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MESSER CAPARELLO & SELF, P.A.

Attorneys At Law

www.lawfla.com

March 14, 2008

BY ELECTRONIC FILING
Ms. Ann Cole, Director
Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 080089-TP

Dear Ms. Cole:

Enclosed for filing on behalf of Intrado Communications Inc. is are an electronic version of Intrado Communications Inc.'s Response to AT&T Florida's Motion to Dismiss and Reply to Intrado's Petition for Declaratory Statement in the above referenced docket.

Thank you for your assistance with this filing.

Sincerely yours,

Floyd R. Self

FRS/amb
Enclosure
cc: Rebecca Ballesteros, Esq.

Regional Center Office Park / 2618 Centennial Place / Tallahassee, Florida 32308
Mailing Address: P.O. Box 15579 / Tallahassee, Florida 32317
Main Telephone: (850) 222-0720 / *Fax:* (850) 224-4359

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of
Intrado Communications Inc.
for Declaratory Statement
Regarding Local Exchange
Telecommunications Network
Emergency 911 Service
_____/

Docket No. 080089-TP
Filed March 14, 2008

RESPONSE TO AT&T FLORIDA'S MOTION TO DISMISS INTRADO'S PETITION FOR DECLARATORY STATEMENT

Intrado Communications Inc. ("Intrado"), pursuant to Rule 28-106.204, Florida Administrative Code, hereby files this Response to AT&T Florida's ("AT&T") Motion to Dismiss Intrado's Petition for Declaratory Statement and states:

1. Section 120.565, Florida Statutes, provides that "[a]ny 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." AT&T filed a Petition for Leave to Intervene, and has now moved the Commission to dismiss the Petition for Declaratory Statement filed by Intrado, primarily on the basis that it does not meet standards applicable to judicial declaratory judgments. As will be explained herein, declaratory statements under Florida Statutes Section 120.565 are intended to be liberally construed to allow persons to seek agency guidance before action is taken, contrary to the standard for declaratory judgments. As set forth herein, AT&T's arguments in support of its motion are based on fundamental misunderstanding of the law, and should be rejected by the Commission.

2. As stated in the Petition for Declaratory Statement, this case involves the specific question of whether Intrado, as a competitive local exchange carrier ("CLEC"), or its customers are required by statute, rule or order of the Commission to pay ILEC tariff charges for local

exchange telecommunications 911 services once the ILEC is no longer the 911 service provider.[1] For the reasons set forth in the Petition, Intrado has legitimate questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority, and determined a need for a declaratory statement to resolve questions or doubts as to how the statutes, rules, orders, and tariffs discussed therein may apply to Intrado's particular circumstances. The fact that the requested declaratory statement may also affect the rights of others is no bar to Intrado's right to request and receive a declaratory statement. *Department of Business and Professional Regulation, Division of Pari-Mutual Wagering v. Investment Corp. Of Palm Beach*, 747 So.2d 374 (Fla. 1999); *1000 Friends of Florida, Inc. v. Department of Community Affairs*, 760 So.2d 154 (Fla. 1st DCA 2000).

3. AT&T relies on a series of cases applicable to judicial declaratory judgments as the basis for its motion to dismiss the petition for a declaratory statement under Section 120.565. Although the remedies are similar, they are by no means identical. An early commentator on the issue noted that:

> Another distinction between declaratory judgments and declaratory statements regards the "case or controversy" requirement applied to declaratory judgment actions. In a declaratory judgment suit, the courts have long held that a matter in controversy must be actually present. . . . Other courts have applied an "injury-in-fact" standard

[1] AT&T has noted that the Petition is couched in terms of whether an ILEC can charge Intrado or its customers for services the ILEC no longer provides, thus in its view seeking a declaration of the conduct of another person. While the courts have construed that provision and Section 120.565, Fla. Stat. so as to avoid the elevation of form over substance, in order to placate AT&T's concerns, Intrado is, simultaneously with this Reply, moving for leave to amend the petition to restate the questions subject to the declaration as follows:

a. Once a PSAP has selected Intrado to be its local exchange telecommunications network provider of 911 services, does Intrado or its customer have to pay an ILEC for any of the ILEC's 911 services that have been terminated by the PSAP and assumed by Intrado?

