. Although Order No. PSC-08-0798-FOF-TP relied upon federal law, staff believes it is erroneous to claim that the Commission "failed to consider" the state law. Because state law was not in conflict with any aspect of the federal law that the Commission cited, a separate argument was not tendered. Staff believes state law was fully considered by the Commission in its Final Order, and a motion for reconsideration is not the proper avenue to pursue new arguments;

- A decision the Prehearing officer imposed (by setting the page limits for briefs) did not adversely impair Intrado Comm in briefing this case. The decision regarding page limits for briefs applied to both parties, and both adhered to it when post-hearing briefs were filed. Either party could have sought timely relief in this regard, but did not. Staff believes Intrado Comm's Motion is not the avenue to seek relief after the fact; and

- The recent contractual arrangements that Intrado Comm touts as "new" are immaterial to the Commission's finding in Order No. PSC-08-0798-FOF-TP. Staff does not believe this Order addressed whether Intrado Comm could establish contracts to provide emergency services in Florida, nor was this Order predicated on the existence or lack of any such contracts.

Staff believes Intrado Comm has not met the standard of review for its Motion. Therefore, staff recommends that the Commission deny Intrado Comm's Motion for Reconsideration.

Conclusion

Staff recommends that the Commission deny Intrado Comm's Motion for Reconsideration.

Issue 3: Should this docket be closed?

Recommendation: Yes. If the Commission approves staff's recommendations in Issues 1 and 2, this Docket should be closed. (Tan, Barrett)

Staff Analysis: If the Commission approves staff's recommendations in Issues 1 and 2, this Docket should be closed.