

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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.

DOCKET NO. 070699-TP
ORDER NO. PSC-08-0799-FOF-TP
ISSUED: December 3, 2008

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

FINAL ORDER

BY THE COMMISSION:

I. Case Background:

On November 27, 2007, Intrado Communications, Inc. (Intrado Comm) filed its Petition for Arbitration of certain rates, terms, and conditions for interconnection and related arrangements with Embarq Florida, Inc. (Embarq), pursuant to Section 252(b) of the Communications Act of 1934, as amended¹ (Act), and Section 364.162, Florida Statutes (F.S.). An evidentiary hearing was held July 9, 2008.

We are vested with jurisdiction over the subject matter by the provisions of Chapters 364 and 120, F.S.

II. Analysis:

A. Intrado Comm service offering

We examine Intrado Comm's service offering, which involves the provision of 911/E911 service to Public Safety Answering Points (PSAPs)² and government entities. An important

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

² For purposes of the "911" system, §365.172, F.S., defines an "[a]nswering point" to mean "the public safety agency that receives incoming 911 calls and dispatches appropriate public safety agencies to respond to the calls."

DOCUMENT NUMBER-DATE

11137 DEC-3 8

FPSC-COMMISSION CLERK

consideration is whether Intrado Comm's service offering meets the definition of a "telephone exchange service," as the term is defined in §3 of the Act.

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 contends its "Intelligent Emergency Network"TM service meets this definition. Embarq disagrees that Intrado Comm's service qualifies as telephone exchange service. This determination is key to whether Embarq (as an incumbent local exchange carrier) must enter into an interconnection agreement with Intrado Comm pursuant to the obligations set forth in §251(a) or in §251(c) of the Act. Further arguments are summarized below.

Parties' Arguments

Intrado Comm contends the 911/E911 service it provides to PSAPs qualifies as telephone exchange service. Embarq asserts that Intrado Comm may be a telecommunications carrier entitled to interconnection under §251(a), but disagrees that the provision of 911/E911 service entitles Intrado Comm access to UNEs under §251(c).

Both parties agree that how competitive 911/E911 service is designated or categorized is integral to this case. Embarq contends that 911/E911 service is not telephone exchange service, and therefore not contemplated under §251(c). Intrado Comm asserts that while it does not currently offer dial tone local exchange service, Intrado Comm's provision of its end-to-end 911/E911 service offering to Florida PSAPs amounts to providing telephone exchange service.

In support of its argument that Intrado Comm does not offer telephone exchange service subject to §251(c) interconnection and unbundling requirements, Embarq argues that federal law requires that all providers of voice services provide their end users access to 911/E911 service. Embarq notes that the FCC defines the Wireline E911 Network as a separate network from the Public Switched Telephone Network. Embarq states that the PSAP chooses only one provider who will provide a service that is one-way in nature and jurisdictionally agnostic. Embarq further asserts that intercarrier compensation does not apply to 911/E911 service and funding is provided by end user surcharges.

Intrado Comm asserts that the FCC determined that "telephone exchange service [is] not limited to traditional voice telephony, but include[s] non-traditional means of communicating

information within a local area.”³ The FCC has also stated “a key component of telephone exchange service is ‘intercommunication’ among subscribers within a local exchange area.”⁴ Intrado Comm argues that its service fulfills the FCC stated goal of intercommunication because it allows 911/E911 users to be connected with PSAPs and communicate with local emergency personnel.

Embarq believes that 911/E911 is a unique service, and §251(c) is not applicable to 911/E911 traffic. Embarq argues that “providing a service that involves telecommunications is not the same as providing a telecommunications service.” Embarq further contends that when a provider uses telecommunications to provide an information service, an information service is being provided to the end user. Intrado Comm asserts that the nature of the service defines the classification, and the combined service it provides has an element of telecommunications.

