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Sent: Friday, March 21, 2008 1:38 PM
To: Filings@psc.state.fl.us
Cc: Susan Masterton
Subject: 080089-TP Embarq Florida, Inc.'s Motion to Dismiss Or, In The Alternative, Deny Intrado's Petition for Declaratory Statement and Amended Petition For Declaratory Statement
Attachments: 080089 Embarq Motion to Dismiss.pdf

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Docket No. 080089-TP

Title of filing: Motion to Dismiss Or, In The Alternative, Deny Intrado's Petition for Declaratory Statement and Amended Petition For Declaratory Statement

Filed on behalf of: Embarq

No of pages: 14

Description: Motion to Dismiss

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FILED ELECTRONICALLY

March 21, 2008

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

RE: Docket No. 080089-TP

Dear Ms. Cole:

Enclosed please find Embarq Florida, Inc.'s Motion to Dismiss Or, In The Alternative, Deny Intrado's Petition for Declaratory Statement and Amended Petition For Declaratory Statement in the above referenced docket matter.

Copies are being served on the parties in this docket pursuant to the attached certificate of service.

If you have any questions regarding this electronic filing, please do not hesitate to call me at (850) 599-1560.

Sincerely,

s/Susan S. Masterton
Susan S. Masterton

Enclosure

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**CERTIFICATE OF SERVICE
DOCKET NO. 080089-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic and U.S. Mail this 21st day of March, 2008 to the following:

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s/Susan S. Masterton
Susan S. Masterton

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition for declaratory statement regarding local exchange telecommunications network emergency 911 service, by Intrado Communications Inc.	Docket No. 080089-TP Filed: March 21, 2008
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EMBARQ FLORIDA, INC.'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, DENY INTRADO'S PETITION FOR DECLARATORY STATEMENT AND AMENDED PETITION FOR DECLARATORY STATEMENT

Embarq Florida, Inc. ("Embarq") hereby files this Motion to Dismiss or, in the Alternative Deny, the Petition for Declaratory Statement and Amended Petition for Declaratory Statement filed by Intrado Communications Inc. ("Intrado") on February 8, 2008 and March 14, 2008, respectively (hereinafter referred to collectively as "Intrado's Petition").¹ The original Petition was noticed by the Commission in the March 7, 2008 edition of the Florida Administrative Law Weekly.² In support of this Motion, Embarq states as follows:

¹ Embarq has separately filed its Petition to Intervene, in accordance with Rule 28-105.0027, F.A.C., on this same day. While Rules 28-105.001-.004, F.A.C., establishing procedural requirements for declaratory statements, do not specifically authorize responsive pleadings by interveners, neither are they prohibited. It has been the Commission's practice in numerous prior declaratory statement proceedings to accept such filings. See, e.g., *Petition for declaratory statement concerning rights under Rule 25-6.115, F.A.C. by Town of Palm Beach, Town of Jupiter Island, and Town of Jupiter Inlet Colony*, Docket 080035-EI; *Request for declaratory statement by Tampa Electric Company regarding territorial dispute with City of Bartow in Polk County*, Docket No. 031017-EI; *Petition by City of Parker for declaratory statement concerning City's application of its Comprehensive Plan, Land Development Regulations, and City Codes and Ordinances to Gulf Power Company's proposed aerial power transmission line planned to travel from private property located within the City, crossing the shoreline of the City, and running across St. Andrew Bay*, Docket No. 030159-EU; *Petition for declaratory statement as to whether service availability agreement with United Water Florida Inc. requires prior Commission approval as "special service availability contract" and whether contract is acceptable to Commission, by St. Johns County*, Docket No. 010704-SU.

² Rule 28-106.204, F.A.C., requires that a Motion to Dismiss a Petition be filed within 20 days of service of the Petition. In a declaratory statement proceeding, "service" of potentially substantially affected persons is accomplished through notice of the petition in the Florida Administrative Law Weekly. Therefore, to the extent the 20-day time frame may be applicable to Embarq's Motion, that time frame began to run on March 7, 2008, the date of the Commission's publication of the required notice.