b. Once a PSAP has selected Intrado to be its local exchange telecommunications network provider of 911 services, does Intrado or its customer have to pay an ILEC for post termination 911 services not currently in the ILEC's tariff?

c. Once a PSAP has selected Intrado to be its local exchange telecommunications network provider of 911 services, does Intrado or its customer have to pay an ILEC for bundled post-termination 911 charges with other charges that may be charged to Intrado and/or the PSAP?

> to determine whether a petitioner may bring an action for declaratory statement. Such a test would be similar to the "case or controversy" standard, requiring a real and present injury to the petitioner. However, the Florida Supreme Court in *Investment Corp.* receded from those holdings, suggesting that a relaxed standard should apply based on its interpretation of the "particular circumstances" standard found in the declaratory statement provision, F.S. §120.565.
>
> The Florida Supreme Court's ruling in *Investment Corp.* broadly expands the availability of declaratory statements to those who would seek agency interpretation on a question of law or policy. This revitalization of an integral component of the Administrative Procedure Act can only improve the guidance available to parties affected by state agency action.

Seann M. Frazier, *The Expanded Availability of Declaratory Statements,* 74 Fla. Bar Journal No. 4 (April 2000).

4. More recent commentary has reinforced the fact that declaratory statements and declaratory judgments are not the same, and are not to be measured by the same standards.

> Thus, there can be no question that no longer are declaratory statements simply the agency equivalent of a declaratory judgment. 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. While it is possible to construct factual scenarios under which either form of relief is proper, declaratory statements are now available in situations in which declaratory judgments most assuredly are not.

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

5. The standards for seeking a declaratory statement under the 1996 amendments to Florida Statutes Section 120.565 first began to be explained by the First District Court of Appeal as follows:

> However, the present case is subject to a less restrictive provision in the Administrative Procedure Act, as revised in 1996. Section 120.565(1), Florida Statutes (Supp.1996), states that "[a]ny substantially affected person may seek a declaratory statement

> regarding an agency's opinion as to the applicability of a statutory provision, or any rule or order of the agency, as it applies to the petitioner's particular set of circumstances." The deletion of the word "only" signifies that a petition for declaratory statement need not raise an issue that is unique. While the issue must apply in the petitioner's particular set of circumstances, there is no longer a requirement that the issue apply only to the petitioner.
>
> . . .
>
> 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. *See* § 120.565, Florida Statutes (1996). A party who obtains a statement of the agency's position may avoid costly administrative litigation by selecting the proper course of action in advance. Moreover, the reasoning employed by the agency in support of a declaratory statement may offer useful guidance to others who are likely to interact with the agency in similar circumstances.

Chiles vs. Department of State, Division of Elections, 711 So.2d 151, 154-155 (Fla. 1st DCA 1998).

6. In 1999, the Supreme Court expounded on the difference between a declaratory judgment and a declaratory statement. In *Department of Business and Professional Regulation, Division of Pari-mutuel Wagering v. Investment Corp. Of Palm Beach*, 747 So.2d 374 (Fla. 1999), the Court cited, with approval, the late Professor Patricia Dore's authoritative APA article and its analysis of the purpose and effect of a declaratory statement, and held that:

> On this general issue, Professor Dore wrote that "[t]he purposes of the declaratory statement procedure are 'to enable members of the public to definitively resolve ambiguities of law arising in the conduct of their daily affairs or in the planning of their future affairs' and 'to enable the public to secure definitive binding advice as to the applicability of agency-enforced law to a particular set of facts.' " Dore, *supra* note 4, at 1052 (footnotes omitted). Professor Dore analogized the procedure to a declaratory judgment action, except that "the administrative substitute [was intended to] be more widely available than the judicial remedy and that its use not be unduly restricted by artificial access barriers that would frustrate its primary purposes." *Id.* at 1053. She elaborated that:
>
> > The procedure was developed to meet the perceived inadequacies of declaratory judgment actions. It was developed to provide a less costly, less lengthy,

> less complicated, and less technical nonjudicial mechanism for members of the public to secure "binding advice where it is necessary or helpful for them to conduct their affairs in accordance with law." For this executive branch alternative to work properly, great care must be exercised by both agencies and courts to understand it for what it is and not to treat it as a masquerading declaratory judgment action.