Intrado Comm argues that its use of Internet protocol should not influence the classification of its 911/E911 service, stating that “[h]ow Intrado Comm may transport calls within its network has no bearing on the classification of the ultimate 911/E911 service offering it provides to Florida PSAPs.” Embarq cites to the FCC’s definition of an IP-enabled service as any service or application that relies on Internet Protocol,⁵ stating that “this IP-based service is not a telecommunications service or a telephone exchange service.” Embarq believes that Intrado Comm’s use of IP technology should be considered when establishing whether Intrado Comm’s proposed service arrangements constitute telephone exchange service for the purposes of §251(c).

Intrado Comm argues that the classification of its service does not depend on whether the PSAP has implemented IP customer premises equipment. Intrado Comm asserts that its Intelligent Emergency Network™ is a “Next Generation” 911/E911 network. Embarq counters that Intrado Comm’s network provides an IP-based information service, which is a type of service which has never been deemed by the FCC to be entitled to §251(c) rights. Intrado Comm states that its network incorporates IP-based technologies and thus accommodates legacy analog services and the IP-based services being offered today, while allowing for next generation technology not generally supported by existing 911/E911 networks.

Analysis

The term “service” is central to this case. Both parties acknowledge that Intrado Comm offers a service, but differ as to what type of service is being offered. Establishing the nature of the service Intrado Comm is offering is important to determine whether Intrado Comm and Embarq should enter into an arrangement under §251(a), a general contract, or §251(c), an interconnection agreement. Section 251(c) specifically provides for an interconnection

³*Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, ¶ 17 (1999) (“Advanced Services Order”).

⁴Advanced Services Order ¶ 30.

⁵ *In the Matter of IP-Enabled Services*; WC Docket No. 04-36; Notice of Proposed Rulemaking; Released March 10, 2004; 19 FCC Rcd 4863.

agreement between a competitive local exchange carrier and an incumbent local exchange carrier to be filed by the parties with this Commission, whereas §251(a) allows for a general contract, commonly referred to as a commercial agreement. Section 251(c) imposes specific, asymmetric obligations on ILECs. Section 252 gives rise to an interconnection agreement incorporating the §251(c) obligations.

911/E911 Service

Section 365.172(3)(i), F.S., defines E911 service as the “enhanced 911 system or enhanced 911 service that is an emergency telephone system or service that provides a subscriber with 911 service and, in addition, directs 911 calls to appropriate public safety answering points by selective routing based on the geographical location from which the call originated.” Both Intrado Comm and Embarq agree that Intrado Comm will provide its services as a competitive alternative 911/E911 provider. Upon Intrado Comm’s entry into the marketplace, PSAPs will have the opportunity to choose an alternate 911/E911 service provider.

Telephone Exchange Service

Intrado Comm’s Intelligent Emergency Network™ is a service that allows a PSAP to receive emergency calls. By identifying its service as “telephone exchange service” because it “allows Florida consumers to be connected with PSAPs, and communication with local emergency personnel,” Intrado Comm attempts to interpret 47 U.S.C. 153(47) to fit its own circumstances. 47 U.S.C. 153(47) provides that a telecommunication service which can *both* originate and terminate calls, can constitute telephone exchange service. However, Intrado Comm provides a service that cannot be used to originate a call.

We find that in order for a service to be considered a telephone exchange service, pursuant to 47 U.S.C. 153(47), it must provide for both the origination and termination of calls. Without the ability both to originate and terminate calls, Intrado Comm’s proposed services do not meet the definition of “telephone exchange service.” The Intelligent Emergency Network™ does not offer a PSAP the ability to call back a 911/E911 user, and administrative lines not offered by Intrado Comm would be required to place such a call.

B. Embarq’s requirement to offer interconnection under §251(c)

This section focuses on whether Embarq is required to offer interconnection to Intrado Comm under §251(a) or §251(c) of the Act. Section 251(a) of the Act describes the general duty of all telecommunications carriers to interconnect, while §251(c) addresses specific obligations of incumbent local exchange companies (ILECs). Two aspects of §251(c) are particularly significant:

- Section 251(c)(2) includes a reference to “telephone exchange service;” and
- Section 251(c)(3) addresses the ILEC’s obligation to provide access to unbundled network elements (UNEs). In essence, this concern is a “rates” issue since Embarq would be obligated to offer these UNEs to Intrado Comm at TELRIC

(Total Element Long-Run Incremental Cost) rates, as opposed to the more general pricing standard applicable to items provided pursuant to §251(a).

