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-09-0155-FOF-TP ISSUED: March 16, 2009

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 DENYING MOTION FOR RECONSIDERATION

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 amended[1] (Act), and Section 364.162, Florida Statutes (F.S.). An evidentiary hearing was held July 9, 2008.

On December 3, 2008, the Florida Public Service Commission (Commission) issued its Final Order in this matter, Order No. PSC-08-0799-FOF-TP. On December 18, 2008, Intrado Comm filed a Motion for Reconsideration (Motion) and a Request for Oral Argument on the Motion for Reconsideration (Request).

On December 29, 2008, Embarq filed its Responses in Opposition to the Intrado Comm pleadings.

We are vested with jurisdiction over these matters pursuant to the provisions of Chapters 364 and 120, Florida Statutes.

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

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II. Analysis

A. Intrado Comm's Request for Oral Argument

Rule 25-22.0022(3), Florida Administrative Code (F.A.C.), states that granting or denying a request for oral argument is within the sole discretion of the Commission or the Prehearing Officer, whichever presides over the matter to be argued. The respective arguments are summarized below.

Intrado Comm believes the Commission "overlooked critical issues of fact and law and misunderstood the law and facts it did consider." Intrado Comm claims that we have not heard argument on the "threshold issue,[2]" nor has it heard argument relating to its obligation to arbitrate the parties' disputes pursuant to state law. Although it presented information on the "threshold issue" in its brief, Intrado Comm states that pre-imposed page limitations hampered its ability to fully discuss this critical legal issue. Intrado Comm seeks the opportunity to "enhance the Commission's understanding of the issues at hand."

Embarq's Response in Opposition to Oral Argument states that oral argument is unnecessary. Embarq believes the record evidence and post-hearing briefs "provided more than a sufficient basis for the Commission's [Final] Order." In addition, both parties made opening presentations, and participated in cross-examining the opposing witnesses in order to set forth the facts and respective positions for this Commission. Intrado Comm acknowledges that Rule 25-22.0022, F.A.C., gives us the latitude to grant a request for oral argument, but only when "the request for oral argument . . . would aid the Commissioners in understanding and evaluating the issues to be decided." Embarq believes in this instance, Intrado Comm's request should be denied.

In pertinent part, Rule 25-22.0022(1), F.A.C., sets forth the rationale for granting a request for oral argument: The moving party should

> state with particularity why oral argument would aid the Commissioners . . . in understanding and evaluating the issues to be decided, and the amount of time requested for oral argument.

We are not swayed by the notion that additional argument "would aid the Commissioners" in considering the matters that were fleshed out in the hearing and the briefs, and memorialized in Order No. PSC-08-0799-FOF-TP. We agree with Embarq on this point. Consequently, we hereby deny Intrado Comm's Request for Oral Argument.

B. Intrado Comm's Motion for Reconsideration

Intrado Comm asserts that this Commission

[2] The "threshold issue" considered whether Intrado Comm's service offering met the definition of 'telephone exchange service' as defined in 47 U.S.C. § 153(47), and if Embarq was required to provide interconnection pursuant to the provisions of §§ 251(a) or 251(c).

- entirely overlooks Intrado Comm's request for arbitration under Florida law;
- entirely overlooks half of the relevant definition from 47 U.S.C. § 153(47)(A);
- runs afoul of FCC precedent in interpreting 47 U.S.C. § 153(47)(B); and
- misunderstood the record evidence, which resulted in an "erroneous decision."

(Motion at 3-4) In addition, Intrado Comm claims new factual information has come to light that supports its Motion for Reconsideration.[3] Intrado Comm has entered into three contracts to provide 911/E-911 services in Florida. The Company states that it "cannot" provide service to these or any other customers in Florida without a section 251(c) interconnection agreement. Intrado Comm believes the Commission erred in its conclusion that "the parties may negotiate a commercial agreement pursuant to §251(a)." (Order No. PSC-08-0799-FOF-TP at 8; Motion at 5)