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I. Introduction

Intrado's Petition fails to comport with the essential requirements for declaratory statements, set forth in section 120.565, Florida Statutes and Rules 28-105.001 through 28-105.004, Florida Administrative Code and interpreted in several judicial and Commission decisions, including:

- Intrado's Petition fails to describe with particularity the circumstances that are the basis for its request for relief or to identify with specificity the statutes, rules or orders that support the relief it seeks;
- Intrado's Petition requests declaratory relief concerning issues that are being litigated in another Commission docket;
- Intrado's Petition requests the Commission to determine the conduct of other persons, contrary to the governing rules; and
- Intrado's Petition seeks relief on behalf of PSAPs that Intrado has no standing to request.

On the basis of these fundamental and material deficiencies alone, the Commission should dismiss, or in the alternative, deny Intrado's Petition. Even if the Commission were to determine that Intrado's Petition were procedurally sufficient, Intrado's Petition should be denied on the merits because it ignores the reality that Embarq continues to provide compensable 911 services, even when another provider serves as the primary 911 provider to a PSAP. In addition, the relief sought by Intrado in its Petition is contrary to established industry practice and Embarq's lawful tariffs.

II. Argument

A. Intrado's Petition is not appropriate for a declaratory statement

Intrado's Petition is irremediably deficient in several material respects. First, Intrado fails to identify the "particular circumstances" or the specific statutes, rules or orders on which its request for relief is based, fundamental requirements of section 120.565 and Rules 28-105.001 and 28-105.002, F.A.C. Second, in direct contravention of established case law, Intrado asks the Commission to issue the declaratory ruling on issues that are currently being litigated in another proceeding (specifically, Docket No. 070699-TP, Intrado's Petition for Arbitration of an interconnection agreement with Embarq). Third, the relief Intrado is requesting requires the Commission to "determine the conduct of another person" (that is, Embarq, among others) contrary to Rule 28-105.001, despite Intrado's attempt to mask this deficiency in its Amended Petition. And, finally, Intrado attempts to assert the substantial interests of PSAPs, although Intrado has no authority to represent these interests. Each of these points, discussed more fully below, demonstrates Intrado's utter failure to present an adequate basis for the declaratory relief it requests and necessitates dismissal or denial of Intrado's Petition by the Commission.

1. Intrado fails to identify particular circumstances as a basis for declaratory relief

Section 120.565, F.S., sets forth the requirements for a declaratory statement by an administrative agency. Specifically the statute provides:

- (1) Any 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.

- (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances.

In addition, Rule 28-105.001 provides that the purpose of a declaratory statement is to determine the applicability of specifically identified statutes and rules to a petitioner's "particular circumstances." By its clear meaning, as well as practice, particularity requires a petitioner to describe with specificity the facts that serve as the basis for a declaratory statement request.³

Intrado has entirely and completely failed to comply with this most basic element of a request for declaratory relief. Instead Intrado has provided general allegations of circumstances that may have or may some day occur and that might result in certain actions by all ILECs or any ILEC that might impact Intrado or unspecified PSAPs. Florida courts have rejected these types of general and speculative allegations to support a petition for a declaratory statement by an administrative agency. See, e.g., *National Association of Optometrists and Opticians v. Florida Department of Health*, 922 So. 2d 1060 (Fla. 1st DCA 2006) (declaratory statement issued by the Department of Health overturned by the First DCA because the facts presented to support the petition were not actual and current but merely speculative as to what might happen in the future.); *Tampa Electric Company v. Florida Department of Community Affairs*, 654 So. 2d 998 (Fla. 1st DCA 1995) (declaratory statement not confined to particular set of circumstances but

³ The American Heritage dictionary defines "particularity" to mean: 1. the quality or state of being particular rather than general 2. exactitude of detail, especially in description.

applying to an entire class of persons rejected by the First DCA as being “impermissibly broad.”)⁴

Section 120.565, F.S., also requires that a declaratory statement “specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances.” Intrado has failed to identify specific provisions of law, Commission rules or orders or Embarq’s tariffs that have been or may be applied to support the relief requested by Intrado. Instead, Intrado generally references lengthy sections of four separate ILEC tariffs, an entire chapter of the Commission’s rules relating to tariff filing requirements, and a statute that broadly establishes the purposes of the Commission’s regulatory authority.

