

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: April 23, 2009

TO: Office of Commission Clerk (Cole)

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

RE: Docket No. 080134-TP – 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.

AGENDA: 05/05/09 – Regular Agenda – Oral Argument Not Requested

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: McMurrian

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\RCP\WP\080134.RCM.DOC

Case Background

On March 5, 2008, Intrado Communications, Inc. (Intrado Comm) filed its Petition for Arbitration with Verizon Florida LLC (Verizon) pursuant to Section 252(b) of the Communications Act of 1934, as amended; Sections 120.80(13), 120.57(1), 364.16, 364.161, and 364.162, Florida Statutes (F.S.); and Rule 28-106.201, Florida Administrative Code (F.A.C.). On November 12, 2008, an Order Establishing Procedure was issued setting this proceeding for hearing. On December 16, 2008, Verizon filed a Motion for Summary Final Order.

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On December 19, 2008, Intrado Comm filed a Motion to Hold in Abeyance this proceeding pending the resolution of Motions for Reconsideration filed in December, in its arbitration proceedings in Docket No. 070699-TP with Embarq Florida, Inc. (Embarq) and in Docket No. 070736-TP with BellSouth Telecommunications, Inc. d/b/a AT&T Florida (AT&T). On January 22, 2009, Order No. PSC-09-0053-PCO-TP was issued granting Intrado Comm's Motion for Abeyance.

On March 3, 2009, the Commission ruled on Intrado Comm's Motions for Reconsideration in the Embarq and AT&T arbitration dockets. On March 16, 2009, the Commission issued Orders denying the Motions for Reconsideration.¹ On March 10, 2009, Verizon requested that the Commission establish procedures necessary to address its pending Motion for Summary Final Order.

On March 20, 2009, Order No. PSC-09-0160-PCO-TP was issued establishing a due date for Intrado Comm's Response to Verizon's Motion for Summary Final Order. On March 27, 2009, an Order Modifying Procedure was issued establishing the hearing and other controlling dates. On this same date, Intrado Comm filed its Response to Verizon's Motion for Summary Final Order.

We are vested with jurisdiction over this matter pursuant to Section 364.012(2), Florida Statutes (F.S.), Section 120.57, F.S., and Section 252 of the 1996 Telecommunications Act.

¹ Order Nos. PSC-09-0155-FOF-TP and PSC-09-0156-FOF-TP.

Discussion of Issues

Issue 1: Should Verizon's Motion for Summary Final Order be granted?

Recommendation: No. Verizon's Motion for Summary Final Order should be denied because it fails to meet the legal standard for which a Summary Final Order may be granted. (Tan, Trueblood)

Staff Analysis: This issue addresses whether the Commission should grant Verizon Florida's Motion for Summary Final Order. Verizon argues that the Commission's recent decisions that Embarq and AT&T were not obligated to provide Intrado Comm interconnection under section 251(c) of the federal Telecommunications Act (Act) justifies granting its Motion for Summary Final Order. In response, Intrado Comm states that the issues in the Verizon arbitration are not the same as those in the Embarq and AT&T dockets and that there are no facts of record in this case because no testimony or discovery has been filed.

Standard of Review

Rule 28-106.204(4), Florida Administrative Code, provides:

Any party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits. All other parties may, within seven days of service, file a response in opposition, with or without supporting affidavits. A party moving for summary final order later than twelve days before the final hearing waives any objection to the continuance of the final hearing.

The purpose of summary judgment, or in this proceeding, summary final order, is to avoid the expense and delay of trial when no dispute exists concerning the material facts. The record is reviewed in the light most favorable toward the party against whom the summary judgment is to be entered. When the moving party presents a showing that no material fact on any issue is disputed, the burden shifts to his opponent to demonstrate the falsity of the showing. If the opponent does not do so, summary judgment is proper and should be affirmed. There are two requisites for granting summary judgment: first, there must be no genuine issue of material fact, and second, one of the parties must be entitled to judgment as a matter of law on the undisputed facts. See Trawick's Florida Practice and Procedure, §25-5, Summary Judgment Generally, Henry P. Trawick, Jr. (2008-2009).

Parties Arguments

Verizon

Verizon contends that the 911/E911 services that Intrado Comm seeks to obtain from Verizon are the same services that Intrado Comm sought from AT&T and Embarq. Verizon asserts that the services are described in all material respects, and in identical terms in Intrado

Comm's Petitions for Arbitration with AT&T, Embarq, and Verizon. Verizon states that based upon a comparison of the services identified in each of the three petitions, it is clear that Intrado Comm would not be originating calls but rather routing the emergency calls of other carriers.² Verizon argues that since all three of Intrado Comm's petitions describe the services that Intrado Comm intends to provide in the same manner, there is no genuine issue of material fact that prevents the Commission from granting its Motion for Summary Final Order.

Verizon contends that Intrado Comm uniformly characterized its services as "routing, transmission, and transport of traditional and non-traditional emergency call traffic to the appropriate public safety answering point (PSAP)," rather than origination.³ Verizon asserts that the price list that Intrado Comm has on file with the Commission also describes its 911/E911 service in the same way as it is described in Intrado Comm's petitions. Verizon argues the Commission has already decided that Intrado Comm is not entitled to the service it seeks from incumbents under Section 251(c) of the Act. (Verizon's Motion at 5) Verizon argues that since the services Intrado Comm is now seeking from Verizon are basically the same as those sought from AT&T and Embarq, the Commission's legal conclusion should be the same.