Intrado Comm contends that a §251(c) agreement is appropriate since its service offering meets the definition of “telephone exchange service.” It believes Embarq is obligated to offer it cost-based, unbundled access to the elements it wants pursuant to §251(c) of the Act.

Embarq believes that Intrado Comm’s “Intelligent Emergency Network”™ service is not a “telephone exchange service,” and as such, the consideration of interconnection with Intrado Comm pursuant to §251(c) is moot. It contends that Intrado Comm is not providing “telephone exchange service” to end users to dial 911/E911, or wholesale services to carriers or other wholesale providers. Embarq believes that Intrado Comm’s 911/E911 service is a unique service that is not contemplated by §251(c), and therefore is not entitled to a §251(c) interconnection agreement.

Parties’ Arguments

Both Intrado Comm and Embarq believe that the core issue is whether §251(c) or §251(a) applies to the interconnection between the parties when Intrado Comm is the 911/E911 service provider to a PSAP. The benefit Intrado Comm believes §251(c) will provide it is a level playing field, the provision of service at TELRIC rates, and connection standards that are established by the Act. Intrado Comm asserts that in order to provide its 911/E911 services to Florida PSAPs, Intrado Comm must interconnect with Embarq. Intrado Comm states that CLECs are entitled to interconnect with ILECs pursuant to §251(c).

Embarq disagrees with this assertion. Rather, Embarq argues that Intrado Comm is not a competitive local exchange provider that provides telephone exchange service and thus §251(a) is the appropriate section of the Act that governs the parties’ interconnection arrangements. Embarq believes that §251(a) rather than §251(c) applies to the interconnection of the parties’ networks when Intrado Comm is the 911/E911 service provider to a PSAP. Embarq asserts that §251(c) would only apply if Embarq is the 911/E911 provider to a PSAP, and Intrado Comm seeks interconnection with Embarq to terminate its end users’ 911/E911 calls.

Intrado Comm believes that it is not required to use a commercial agreement (*i.e.*, a §251(a) agreement) because the FCC has recognized that without interconnection between competitors and ILECs, competitors would be unable to effectively enter the market. This problem was addressed by the Act offering §251(c) interconnection between competitors and ILECs. Embarq witness Maples describes §251(c) as placing additional obligations on ILECs to open up the markets for competition, such as allowing the CLEC to select a POI (Point of Interconnection) as a way to manage the CLEC’s costs. Intrado Comm asserts that its request for §251(c) interconnection is based on the same principles of competitive fairness and market entry.

Conversely, Embarq asserts that Intrado Comm incorrectly requests interconnection pursuant to §251(c) because Intrado Comm does not qualify for §251(c) provisions. Embarq argues that Intrado Comm’s 911/E911 traffic is unique. In pursuing a §251(c) agreement,

ORDER NO. PSC-08-0799-FOF-TP
DOCKET NO. 070699-TP
PAGE 6

Embarq asserts that Intrado Comm is seeking the same treatment as other CLECs under §251(c), even as it requests exceptions to these arrangements due to its service's distinctive nature.

Analysis

Section 251 establishes the interconnection rights and obligations of telecommunications carriers, including local exchange telecommunications carriers. More specifically, §251(a) imposes a general obligation on all telecommunications carriers to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." Section §251(c) goes beyond the general obligation and imposes specific obligations on incumbent local exchange carriers (like Embarq) to allow interconnection by competing carriers on the incumbent's network.

If Intrado Comm becomes the 911/E911 service provider to PSAPs, Embarq becomes the carrier requesting interconnection on Intrado Comm's network in order to provide access to 911/E911 to Embarq's end user customers. Embarq believes the requirements imposed on ILECs do not support the type of interconnection arrangements currently requested by Intrado Comm. If they did, Embarq would be in a situation where it would be both the ILEC providing interconnection and a carrier seeking access. This situation could present a serious disadvantage to Embarq, who would pay for Intrado Comm establishing its 911/E911 service. We are concerned that the costs for interconnection would be borne by Embarq.

