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March 19, 2008

**VIA 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 an electronic version of Intrado Communications Inc.'s Response to Verizon Florida LLC's Motion to Dismiss 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
Enclosures
cc: Rebecca Ballesteros, Esq.

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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| In Re: Petition of Intrado Communications, Inc. for Declaratory Statement Regarding Local Exchange Telecommunications Network Emergency 911 Service | ) ) ) ) | Docket No. 080089-TP Filed: March 19, 2008 |

**RESPONSE TO VERIZON FLORIDA LLC'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 Verizon Florida LLC's ("Verizon") Motion to Dismiss Intrado's Petition for Declaratory Statement[1] 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." Verizon filed a Petition for Leave to Intervene[2], 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

[1] On March 12, 2008, Verizon filed its Response in Opposition to Intrado's Response to Verizon's Petition for Leave to Intervene and Motion for More Definite Statement, and on March 14, 2008, Verizon filed its Motion to Dismiss and Response to Intrado's Petition for Declaratory Statement. The applicable rules of procedure authorize the filing of a response to a motion, but do not authorize a reply to a response. Therefore, as to both AT&T and Verizon, Intrado's response is limited to the Motion to Dismiss. The lack of a reply to the Response to Intrado's Petition should not be misconstrued as acquiescence in the allegations in the unauthorized responses, although some of the arguments were also included in the Motions to Dismiss.

[2] In Verizon's *Response in Opposition to Intrado's Response to Verizon's Petition for Leave to Intervene and Motion for More Definite Statement*, Verizon admits that it failed to comply with Rule 28-106.201(2), F.A.C., but states that "most of the other subsections are inapplicable." The rules of procedure do not give a party the right to pick and choose, complying only with those provisions it deems worthy. If Verizon's argument were accepted, i.e., Rule 28.106.201 applies only to "agency's proposed action" matters, then there would be no need for its express reference in Rule 28-105. Since Verizon has, by its own admission, failed to comply with Rules 28-105.0027 and 28-106.201, F.A.C., its Petition to Intervene should be dismissed with leave for it to file a compliant petition.

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, Verizon'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.[3] 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. Verizon, taking a page from AT&T's playbook, 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. (Verizon Motion to Dismiss, pp. 6-7) As stated

[3] Intrado has filed an amended petition to restate and clarify the questions to which Intrado is seeking a declaratory statement regarding the applicability of ILEC tariff charges, which have the force and effect of a rule, to Intrado's particular circumstances as a CLEC 911 service provider.

in the response to AT&T's Motion to Dismiss, 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 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, Verizon's argument, which is predicated on declaratory judgment cases that are entirely inapplicable to this proceeding, reflects an incomplete and erroneous understanding of the law and is completely without merit.

8. Verizon first alleges that Intrado failed to set forth facts and tariff provisions in sufficient detail for the Commission to develop a declaratory statement. (Verizon Motion to Dismiss, pp. 3-6) 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/Sunbelt, Inc. v. Agency For Health Care Administration*, 955 So.2d 1173, 1176 (Fla. 1st DCA 2007). That decision is, however, up to the Commission and not Verizon.

9. As to Verizon's argument that the Petition for Declaratory Statement must be dismissed because it may affect the rights of others, (Verizon Motion to Dismiss, pp. 7-8) such an effect does not form the basis for a dismissal. In addition to the caselaw set forth herein, the notice that is requires to be filed pursuant to Rule 28-105, F.A.C., is an explicit recognition that a declaratory statement may affect others. 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). Thus, Verizon's argument that the Petition should be dismissed because it affects its ability to collect unauthorized charges, and in so doing stifle competition, is unfounded.

10. 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).

11. St. Johns County 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. As Verizon 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.

12. 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.

13. 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.

14. 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)

15. 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, supra*, at 1176.

16. 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.

17. 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.

18. Verizon relies on the Commission's Order in *In re: Petition for declaratory statement concerning urgent need for electrical substation in North Key Largo by Florida Keys Electric Cooperative Association, Inc.*, Docket No. 020829-EC, Order No. PSC-02-1459-DS-EC (October 23, 2002) in support of its motion to dismiss. Verizon's analysis of the Commission's action is incorrect, and its reliance on that Order is misplaced. In its Order, The Commission noted that the Florida Keys Electric Cooperative Association was engaged in litigation regarding the land use implications of its decision to site an electrical substation in a wildlife preservation area, a decision that was under review by a different agency, and was being litigated by a third party environmental organization. Thus, the Commission recognized that it did not have authority over land use matters, and could not unilaterally command construction of the electrical

substation. Thus it denied the petition seeking a declaratory statement that the Florida Keys Electric Cooperative Association could construct the substation. In this case, although interconnection is the subject of an arbitration proceeding between Verizon and Intrado, the issues upon which a the declaratory statement are outside the scope of an interconnection agreement, and concern Intrado's obligation to pay unauthorized tariff charges, and the chilling effect that the threat of such payment has on its customers and on competition in general.

19. Finally, by filing this Reply, Intrado does not waive its argument 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. As set forth in Intrado's Response and Motion for More Definite Statement, Verizon has failed even that simple task. In any event, 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, Verizon'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.

20. For the reasons set forth herein, Intrado requests that the Commission deny Verizon'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,

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## 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 19th day of March, 2008.

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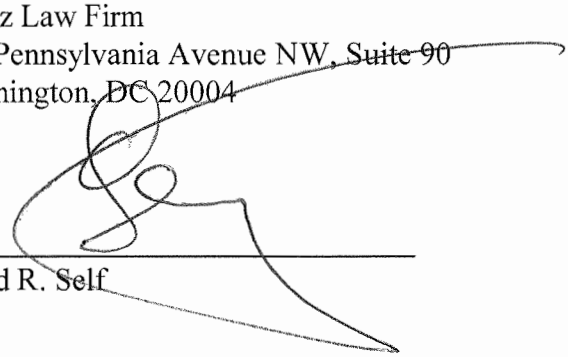

Floyd R. Self