Intrado has failed to comply with the essential requirements that a petition or declaratory statement must describe particular circumstances as a basis for the requested relief and must cite with specificity the laws, rules, or orders for which it seeks Commission guidance. Therefore, Intrado’s Petition should be dismissed or denied.

2. Intrado’s Petition asks the Commission decide issues that are currently being litigated in another docket

Established case law and prior Commission decisions have held that a declaratory statement is not appropriate when the issues that are the subject of the request for declaratory relief are being considered in other court or administrative proceedings. (See, e.g., *Gopman v. Department of Education*, 908 So. 2d 1118, 1123 (Fla. 1st DCA 2005);

⁴ Compare *Adventist Health System v. AHCA*, 955 So. 2d 1173 (Fla. 1st DCA 2007), in which the First DCA allowed a declaratory statement based on the petitioner’s specific and particular, though potential rather than actual, circumstances. The Petition was filed under a statutory provision that specifically authorized declaratory statements to clarify the application of the statute to patient referrals by certain health care providers. Importantly, the court’s opinion did not alter the requirement for particularity and did not overrule the *National Association of Optometrist* case, but rather cited it in its decision at 1176.

Suntide Condominium v. Division of Land Sales, 504 So. 2d 1343, 1345 (Fla. 1st DCA 1987) See, also, *Petition for declaratory statement concerning urgent need for electrical substation in North Key Largo by Florida Keys Electric Cooperative Association, Inc. pursuant to Section 366.04, Florida Statutes*, Order No. PSC-02-1459-DS-EC issued October 23, 2002 at pages 4, 6 and 9; *In re: Petition by GTE Florida Incorporated for declaratory ruling concerning Order PSC-99-1477-FOF-TP*, Order No. PSC-99-2439-FOF-TP, issued December 13, 1999 at pages 2-3.

Despite Intrado's self-serving assertions to the contrary in footnote 1 of its Petition and Amended Petition, Intrado's request for a declaration regarding its obligation to pay Embarq for certain 911 services raises issues that are in dispute in the proceedings initiated by Intrado to arbitrate an interconnection agreement between Intrado and Embarq. (See, Docket No. 070699-TP). Specifically, the proposed issues to be resolved in that docket include issues related to the specific terms and conditions applicable to inter-selective router trunking, PSAP-to-PSAP call transfer with automatic location identification (ALI), access to 911/E911 data bases, and appropriate rates under the interconnection agreement. Because these issues are already being considered and will be determined in the arbitration proceeding, it is inappropriate for the Commission to consider them in this declaratory statement proceeding. For this reason, also, Intrado's Petition should be dismissed or, in the alternative, denied.

3. The Petition Asks the Commission to determine the conduct of others

Section 28-105.001, which establishes the purpose and use of a declaratory statement, expressly provides that "[a] declaratory statement is not the appropriate means for determining the conduct of another person." However, Intrado's Petition requests

precisely that result, despite Intrado's clumsy attempt to amend the Petition to correct this deficiency.

While Intrado postures that it is seeking a ruling concerning its (or a PSAPs) obligation to pay certain ILEC charges, and has amended its Petition to couch its request for relief in those terms, it is inescapable that to provide the relief Intrado has requested the Commission must first determine that Embarq's (and other ILECs') charges have been or will be applied improperly. That determination amounts to determining the conduct of another person, exactly what is prohibited by Rule 28-105.001, F.A.C.⁵

The underlying nature of Intrado's request continues to be evident, even in Intrado's Amended Petition. In paragraph 8 of the Amended Petition Intrado asserts "the ILEC should not charge Intrado for any tariffed services." In paragraph 11 Intrado asks the Commission to issue a statement "as to the respective rights and responsibilities of Intrado, the PSAP, and the ILEC." And, finally, in paragraph 22, Intrado requests the Commission to issue a declaratory statement that certain statutes, rules and tariffs "do not allow an ILEC to collect 911 tariff charges, new unjustified charges, or unbundled charges" under circumstances alleged by Intrado. Intrado's facile attempts to cure its defective petition fail to alter Intrado's underlying intent to have the Commission prohibit