Intrado Comm seeks a §251(c) interconnection agreement with Embarq to gain access to the Public Switched Telephone Network to offer its competitive services to PSAPs throughout the State of Florida. However, we find that the service Intrado Comm intends to provide is not one that will both originate and terminate calls. We find that §251(c) is applicable when an entrant seeks interconnection arrangements with an ILEC in order to offer telephone exchange service and exchange access. However, §251(c) does not apply or impose specific obligations on an ILEC when the ILEC seeks interconnection on the CLEC's network. Intrado Comm states that §251(c) is the "appropriate mechanism for Intrado Comm to secure "nondiscriminatory access to, and interconnection with Embarq's networks for the provision of 911/E911 services." Because Intrado Comm does not offer telephone exchange service, Embarq is not obligated to interconnect with Intrado Comm pursuant to §251(c).

Finally, we have arbitrated issues outside of §251(c) when both parties agreed to Commission action. To date, we have not reviewed any interconnection arrangements pursuant solely to §251(a).⁶

⁶ Recently, a similar issue was addressed by the Virginia State Corporation Commission (Virginia Commission), which deferred Intrado Comm's petition for arbitration to the FCC, stating the FCC should first decide whether Intrado Comm is entitled to §251(c) interconnection. *Petition of Intrado Comm. of Virginia, Inc. for Arbitration to Establish an Interconnection Agreement with Central Telephone Co. of Virginia d/b/a Embarq and United Tel.-Southeast, Inc. d/b/a Embarq, under Section 252(b) of the Telecommunications Act of 1996*, Order of Dismissal, Case No. PUC-2007-00112, at 2-3 (Feb. 14, 2008). As a result, Intrado Comm petitioned the FCC for resolution of the issues. *Petition of Intrado Comm. of Virginia Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corp. Commission Regarding arbitration of an Interconnection Agreement with Central Tel. Co. of Virginia and United Tel.-Southeast, Inc.*, FCC WC Docket No. 08-33, filed March 6, 2008. The FCC granted Intrado Comm's petition, preempting the jurisdiction of the Virginia Commission in a Memorandum Order and Opinion, issued October 16, 2008, *In the matter of Petition of Intrado*

C. Public Interest Considerations

With the emergence of a competitive 911/E911 provider in the Florida marketplace, there may be potential unintended consequences that affect more than just the current parties to this docket, impacting all carriers in Florida, including wireless and VoIP providers. Most carriers are directed by statute to provide their end users access to 911/E911 service. These carriers may incur higher costs to access 911/E911 service or be forced to rehome circuits,⁷ if a competitive provider's selective router is located outside of Florida. Intrado Comm currently has no selective routers in Florida, although it will eventually be deploying a minimum of two selective routers within the state of Florida. We are concerned that carriers may be forced to transport 911/E911 calls over great distances, perhaps even out of state.

Commission involvement in the provisioning of 911/E911 service is important because of the potential impact on the health and safety of Florida citizens. This is a case of first impression which presents unique circumstances and policy concerns not previously addressed by this Commission. We note that 911/E911 service is an essential service in Florida. Pursuant to §364.01(4)(a), F.S., we are entrusted with protecting the public health, safety and welfare and must ensure access to basic local service, which includes access to 911/E911 service. It is imperative that access to 911/E911 services continue uninterrupted regardless of the 911/E911 service provider. We are further supported by the FCC which has acknowledged the importance of a state's role in 911/E911 matters.⁸

We find that this Commission is not the only agency or entity with an interest in monitoring of 911/E911 service. Intrado Comm witness Melcher acknowledges that 911/E911 service impacts many entities, stating that:

Public safety is the customer. It's the public safety leaders that should be involved in the decision-making process. And what is so sad to me is that as these kinds of hearings are going on around the country today, the person not sitting at the table that needs to be represented is the public safety leader. They have to be provided choices, they have to be given options that they've not been given in the past.