Investment Corp. of Palm Beach at 382, citing Patricia A. Dore, *Access to Florida Administrative Proceedings,* 13 Fla. St. U.L.Rev. 965 (1986).

7. Based on the authoritative analysis by the courts and commentators, it is clear that a declaratory statement is intended be far more widely available to determine the legality of actions before they occur than a declaratory judgment. Some of the broadened access is attributable to the 1996 amendments to the Administrative Procedures Act. Therefore, AT&T's argument, which is predicated on pre-1996 declaratory statement cases (Motion to Dismiss at p.2, ¶3) and on declaratory judgments cases that are entirely inapplicable to this proceeding (Motion to Dismiss at pp. 4-5, ¶¶6-8 and pp.7-8, ¶¶12-13), is completely without merit. Unlike AT&T, which consistently implies ill-intent on Intrado's actions in filing its petition (see ¶21 below), Intrado does not assert that AT&T's arguments were presented in an intentional effort to mislead the Commission. Rather, Intrado accepting AT&T's pleading at face value, and merely notes that it reflects an incomplete and erroneous understanding of the law.

8. In a case before the First District Court that shares substantive and procedural similarities to this proceeding, the statewide environmental organization, 1000 Friends of Florida, and several other similar parties filed a petition for declaratory statement with the Department of Community Affairs ("DCA") arguing that the Department of Transportation ("DOT") applied for, and was granted, a permit from the Department of Environmental Protection to install sewer and water lines to two rest stops maintained by the DOT. 1000

Friends alleged that St. Johns County failed to comply with applicable law by allowing DOT to construct the lines, and by agreeing to pay for them, without first processing an amendment to its Comprehensive Plan. *1000 Friends of Florida, Inc. v. State, Dept. of Community Affairs*, 760 So.2d 154, 155 (Fla. 1st DCA 2000).

9. As AT&T has done in this case, St. Johns County filed a response alleging, among other things, that the petition was based on misstatements of fact and law. St. Johns County further alleged that 1000 Friends was not a "substantially affected person" because it would not sustain any significant or substantial effect the approval of the project. St. Johns County alleged substantial public benefit from the project, and denied that it would be directly paying for the lines as alleged by 1000 Friends. *1000 Friends of Florida, Inc., supra* at 155-156.

10. St. Johns County next complained that the petition substantially affected the rights and interest of St. Johns County, but that St. Johns County was not named or served as a respondent. Finally, as AT&T has argued in this case, St. Johns County argued that:

> A declaratory statement may only be issued on "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*" (emphasis added) Section 120.565(1), Florida Statutes (1997). The primary focus and purpose of the Petition in this case is to determine the applicability of laws and rules to St. Johns County, not the Petitioners. The issue of the applicability of laws and rules to the Petitioner is peripheral and secondary at best. Therefore the subject Petition for Declaratory Statement should be denied because the requested Declaratory Statement is sought for a purpose not permitted by the authorizing statute.

1000 Friends of Florida, Inc., supra at 156.

11. The Department of Community Affairs referred the matter to the DOAH with the following referral:

> In light of the recent *Chiles* decision, the Department is unable to determine whether the Petition, which seeks the determination of laws and rules as they apply primarily to the Florida Department of Transportation and St. Johns County, is a proper request upon

> which the Department may issue a declaratory statement. In the matter currently before the Department, Petitioners seek relief that appears to directly affect the rights of another party, or parties, not named in this action.