Arbitration pursuant to Florida Law

Intrado Comm believes we simply failed to consider state law in our Order. In doing so, it "missed the opportunity . . . to ensure that Florida citizens receive the benefits of a competitive 911/E911 services industry." The Company states that its original pleading (to request arbitration) was clear in that it sought relief pursuant to state and federal law. However, in rendering its decision, the Commission relied upon portions of 47 U.S.C. § 153(47) that are not found in Florida law. In pertinent part, Section 364.161(1) states that "parties . . . may petition the commission to arbitrate the dispute *and the commission **shall** make a determination within 120 days*." Intrado Comm states a three-part litmus test must be met before either party can engage the arbitration procedures pursuant to Florida law:

- First, a Florida-certified local exchange company must have received a request to unbundle "all of its network features, functions, and capabilities, including access to signaling databases, systems and routing processes;"
- Second, the above-described request must have come from any other telecommunications provider; and
- Third, the parties must demonstrate that they have been unable to reach a resolution within 60 days.

Intrado Comm believes it has satisfied these requirements and that "Florida law [has] triggered the Commission's unmitigated duty to arbitrate the parties' disputes." In its Motion, Intrado Comm states that in other cases, we have asserted its state-law authority over interconnection matters.

[3] In Order No. PSC-97-0637-FOF-TL, issued on June 3, 1997, in Docket No. 961153-TL, Intrado Comm asserts that we granted a similar motion based on "substantial pertinent information that was not in the record originally." (Intrado Comm Motion at 5)

Consideration of 47 U.S.C. § 153(47)

Order No. PSC-08-0799-FOF-TP states that Intrado Comm is not entitled to arbitration under Section 251(c) of the Act since it will not be providing "local exchange service." Intrado Comm believes that when we considered the definition in 47 U.S.C. § 153(47), it only considered a portion of the full definition shown below:

> **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 believes the word "or" means that it must only satisfy only one of the "parts" from this definition. Intrado Comm contends that the Commission "misconstrued section 153(47)(B) and altogether failed to consider the definition of telephone exchange service under section 153(47)(A)." Intrado Comm believes we erred and contends that it satisfies both parts of the definition.

Regarding section 153(47)(A), Intrado Comm believes its service provides subscribers the ability to intercommunicate, and our Order is silent on this matter. Intrado Comm contends that we restricted its analysis to the "B-part" of 47 U.S.C. § 153(47), wherein it stated that "Intrado Comm's service is incapable of originating calls and is therefore not a telephone exchange service." (Motion at 7) However, Intrado Comm argues that we failed to acknowledge that a PSAP served by Intrado Comm could "hookflash" to obtain a dial tone in order to originate a bridged call to a third party – essentially connecting the originating caller to the 3rd party by using more modern technology than what other providers currently offer.

Intrado Comm notes that its service compares favorably with a scenario the FCC faced in 2001. In its *Provision of Directory Listing information under the Telecommunications Act of 1934, as Amended,* 16 FCC Rcd 2736 ("*DA Call Completion Order*"), the FCC examined the service directory assistance providers offered – specifically whether call completion services were providing a "telephone exchange service" pursuant to 47 U.S.C. § 153(47). Intrado Comm states:

> The FCC held that the call-completion service allows a "local caller to connect to another local telephone subscriber and, in that process, through a system of either owned or resold switches, enables the caller to originate and terminate a call." It was irrelevant that the originated call did not start with an ordinary telephone call. The same should be said of the fact that Intrado Comm does not originate calls in the form of an ordinary telephone call.

In addition, Intrado Comm argues that the Commission failed to consider what the FCC's *Advanced Services Order* said regarding "telephone exchange service." Intrado Comm claims that the Commission erred because it took such a narrow posture in considering 47 U.S.C. § 153(47), whereas the *Advanced Services Order* advocates a broader view. The Company asserts that "nothing in 153(47)(B) supports the conclusion that the meaning of 'originate a call' was locked in and keyed to the ways in which older technologies have operated." Intrado Comm states that its product offering "bridges the gap between the inferior, antiquated telephone exchange services of the past and those of the future." Intrado Comm contends that the decision rendered in Order No. PSC-08-0799-FOF-TP hampers it in providing safe and accurate 911/E911 service to the citizens of Florida.

