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April 3, 2008 – **VIA ELECTRONIC MAIL**

Ann Cole, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 080089-TP
Petition for declaratory statement regarding local exchange telecommunications
network emergency 911 service, by Intrado Communications Inc.

Dear Ms. Cole:

Enclosed for filing in the above-referenced matter is Verizon Florida LLC’s Motion to Dismiss and Response to Intrado’s Amended Petition for Declaratory Statement. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this filing, please contact me at (678) 259-1449.

Sincerely,

s/ Dulaney L. O’Roark III

Dulaney L. O’Roark III

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Enclosures

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via electronic mail and U.S. mail on April 3, 2008 to:

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s/ Dulaney L. O'Roark III

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement regarding) Docket No. 080089-TP
local exchange telecommunications network) Filed: April 3, 2008
emergency 911 service, by Intrado)
Communications Inc.)
_____)

**VERIZON'S MOTION TO DISMISS AND RESPONSE TO
INTRADO'S AMENDED PETITION FOR DECLARATORY STATEMENT**

Verizon Florida LLC ("Verizon") moves to dismiss the Amended Petition for Declaratory Statement ("Amended Petition")¹ and in the alternative responds to the Amended Petition and requests that it be denied. The Amended Petition makes substantially the same allegations as the initial Petition for Declaratory Statement ("Initial Petition"), except that the questions Intrado asks the Commission to address have been recast in terms of what Intrado or its customers must pay an incumbent local exchange carrier ("ILEC") rather than what an ILEC has the authority to charge, which is a change in form rather than substance.² Accordingly, Verizon incorporates herein by reference its Motion to Dismiss and Response to Intrado's Petition for Declaratory Statement ("Initial Motion"). In addition, Verizon responds below to Intrado's assertion in various filings that it may use the declaratory statement process to obtain a determination of the contractual rights of Verizon and the other ILECs that arise from their respective tariffs.

Intrado mistakenly relies on the 1996 amendment to section 120.565, Florida Statutes to support its theory that it may use this proceeding to obtain a determination of

¹ Verizon does not oppose Intrado's Motion for Leave to Amend Intrado's Petition for Declaratory Statement.

² Intrado did not attempt to remedy substantive deficiencies in its Initial Petition such as the failure to specify the particular set of circumstances in question. Instead, Intrado has cavalierly asserted that any deficiency in its factual allegations can be remedied through a request by the Commission for additional facts or during a hearing. (Intrado's Response to Initial Motion, p. 6.) The case on which Intrado relies for this approach, however, merely observed that the agency in question could have taken such measures; it did not hold that a petition for declaratory statement cannot be dismissed for failure to specify a particular set of circumstances as to which an opinion is requested. See *Adventist Health System/Sunbelt, Inc. v. Agency for Health Care Administration*, 955 So. 2d 1173, 1176 n.3 (Fla. 1st DCA 2007). Because Intrado failed to meet that statutory requirement in its Initial Petition, and has not remedied the deficiency in its Amended Petition, dismissal is appropriate.

the ILECs' contractual rights. Before 1996, section 120.565(1) provided that a petitioner could seek a declaratory statement "as it applies to the petitioner in his or her particular set of circumstances only." The 1996 amendment deleted the word "only," which "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."³ Moreover, "a declaratory statement is not transformed into a rule merely because it addresses a matter of interest to more than one person."⁴ Thus, a petitioner may not be turned away just because there may be other parties with similar interests who may as a practical matter be affected by the precedential effect of a declaratory statement. Intrado's arguments based on this authority miss the mark because Verizon is not challenging the petition on the ground that it might establish a precedent for other providers of 911 service. Rather, Verizon asserts (in addition to the other issues raised in its Initial Motion) that Intrado is misusing the declaratory statement process in an attempt to adjudicate Verizon's contractual rights.

The Amended Petition asks for a determination that Intrado and Public Safety Answering Points ("PSAPs") are not required to pay for certain unspecified 911 services under the ILECs' tariffs once a PSAP elects to use Intrado's 911 services. Although a tariff that is filed and accepted by the Commission "has the force and effect of law," the tariff "also 'constitutes the contract of carriage between the parties.'"⁵ By seeking an interpretation of the ILECs' tariffs, therefore, Intrado is asking for a determination of the

³ *Chiles v. Department of State*, 711 So. 2d 151, 154 (Fla 1st DCA 1998). In *Florida Department of Business and Professional Regulation v. Investment Corp. of Palm Beach*, 747 So. 2d 374 (Fla. 1999), the Florida Supreme Court cited *Chiles* with approval, but noted that the 1996 amendment may not have effected any substantive change in the law, but only clarified section 120.565(1).