⁵ The cases cited by Intrado in attempt to support the propriety of its requested relief are inapposite to Intrado's Petition. In *Department of Business and Professional Regulation v. Investment Corp. of Palm Beach*, 747 So. 2d 374 (Fla. 1999), the issue the court addressed was whether a declaratory statement was appropriate when other similarly situated entities, in addition to the entities requesting declaratory relief, would be affected by the requested declaration. In contrast, in its Petition, Intrado is seeking relief that would determine the substantial interest of adverse persons, rather than similarly situated persons. In *Friends of Florida, Inc. v. Department of Community Affairs*, 760 So. 2d 154 (Fla. 1st DCA 2000) the petitioners requested a declaration that would ensure their right to participate in the policy level of county planning. The declaratory statement did not address the substantive rights of the parties, as Intrado is requesting in its Petition, rather the ruling addressed the proper procedure to be followed for determining those substantive rights.

Embarq and other ILECs from engaging in certain behavior, which, clearly, is relief that is not properly granted through the declaratory statement mechanism.

As AT&T explains in its Motion to Dismiss, the Commission denied portions of a declaratory statement requested by Broward County because it failed to comport with Rule 28-105.001.⁶ In finding that certain rulings requested by Broward County were inappropriate, the Commission recognized that Rule 28-105.001, Florida Administrative Code, specifically provides that “a declaratory statement is not the appropriate means for determining the conduct of another person. Broward County’s request, as set forth in Points A and D above, does not conform to Rule 28-105.001, Florida Administrative Code, in that it is asking us to state that BellSouth is not entitled to take certain actions.” (See Broward County Request for Declaratory Statement at page 6) Based on the rule, the Commission denied Broward County’s request for declaratory relief on the cited points. (Id. at page 8) Like Broward County, Intrado essentially is asking the Commission to state that ILECs (including Embarq) are not entitled to take certain actions. As it did in the Broward County case, the Commission should dismiss or deny Intrado’s requested relief because it fails to comply with Rule 28-105.001.

While a declaratory statement request is not the appropriate means for determining the conduct of another person, disputes determining the substantial interests of parties are typically handled through a petition filed under sections 120.569 and 120.57, Florida Statutes. If Intrado believes that Embarq (or any other ILEC) is violating the law or its tariffs, or engaging in anticompetitive behavior in violation of applicable

⁶ *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*

law or rules, the proper procedural forum to pursue these claims is a complaint under Rule 25-22.0036, F.A.C., or a Petition under Rule 28-106.201, F.A.C.

Notably, while Intrado baldly proclaims in paragraph 13 of its Petition that past Commission decisions support Intrado's requested relief, Intrado fails to identify any specific statute, Commission rule or Commission order supporting this assertion. In fact, Intrado acknowledges in its Petition that the statutes, order and rules are unclear on this very point. (Intrado's Petition at paragraph 14) Patently, Intrado's request for declaratory statement is not intended to ask the Commission to interpret existing laws, rules or orders, but is intended to ask the Commission to make new law—law that adversely proscribes Embarq's actions and, thus, may not be established through the procedural mechanism of a declaratory statement.⁷

Intrado's use of a petition for a declaratory statement to address what it alleges to be inappropriate actions by Embarq and other ILECs, is inappropriate and contrary to the applicable law and rules. For these reasons the Commission should dismiss or, alternatively, deny Intrado's Petition.

4. Intrado does not have standing to assert the substantial interest of PSAPs

In addition to requesting that the Commission declare that ILECs may not impose certain charges on Intrado, Intrado asks the Commission to declare that ILECs may not impose certain charges on PSAPs. As the apparent basis for seeking this relief, Intrado implies that unspecified PSAPs possibly are, or may some day be, customers of Intrado.

Lauderdale-Hollywood International Airport on property leased by BellSouth from Broward County's Aviation Department, Order No. PSC-06-0306-DS-TL issued April 19, 2006 in Docket No. 060049-TL.

⁷ Interestingly, the Commission proceeding discussed by Intrado in paragraph 18 and footnote 12 of its Petition was a Proposed Agency Action proceeding, rather than a declaratory statement proceeding. Under applicable administrative rules, a PAA proceeding provides a clear opportunity for persons whose substantial interests are affected to protest the decision and request a 120.57 hearing to resolve disputed issues of fact.