The Commission misunderstood evidence

Intrado Comm asserts that we erred in its belief that a Commercial Agreement under §251(a) is a viable alternative for Intrado Comm. Intrado Comm claims its witness Hicks addressed this topic, and its brief did as well. Intrado Comm believes it needs to negotiate pursuant to §251(c) in order to obtain interconnection with Embarq that is "at least equal in quality to that provided to itself, an affiliate, or [to] other carriers." According to Intrado Comm, testimony that explained this viewpoint was not adequately considered by us.

Embarq's Response to Motion

Embarq states that the law is clear regarding the standard of review for a motion for reconsideration. We consistently looked at whether such a motion identifies a point of fact or law that we overlooked or failed to consider in rendering its order.[4] Embarq believes that Intrado Comm's Motion fails to meet this standard since it offers no new evidence and merely reiterates the assertions it made in its post-hearing briefs. According to Embarq, Intrado Comm has presented no valid grounds to reconsider Order No. PSC-08-0799-FOF-TP. Embarq counters the Intrado Comm assertions, and states that

- we did not overlook evidence and argument, even though it may not have explicitly addressed every aspect of Intrado Comm's case. Embarq believes that we evaluated everything, but only discussed the most relevant evidence and argument;

- Intrado Comm's Motion offers the same arguments as those proffered in its post-hearing brief. In its Motion and brief, Intrado Comm argues that the FCC's *DA Call Completion Order* and its *Advanced Services Order* are applicable to the instant case. By repeating these assertions in the manner it has, Embarq believes Intrado Comm fails to raise additional or new arguments. The same can be said for Intrado Comm's argument regarding 47 U.S.C. § 153(47); and

- we properly found that the services that Intrado Comm provides do not give their customers (PSAPs) the ability to originate calls, or "intercommunicate," with end users

[4] See *Stewart Bonded Warehouse v. Bevis,* 294 So. 2d 315 (Fla 1974); *Diamond Cab Co. v King*, 146 So. 2d 889 (Fla. 1962); *Pingree v. Quaintance*, 394 So. 2d 162 (Fla 1st DCA 1981).

dialing 9-1-1. According to Embarq, certain arguments Intrado Comm made in its brief and reiterated in its Motion were in conflict with its own price list.[5] Specifically, the price list describes the "hook flash" option as a "Manual Transfer" whereas the Motion describes the "hook flash" method as a means to originate a call. Embarq believes this is significant because "end user originated calls [to 911] are terminated to PSAPs served by Intrado, which means that Intrado [Comm's] services meet the terminating aspects of intercommunication." However, Intrado Comm's price list does not indicate that Intrado Comm services can be used to originate calls, "because they cannot," according to Embarq.

Embarq reiterates that we should not reconsider Order No. PSC-08-0799-FOF-TP, and notes that two other state commissions have reached conclusions that are similar to Florida's.[6] Embarq believes reconsideration is not warranted because

- nothing that Intrado Comm alleges in its Motion is "new evidence." The mere existence of the "new" contracts "does nothing to alter the evidence on which the Commission based its decision . . .."; and
- at no time during the negotiations for interconnection did Intrado Comm "state or even suggest" that it intended the negotiations to be pursuant to Florida law. Embarq believes it would be improper to "start over" and delve into the applicability of state statutes at this juncture.

Analysis

We have looked on numerous occasions[7] to the Stewart Bonded Warehouse, Inc. v. Bevis and to the Diamond Cab Co. v. King cases for guidance in reviewing motions for reconsideration. Relevant portions of these cases are summarized below:

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[5] An original version of Intrado Comm's Price List was identified as Hearing Exhibit 17, and a revised one as Hearing Exhibit 26.

[6] See *In the Matter of the Petition of Intrado Communications, Inc. for Arbitration of Interconnection, Rates, Terms, and Conditions and Related Arrangements with United Telephone Company of Ohio d/b/a Embarq and United Telephone Company of Indiana d/b/a Embarq, Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Case No., 07-1216-TP-ARB, Arbitration Award, issued September 24, 2008, and *Intrado Communication Inc. and Verizon West Virginia, Inc., Petition for Arbitration,* Case No. 08-0298-T-PC, Arbitration Award, issued November 14, 2008. The West Virginia Commission affirmed the Arbitrator's decision on December 16, 2008.