⁴ *Chiles*, 711 So. 2d at 154.

⁵ *BellSouth Telecommunications, Inc. v. Jacobs*, 834 So. 2d 855, 859 (Fla. 2002) (emphasis added)(quoting *Bella Boutique Corp. v. Venezolana Internacional de Aviacion, S.A.*, 459 So. 2d 440, 441 (Fla. 3d DCA 1984).

terms and conditions of the existing contractual arrangements between the ILECs and PSAPs and the prospective contractual arrangement between the ILECs and Intrado. In other words, Intrado does not merely request Commission action that will *affect* the interests of third parties as a matter of non-binding precedent, it asks the Commission to *determine* the contractual rights of third parties by seeking a dispositive interpretation of the ILECs' tariffs. Because "[a] declaratory statement is not the appropriate means for determining the conduct of another person,"⁶ Intrado cannot get the result it seeks using a request for declaratory statement.⁷ When a party is seeking a determination of another party's substantial rights, it must rely on another statutory process, such as provided under sections 120.569 and 120.57, Florida Statutes.⁸

Chapter 28-105 demonstrates that Florida's declaratory statement process was not designed for the determination of opposing parties' rights. Under Chapter 28-105, notice of filing the petition is not required to be personally served on other parties, but rather is made by publication. In contrast, in proceedings involving the determination of a party's substantial interest, pleadings generally must be served on each party (or the party's representative) at the last address of record.⁹ The declaratory statement process does not address discovery and does not require that a hearing be held, and as a

⁶ Rule 28-105.001.

⁷ Although the Commission has stated that it may issue a declaratory statement interpreting tariff provisions, it did so in a case in which the underlying facts were not in dispute and the petitioner's right to request a declaratory statement was not challenged. See *In re: Petition by Board of County Commissioners of Broward County for declaratory statement regarding applicability of BellSouth Telecommunications, Inc. Tariff provision 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. 060049-TL, Order No. PSC-06-0306-DS-TL (April 16, 2006). The Commission thus did not consider arguments that use of the declaratory statement process is not appropriate when contractual rights under a tariff are in dispute.

⁸ Section 120.569 states in pertinent part that "[t]he provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency, unless the parties are proceeding under s. 120.573 or s. 120.574. Unless waived by all parties, s. 120.57(1) applies whenever the proceeding involves a disputed issue of material fact. Unless otherwise agreed, s. 120.57(2) applies in all other cases." Likewise, the procedural rules that apply to proceedings in which the substantial interests of a party are determined (see Chapter 28-106) differ from those that apply to declaratory statement proceedings (see Chapter 28-105).

practical matter there is little time for activities such as factual development, resolution of discovery disputes and filing of pre-filed testimony because the Commission must make its decision within 90 days. Indeed, the Commission “may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts.”¹⁰ A process that permits the Commission to accept one party’s version of the facts and disregard factual disputes raised by another party would be fundamentally unfair (and indeed could violate procedural due process rights) if applied to contested cases involving the determination of substantial rights.

Intrado’s contentions in this case show that it chose the declaratory statement process precisely because it hoped to prevent adverse parties from contesting its version of the facts. Intrado has insisted that “there are no disputed facts” in this case and that Verizon’s “role is not to suggest some alternative set of facts upon which the Commission should base its declaratory statement.”¹¹ To the contrary, Intrado has asserted, “Verizon’s role is limited by statute only to any argument as to the law as applied to the facts presented to the Commission by Intrado.”¹² Although Verizon disagrees with Intrado’s self-serving interpretation of the applicable procedures, Intrado’s statements underscore the limitations of declaratory statement proceedings and the practical reasons why they are inappropriate for the determination of parties’ substantial rights. If taken to the extremes suggested by Intrado, the declaratory statement process would violate Verizon’s procedural due process rights in this case by denying it a meaningful opportunity to be heard.

⁹ Rule 28-106.110.

¹⁰ Rule 28-105.003.

¹¹ Response to Verizon Florida LLC’s Petition for Leave to Intervene, and Motion for More Definite Statement, p. 3 (March 5, 2008).

¹² *Id.*

For the foregoing reasons, and those stated in the Initial Motion, Verizon requests that Intrado's Petition be dismissed or in the alternative denied.

Respectfully submitted on April 3, 2008.

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