Communications of Virginia Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Arbitration of an Interconnection Agreement with Verizon South Inc. and Verizon Virginia Inc., FCC WC Docket 08-185, stating that the Virginia Commission explicitly deferred action to the FCC.

⁷ Rehoming is when there is a major network change which involves moving customer services from one switching center to another and establishing the necessary trunking facilities to do so. Harry Newton, Newton's Telecom Dictionary, 19th ed. 2003.

⁸ The Wireless Telecommunications and Public Safety Act of 1999 mandates that the Federal Communications Commission "shall encourage and support efforts by States to deploy comprehensive end-to-end emergency communications infrastructure and programs, based on coordinated statewide plans, including seamless, ubiquitous, reliable wireless telecommunications networks and enhanced wireless 911 service."

ORDER NO. PSC-08-0799-FOF-TP
DOCKET NO. 070699-TP
PAGE 8

Embarq witness Maples also acknowledges the need for coordination among all affected entities, stating that the:

Different aspects of emergency service is [sic] extremely important to the issue of how the existing emergency service infrastructure will evolve to the NG-911 platform. It is a massive and likely expensive task that will require much coordination in addition to legislation to address how it will be funded. This effort cannot effectively be accomplished through a series of isolated arbitrations and legal disputes between carriers, such as this proceeding, where one carrier is attempting to implement a business plan that depends on imposing unreasonable obligations upon ILECs such as Embarq that go far beyond the Telecommunications Act.

Sections 365.171-175, F.S., address Florida's 911/E911 plan. Any changes involving 911/E911 require the facilitation and cooperation of all affected agencies and entities to resolve any changes or complications that affect 911/E911 in Florida. Decisions affecting the provision of 911/E911 service in Florida are made by several different agencies, including the Department of Management Services, local and state officials, providers and PSAPs. Accordingly, any discussion regarding the provisioning of competitive 911/E911 service in Florida requires that all potentially affected parties be consulted and afforded an opportunity to weigh in on these vital matters.

III. Decision:

We find that Intrado Comm currently provides or intends to provide 911/E911 service to Public Safety Answering Points in Florida. This service does not meet the definition of "telephone exchange service" pursuant to 47 U.S.C. 153(47) because it will not provide the ability both to originate and terminate calls.

We also find that Intrado Comm's 911/E911 service does not meet the definition of "telephone exchange service," pursuant to the provisions set forth in §251(c). We also find that Embarq is not required to provide interconnection pursuant to the provisions set forth in §251(c). We find it appropriate that since any resulting agreement between the parties is not pursuant to §251(c), this Commission need not address the remaining 9 issues identified in the Prehearing Order, Order No. PSC-08-0401-PHO-TP.

This docket shall be closed and the parties may negotiate a commercial agreement pursuant to §251(a). We are aware of several public policy matters that may warrant examination with the emergence of competitive 911/E911 providers. As such, we direct our staff to further explore these matters.

ORDER NO. PSC-08-0799-FOF-TP
DOCKET NO. 070699-TP
PAGE 9

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Intrado Communications, Inc. currently provides or intends to provide 911/E911 service to Public Safety Answering Points in Florida. It is further

ORDERED that Intrado Communications, Inc.'s 911/E911 service does not meet the definition of "telephone exchange service" pursuant to 47 U.S.C. 153(47) because the service will not provide the ability both to originate and terminate calls. It is further

ORDERED that Embarq Florida, Inc. is not required to provide interconnection pursuant to the provisions set forth in §251(c) and the parties may negotiate a commercial agreement. In addition, the remaining 9 issues identified in the Prehearing Order, Order No. PSC-08-0401-PHO-TP, need not be addressed. It is further

ORDERED that our staff shall further explore public policy matters that may warrant examination with the emergence of competitive 911/E911 providers. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 3rd day of December, 2008.



ANN COLE
Commission Clerk

(S E A L)

TLT

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request:

- 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or
- 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.