Verizon contends the policy considerations that, in part, lead to the Commission's decision in the AT&T and Embarq arbitration cases are relevant in this case and support the granting of Verizon's Motion for Summary Final Order.

Intrado Comm

In its Response, Intrado Comm argues that Verizon's Motion should be denied because:

- Verizon's motion fails to comply with the standard for a summary final order which requires the absence of any genuine issue as to any material fact. Since no facts are in the record for this arbitration, the Commission has no basis to rule that there are no disputed issues of material fact. The past decisions of the Commission where a summary final order has been granted were based upon facts from pleadings, responses from discovery questions, and affidavits.
- Verizon's motion is based upon the assumption that the record established in this arbitration will be exactly the same as the record for the AT&T and Embarq arbitrations. Verizon errs in its claim that a determining factor in this arbitration is whether Intrado Comm is providing telephone exchange service.⁴
- Verizon's motion includes issues that are outside of the scope set for the Commission to follow when conducting arbitrations under Sections 251 and 252 of the Act. The issues are limited to those presented by the Parties for

² See Verizon Motion for Summary Final Order at 3-4.

³ In Dockets Nos. 070699-TP and 070736-TP, the Commission found that a service which does not provide both origination and termination of calls cannot be considered a telephone exchange service for the definition purposes of 47 U.S.C. section 153(47). A company must provide telephone exchange service to qualify for Section 251(c) interconnection.

⁴ Intrado Comm's Response to Verizon's Motion at 6.

arbitration. (Response at 6) Specifically, the Commission is required to “limit its consideration ... to the issues set forth in the petition and in the response, if any.”⁵

Staff’s Analysis

There are two requisites for granting a summary final order: (1) no genuine issue as to any material fact exists; and (2) the moving party is entitled as a matter of law to the entry of a summary final order. To decide whether a genuine issue as to any material fact exists, the applicable substantive law must be determined and then compared with the facts in the record. If the comparison shows a genuinely disputed material factual issue, the summary final order must be denied, and the Commission cannot decide the issue. Even though the facts are not disputed, a summary judgment is improper if differing conclusions or inferences can be drawn from the facts.⁶

Under Florida law, “the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and . . . every possible inference must be drawn in favor of the party against whom a summary judgment is sought.” Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993) (citing Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1977)). Furthermore, “summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law.” Moore v. Morris, 475 So. 2d 666 (Fla. 1985); City of Clermont, Florida v. Lake City Utility Services, Inc., 760 So. 2d 1123 (5th DCA 2000).

The Commission has historically found that if there is no genuine issue of material fact and that the moving party is entitled as a matter of law, then summary final order should be issued.⁷ Staff believes that Verizon has failed to prove that there exists no genuine issue as to any material fact. Staff believes that Florida law establishes that a party moving for summary final judgment must show conclusively the absence of any genuine issue of material fact. Verizon has offered that granting the order early in this proceeding would prevent the expense and delay of litigation. However, if the record reflects the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt that an issue might exist, summary judgment is improper.⁸ The burden is on Verizon to prove that no genuine issue of material fact exists and that Verizon is entitled as a matter of law to the entry of the final order.⁹ In this proceeding, staff believes that without additional evidence beyond Intrado Comm’s initial petition and Verizon’s response, there can be different reasonable interpretations of the facts.¹⁰ The Commission needs to gather additional information through the discovery process to

⁵ 47 U.S.C. §252(b)(4)(A) and Order No. PSC-96-0933, at 2 (July 17, 1996) which states that the Commission consideration is limited to issues raised by the petition and the response.

⁶ Trawick’s Florida Practice and Procedure, §25-5, Summary Judgment Generally, Henry P. Trawick, Jr. (2008-2009).

⁷ Order No. PSC-05-0702-FOF-TP, p. 12, issued June 29, 2009; Order No. PSC-01-1427-FOF-TP, p. 13, issued July 3, 2001.

⁸ Albelo v. Southern Bell, 682 So. 2d 1126 (Fla. 4th DCA 1996).

⁹ Christian v. Overstreet Paving Co., 679 So. 2d 839 (Fla. 2nd DCA 1996).

¹⁰ McCraney v. Barberi, 677 So.2d 355 (Fla.1st DCA 1996).

determine if there are genuine issues of material fact. Staff notes that on April 8, 2009, Verizon served its First Set of Interrogatories and Production of Document Requests to Intrado Comm.

Staff believes that Verizon has not met the standard necessary to grant a motion for a summary final order because it has not made a conclusive showing that there is no genuine issue of material fact or that it is entitled to judgment as a matter of law on the undisputed facts. Absent any testimony and discovery to establish a factual basis for granting the Motion, staff recommends that the Motion be denied. Alternatively, the Commission may consider Verizon's Motion for Summary Final Order as premature, until there is a full evidentiary record and defer ruling at this time.¹¹

¹¹The Commission has also found that the suitable time to seek summary final order, if appropriate, is after testimony has been filed and discovery has ceased. See Order No. PSC-00-2388-AS-WU, issued December 13, 2000, in Docket No. 991437-WU and Order No. PSC-02-1464-FOF-TL issued October 23, 2002.

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Issue 2: Should this docket be closed?

Recommendation: No. If the Commission approves staff's recommendation in Issue 1 or defers ruling on the motion for summary final order, this docket should remain open. If the Commission grants the motion for summary final order, this docket should be closed. (Tan)

Staff Analysis: If the Commission approves staff's recommendation in Issue 1 or defers ruling on the motion for summary final order, this docket should remain open. If the Commission grants the motion for summary final order, this docket should be closed.