1000 Friends of Florida, Inc. at 156.

12. The DOAH dismissed the petition, in part based on the ALJ's conclusion that the petition did not meet the requirements of Rule 28-105 because 1000 Friends sought a declaration concerning the conduct of St. Johns County and the DOT, rather than their own particular circumstances. The DCA Final Order dismissed the petition on that basis.

13. The First District Court reversed the Department of Community Affairs' dismissal of the petition. In its opinion, the Court rejected St. Johns County's argument that the petition should be dismissed because it sought a declaration concerning the application of a statute or rule to the circumstances of St. Johns County and the Florida Department of Transportation, and held:

> Moreover, the supreme court acknowledged with approval this court's determination that declaratory statements may help parties avoid costly administrative litigation, while simultaneously providing useful guidance to others who may find themselves in the same or similar situations. *See Investment Corp.*, 747 So.2d at 384. The court has long recognized that contemporary society requires that administrative agencies be accorded flexibility in the use of their authority. *See id.* In light of the foregoing principles and the more liberal language of the amended declaratory judgment statute, we conclude the Department improperly dismissed appellants' petition for declaratory statement.

1000 Friends of Florida, Inc. v. State, Dept. of Community Affairs, 760 So.2d 154, 158 (Fla. 1st DCA 2000)

14. In a more recent analysis of the scope of a declaratory statement, the First District Court considered the issue of a health service provider seeking a declaratory statement from the Agency for Health Care Administration on whether a future company that was to be created to handle certain aspects of the company's medical practice would be able to conduct business

consistent with Florida law. Without conducting a hearing, the AHCA dismissed the petition for declaratory statement on the following grounds:

> 1. Petitioner's Petition consists of a hypothetical scenario which has not yet occurred. Therefore, Petitioner is not substantially affected . . .
>
> 2. In the instant case, Petitioner's described set of circumstances are purely hypothetical, having not yet taken place. Petitioner acknowledges this, stating that it is interested in forming and owning, in large part, the Oncology Group, and that if it **were** formed, Petitioner **would** have a significant interest and **would** be at **risk** of being prohibited from billing for radiation services rendered. Because the circumstances Petitioner predicts have not yet occurred, and may never occur, Petitioner cannot demonstrate that it will be substantially affected should the declaratory statement not issue. Therefore, Petitioner lacks standing to bring the Petition. (emphasis in original)

Adventist Health System/Sunbelt, Inc. v. Agency For Health Care Administration, 955 So.2d 1173, 1175-1176 (Fla. 1st DCA 2007)

15. The First District Court reversed the AHCA's narrow construction of the scope of a declaratory statement. In a reasonably comprehensive recitation of the purpose and intent behind a petition for declaratory statement, the First District offered the following primer:

> "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." *Chiles v. Div. of Elections,* 711 So.2d 151, 154 (Fla. 1st DCA 1998). Florida courts have repeatedly noted that one of the benefits of a declaratory statement is to "avoid costly administrative litigation by selecting the proper course of action in advance." *See id.; Nat'l Ass'n of Optometrists & Opticians v. Fla. Dep't of Health,* 922 So.2d 1060, 1062 (Fla. 1st DCA 2006). Thus, a party should seek a declaratory statement from the agency "in advance" of selecting and taking a course of action. *See Novick v. Dep't of Health, Bd. of Med.,* 816 So.2d 1237, 1240 (Fla. 5th DCA 2002) ("The purpose of a declaratory statement is to allow a petitioner to select a proper course of action in advance."); *Fla. Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering v. Inv. Corp. of Palm Beach*, 747 So.2d 374, 382 (Fla.1999). In fact, a declaratory statement is not available when seeking approval of acts which have already occurred. *See Novick,* 816 So.2d at 1240.

Adventist Health System, supra at 1176.