In addition to the absence of the requisite particularity in these vague allegations, Intrado has no authority to assert the interests of its customers (i.e., PSAPs), whether actual or potential. The Commission has rejected similar ill-founded efforts to establish this type of “representational” standing.⁸ Because Intrado cannot properly represent the substantial interests of PSAPs, its request for declaratory relief involving the propriety of any charges PSAPs may incur should be dismissed or denied.

B. The relief requested by Intrado is contrary to established practice and Embarq’s tariffs

Embarq believes that Intrado’s Petition is materially flawed as described above. However, even if the Commission were to accept that Intrado’s Petition meets the requirements for declaratory relief, the relief requested should be denied. Intrado has asked the Commission to declare that neither Intrado nor a PSAP may be required to pay any charges that Embarq (or other ILECs) may impose for 911 services when Intrado is acting as the primary E911 provider to the PSAP, apparently without regard for whether Embarq actually provides services to Intrado or the PSAP. Intrado’s position is wholly inconsistent with the current practices of the 911 industry and, if adopted by Commission, would nullify the provisions of Embarq’s lawful tariffs.

⁸ See, e.g., *In re: Initiation of deletion proceedings against Aloha Utilities, Inc. for failure to provide sufficient water service consistent with the reasonable and proper operation of the utility system in the public interest, in violation of Section 367.111(2), Florida Statutes*, Order No. PSC-05-0354-PCO-WU (in which the Commission determined that an individual had no authority to represent the interests of other customers in the proceeding); *Review of the retail rates of Florida Power & Light Company*, Order No. PSC-01-0628-PCO-EI (in which the Commission determined that a corporation did not have standing to represent the interests of its subsidiary in the proceeding); *In re: Application for a limited proceeding to include groundwater development and protection costs in rates in Martin County by Hobe Sound Water Company*, Order No. PSC-96-0768-PCO-WU (in which the Commission determined that a municipality was not authorized to represent its the interests of its citizens in the proceeding); *In re: Application for a rate increase and increase in service availability charges by Southern States Utilities, Inc.*, Order No. PSC-96-0416-FOF-WS (in which the Commission determined that a water control district was not authorized to participate in administrative proceedings on behalf of its taxpayers).

AT&T has accurately captured the various scenarios that can occur and that may necessitate charges to the primary 911 provider (i.e., Intrado) or the PSAP for services rendered by Embarq, even when Embarq is not the primary 911 provider for a PSAP. (See AT&T Motion to Dismiss and Response at paragraphs 18-27) As described by AT&T, typically these scenarios involve Embarq's provisioning of ANI/ALI or selective router services to either the alternative 911 provider or the PSAP.

A specific example where Embarq is not the primary 911 provider, but still provides compensable services to the PSAP, is Leon County. There, the company that is maintaining 911 is an equipment vendor. Leon County has its own selective router and the equipment vendor maintains this piece of equipment. Embarq provides direct trunks to the end offices that do not overlap with Leon County. The end offices that overlap go to Embarq's 911 selective router first and, then, if a call is for Leon County, the call is sent via a dedicated trunk group. In this scenario, Leon County pays Embarq \$93 per 1000 for the ANI/ALI services Embarq provides for its end user customers and \$40 per 1000 for selective routing performed by Embarq in the overlapping areas, in accordance with Embarq's 911 tariffs.

If the Commission were to grant Intrado's Petition, Embarq would be precluded from assessing these charges for necessary services that Embarq renders, even when Embarq is not the primary 911 provider. This result is unreasonable and contrary to lawful tariffs and industry practice. Therefore, should the Commission decide to consider Intrado's Petition on its merits, it should be denied.

III. Conclusion

As set forth fully above, Intrado's Petition for Declaratory Statement utterly and completely fails to meet the requirements for such relief and should, therefore, be dismissed or denied. Intrado's Petition fails on the merits, as well, as it asks for relief that would deny Embarq compensation for services rendered and is inconsistent with industry practice and Embarq's tariffs. For all of these reasons, the Commission should dismiss, or in the alternative deny, Intrado's Petition for declaratory statement.

Respectfully submitted this 21st day of March 2008.

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