[7] See In re: Notice of adoption of existing interconnection agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P., by Nextel South Corp. and Nextel West Corp., Order No. PSC-08-0817-FOF-TP, issued on December 18, 2008, in Docket No. 070369-TP, and In re: Complaint and request for emergency relief against Verizon Florida, L.L.C. for anticompetitive behavior in violation of Sections 364.01(4), 364.3381, and 364.10, F.S., and for failure to facilitate transfer of customers' numbers to Comcast Phone of Florida, L.L.C. d/b/a Comcast Digital Phone, Order No. PSC-08-0549-PCO-TP, issued on August 19, 2008, in Docket No. 080036-TP, and In re: Petition on behalf of Citizens of the State of Florida to require Progress Energy Florida, Inc. to refund customers $143 million, Order No. PSC-08-0136-FOF-EI, issued on March 3, 2008, in Docket No. 060658-EI.

- In Stewart Bonded Warehouse, Inc. v. Bevis, the primary consideration was "whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order." See, Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981).

- In the Diamond Cab case, the court stated, in part: "The purpose of a petition for rehearing is merely to bring . . . [out] some point which . . . [the Commission] overlooked or failed to consider when it rendered its order in the first instance . . . It is not intended as a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment or order . . .." (Diamond Cab, 146 So. 2d at 891.)

We have also looked to State ex. rel. Jaytex Realty Co. v. Green (Jaytex) to consider the scope of its review for motions for reconsideration, and whether it is necessary for a respondent to answer every argument and fact raised by each party. In Jaytex, the court found

> the sole and only purpose of a petition for rehearing is to call to the attention of the court some fact, precedent or rule of law which the court has overlooked in rendering its decision . . . (Jaytex, 105 So. 2d at 818.)
>
> . . .
>
> An opinion should never be prepared merely to refute the arguments advanced by the unsuccessful litigant. For this reason it frequently occurs that an opinion will discuss some phases of a case, but will not mention others. Counsel should not from this fact draw the conclusion that the matters not discussed were not considered. (Id. at 819)

In considering the standard of review for motions for reconsideration, we find the Intrado Comm Motion falls short. Specifically, we find the Motion fails because:

- The information in Intrado Comm's Motion was reargument of facts previously considered. Reargument in a Motion for Reconsideration is procedurally improper;

- Intrado Comm never made a demonstrative "state law argument" in the case it built through testimony and exhibits. In this proceeding, both parties cited more to "federal law" than to "state law" to support for their respective positions. Although Order No. PSC-08-0799-FOF-TP relied on federal law, we find it is erroneous to claim that we "failed to consider" the state law. Because state law was not in conflict with any aspect of the federal law that we cited, a separate argument was not tendered. We find state law

was fully considered in our Final Order, and a motion for reconsideration is not the proper avenue to pursue new arguments;

- A decision the Prehearing officer imposed (by setting the page limits for briefs) did not adversely impair Intrado Comm in briefing this case. The decision regarding page limits for briefs applied to both parties, and both adhered to it when post-hearing briefs were filed. Either party could have sought timely relief in this regard, but did not. Intrado Comm's Motion is not the avenue to seek relief after the fact; and

- The recent contractual arrangements that Intrado Comm touts as "new" are immaterial to our finding in Order No. PSC-08-0799-FOF-TP. We do not find this Order addressed whether Intrado Comm could establish contracts to provide emergency services in Florida, nor was this Order predicated on the existence or lack of any such contracts.

III. Decision

Intrado Comm has not met the standard of review for its Motion. Therefore, we find it appropriate to deny Intrado Comm's Motion for Reconsideration.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Intrado Communications, Inc.'s Request for Oral Argument is hereby denied. It is further

ORDERED that Intrado Communications, Inc.'s Motion for Reconsideration of Order No. PSC-08-0799-FOF-TP is hereby denied. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 16th day of March, 2009.

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.