16. In reversing the AHCA's dismissal of Adventist Health System's petition, the court held that:

> Thus, a declaratory statement will allow Appellant to plan its future conduct regarding the formation of the Group. This is precisely the type of situation for which the declaratory statement was designed. *See Fla. Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering,* 747 So.2d at 382 ("'[T]he purposes of the declaratory statement procedure are to enable members of the public to definitively resolve ambiguities of law arising in the conduct of their daily affairs *or in the planning of their future affairs.*' ") (emphasis added) (quoting Patricia A. Dore, *Access to Florida Administrative Proceedings,* 13 Fla. St. U.L.Rev. 965, 1052 (1986)). Thus, AHCA erred when it refused to issue a declaratory statement on the grounds that the issue raised by Appellant was "purely hypothetical" and Appellant was not substantially affected.

Adventist Health System, supra at 1176.

17. AT&T also decries the alleged "sparse recitation" of facts in Intrado's petition. Intrado asserts that it included all of 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. However, if the Commission determines that further facts are necessary in order for it to enter a declaratory statement, the remedy is not dismissal of the Intrado petition. Rather, "[t]o the extent the agency did not have enough facts to make a decision, it could have requested those facts from Appellant, . . . it also could have held a hearing to determine those facts. *Adventist Health System, supra* at 1176.

18. AT&T relies on the Commission's Order in *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, Docket No. 0060049-TL, Order No. PSC-06-0306-DS-TL (April 19, 2006) in support of its motion to dismiss. Again, AT&T's analysis of the Commission's action is incorrect, and its reliance on that Order is misplaced.

19. While it is true that the Commission was concerned with the manner in which the questions posed by Broward County were presented, i.e., whether BellSouth could take certain actions, instead of whether Broward County was required to take certain actions, the Commission did not dismiss Broward County's petition. Rather, in keeping with the broad and liberal construction placed by the courts on Section 120.565 and the public purpose served by enabling the public to resolve ambiguities of law arising in their daily affairs, whether in the present or in the future, the Commission restated the questions. In its Order, the Commission stated that:

> We find that any declaratory statement issued by us should pertain to Broward County, not BellSouth; should only address the tariff provisions and rules specifically referenced in Broward County's petition; and should only interpret the telecommunications provisions within our purview. With this in mind, it appears that Broward County's Petition for Declaratory Statement raises the following issues: 1) whether Broward County is required to provide space for BellSouth's Maxihut rent-free; and 2) whether Broward County is obligated to pay for the relocation of the Maxihut if Broward County requires the relocation of the Maxihut.

In re: Petition by Board of County Commissioners of Broward County, Order No. PSC-06-0306-DS-TL at p.7.

20. Thus, contrary to AT&T's assertion that the Commission "rejected this portion of Broward County's Petition," (Motion at p.4, ¶5) thus justifying dismissal of Intrado's petition, the Commission restated the question to allow for a reasoned analysis of the issue.[2] In this case,

[2] It should also be noted that the Commission granted the relief requested by Broward County, despite the inartful presentation of its questions.

in order to assist the Commission to that means, Intrado is moving for leave to amend its petition to restate the questions posed. See footnote 1, *infra.*

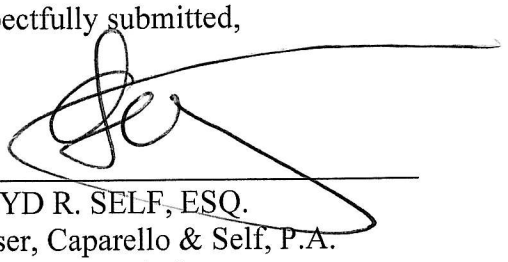
21. As to a more procedural matter, AT&T again wrongfully accuses Intrado, in filing its petition under Section 120.565, of attempting to "sneak it by" other persons (AT&T Motion at p.7, ¶11), of filing a "stealth petition" (AT&T Motion at p.8, ¶13), or of engaging in "subterfuge" (AT&T Motion at p.8, ¶14). AT&T's allegations fail to understand the procedures established in Florida for filing Declaratory Statements. As set forth in Intrado's Response to AT&T Florida's Petition to Intervene, Rule 28-105.002, Florida Administrative Code provides "[a] petition seeking a declaratory statement shall be filed with the clerk of the agency that has the authority to interpret the statute, rule, or order at issue." Upon filing, Section 120.565(3), Florida Statutes and Rule 28-105.0024, Florida Administrative Code require the agency to file a notice in the Florida Administrative Weekly containing information sufficient to place interested persons on notice. The Commission filed the notice as required, and it was published March 7, 2008 in the Florida Administrative Weekly at Volume 34, Number 10, page 1418. There is absolutely no requirement in statute or rule that a petitioner serve anyone other than the agency.

The notice, as described by the First District Court, "accounts for the possibility that a declaratory statement may, in a practical sense, affect the rights of other parties." *Chiles vs. Department of State, Division of Elections*, 711 So.2d 151, 155 (Fla. 1st DCA 1998). The Supreme Court, citing *Chiles* with approval, has held that "[w]e also find that the procedural safeguards inherent in a petition for declaratory statement are sufficient to protect the rights of any other concerned parties." *Department of Business and Professional Regulation, Division of Pari-mutuel Wagering v. Investment Corp. Of Palm Beach*, 747 So.2d 374 (Fla. 1999). If AT&T has difficulty with the procedures applicable to declaratory statements, it should direct its attention to the Florida Legislature or the Administration Commission.

22. Finally, by filing this Reply, Intrado does not waive its argument, raised in its Response to AT&T Florida's Petition for Leave to Intervene that Rule 28-105.0027, Florida Administrative Code does not authorize the filing of a "responsive pleading." Rather, the Rule only allows a substantially affected person to file a petition to intervene in a form that meets the requirements of subsection 28-106.201(2). F.A.C. The intervention rules do not authorize the filing of either a Motion to Dismiss or an Answer and Affirmative Defenses. As set forth in the response, Section 120.565, Florida Statutes, 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." Rule 28-105.003, Florida Administrative Code provides that in making its declaratory statement, "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, AT&T's role is limited to arguing the law as applied to the facts presented to the Commission by Intrado or as developed pursuant to request by the Commission.

23. For the reasons set forth herein, Intrado requests that the Commission deny AT&T's unauthorized and legally baseless Motion to Dismiss, and proceed with the development and entry of a declaratory statement on the issues identified by Intrado.

Respectfully submitted,



FLOYD R. SELF, ESQ.
Messer, Caparello & Self, P.A.
2618 Centennial Place
Tallahassee, Florida 32308
Telephone: (850) 222-0720
Facsimile: (850) 558-0656

and

Rebecca Ballesteros
Associate Counsel
Intrado Communications Inc.
1601 Dry Creek Drive
Longmont, CO 80503
(720) 494-5800 (telephone)
(720) 494-6600 (facsimile)

Counsel for Intrado Communications, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Electronic Mail and U.S. Mail this 14th day of March, 2008.

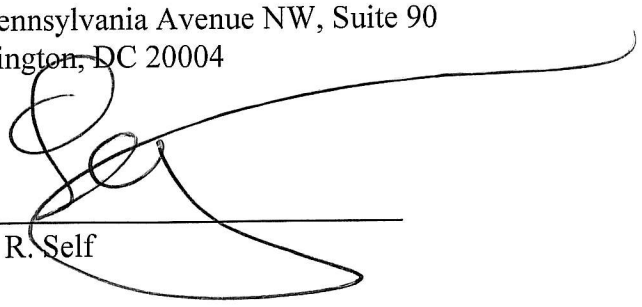
Richard Bellak, Esq.
Rosanne Gervasi, Esq.
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Earl Edenfield
Tracy Hatch
c/o Mr. Gregory Follensbee
AT&T Florida Inc.
150 South Monroe Street, Suite 400
Tallahassee, FL 32303-1556

Dulaney L. O'Roark III
Verizon Florida LLC
5055 North Point Parkway
Alpharetta, GA 30022

Rebecca Ballesteros
Intrado, Inc.
1601 Dry Creek Drive
Longmont, CO 80503

Chérie R. Kiser
Angela F. Collins
Mintz Law Firm
701 Pennsylvania Avenue NW, Suite 90
Washington, DC 20004



Floyd R. Self