

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

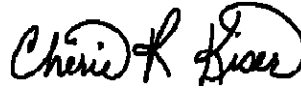
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In the Matter of the Petition)	
of Intrado Communications Inc. for Arbitration)	Case No. 08-537-TP-ARB
Pursuant to Section 252(b) of the Communications Act)	
of 1934, as amended, to Establish an Interconnection)	
Agreement with Cincinnati Bell Telephone Company)	
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APPLICATION FOR REHEARING OF INTRADO COMMUNICATIONS INC.

Pursuant to §§ 4903.10 of the Revised Code and Rule 4901-1-35 of the Ohio Administrative Code, Intrado Communications Inc. ("Intrado Comm"), by its attorneys, respectfully seeks rehearing of the Commission's October 8, 2008 Arbitration Award as unreasonable and unlawful. The reasons for rehearing are explained in the attached Memorandum in Support.

Respectfully submitted,

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Dated: November 7, 2008

Its Attorneys

MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING

Intrado Communications Inc. (“Intrado Comm”) appreciates that the *CBT Arbitration Award* issued by the Public Utilities Commission of Ohio (“Commission”) on October 8, 2008 will provide Intrado Comm with the opportunity to offer Ohio counties and public safety answering points (“PSAPs”) a competitive alternative for their 911/E911 services in some manner. The *CBT Arbitration Award*, however, does limit Intrado Comm’s ability to compete because it: (1) fails to find that interconnection between a competitor like Intrado Comm and an incumbent local exchange carrier (“ILEC”) like Cincinnati Bell Telephone Company (“CBT”) is subject to Section 251(c) of the Communications Act of 1934, as amended (“Act”);¹ and (2) fails to adopt Intrado Comm’s proposed interconnection arrangements to ensure Intrado Comm receives interconnection from CBT that is at least equal in quality to that which CBT provides to itself and other parties interconnecting to its own network.² Intrado Comm therefore respectfully requests that the Commission grant rehearing on these issues. In addition, Intrado Comm respectfully requests that the Commission clarify the *CBT Arbitration Award* and confirm that Intrado Comm is entitled to obtain unbundled network elements (“UNEs”) pursuant to Section 251(c) to provide service to its PSAP customers.

I. THE COMMISSION ERRED IN CONCLUDING THAT SECTION 251(C) DOES NOT APPLY WHEN INTRADO COMM IS THE 911/E911 SERVICE PROVIDER

The Commission concluded in the *Certification Order* that Intrado Comm is entitled to Section 251(c) rights with respect to its 911/E911 service because it is a telecommunications

¹ 47 U.S.C. § 251(c).

² 47 U.S.C. § 251(c)(2)(C).

carrier providing telephone exchange service.³ This determination was absolutely correct. Section 251(c) provides that all ILECs have the duty to interconnect with a competitor upon request, so long as that competitor is providing “telephone exchange service.”⁴ The Commission properly determined that Intrado Comm is a telecommunications carrier and is providing telephone exchange service (the only prerequisites the Act requires) and thus, pursuant to the plain terms of Section 251(c) is entitled to interconnection with an ILEC (like CBT) upon request. This determination is grounded in the law, and was reaffirmed by the Commission in both the *CBT Arbitration Award*⁵ and the *Embarq Arbitration Award*.⁶

Given the Commission’s clear ruling that Intrado Comm is a telecommunications carrier providing telephone exchange service and is entitled to Section 251(c) rights, the analysis of this issue should have ended there and the Commission should have proceeded to evaluate the terms of the Parties’ proposed interconnection agreement in order to ensure that Intrado Comm would receive interconnection “that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection,” as required by Section 251(c).⁷ However, the Commission inexplicably and

³ *Application of Intrado Communications, Inc. to Provide Competitive Local Exchange Services in the State of Ohio*, Finding and Order at Finding 7 (“*Certification Order*”); Order on Rehearing (Apr. 2, 2008) (“*Certification Rehearing Order*”).

⁴ 47 U.S.C. § 251(c).

⁵ *CBT Arbitration Award* at 6.

⁶ Case No. 07-1216-TP-ARB, *Petition of Intrado Communications, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with United Telephone Company of Ohio dba Embarq and United Telephone Company of Indiana dba Embarq Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Arbitration Award at 13 (Sept. 24, 2008) (“*Embarq Arbitration Award*”).

⁷ 47 U.S.C. § 251(c)(2)(C).

unreasonably reversed course, departing from the clear guidance of the *Certification Order* and the unambiguous terms of the Act.⁸

In the *CBT Arbitration Award*, the Commission looked to its findings in the *Embarq Arbitration Award* to determine Section 251(c) did not apply to Intrado Comm’s interconnection arrangements with CBT when Intrado Comm was the designated 911/E911 service provider.⁹ This determination was an error of law. The Commission erred in subjecting Intrado Comm to an inequitable and unreasonable double standard — the determination that Section 251(c) governs Intrado Comm’s interconnection with CBT in certain situations, but not in others.¹⁰ In ruling that Intrado Comm is not entitled to Section 251(c) interconnection where it is the 911/E911 service provider, the Commission has created an unreasonable distinction that has no basis in law and impermissibly strips Intrado Comm of the rights it is entitled to by virtue of its status as a competitive telecommunications carrier providing telephone exchange service. The *CBT Arbitration Award* thus runs afoul of the plain meaning of the Act and disregards the fundamental policy goal of the Act: to promote competition in the marketplace and provide competitive carriers a reasonable opportunity to access a market historically controlled by the ILECs.¹¹

⁸ The Commission’s disregard for its earlier findings runs counter to the Ohio courts’ instruction that the Commission must “respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law” (*Cleveland Elect. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St. 2d 403, 431 (1975)) and the guidance of the U.S. Court of Appeals for the Sixth Circuit that “[i]t is axiomatic that an administrative agency must conform with its own precedents or explain its departure with them” (*Ohio Fast Freight, Inc. v. U.S.*, 574 F.2d 316, 319 (6th Cir. 1978)).

⁹ *CBT Arbitration Award* at 8.

¹⁰ *CBT Arbitration Award* at 8-9.

¹¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶¶ 16, 18 (1996) (“*Local Competition Order*”) (intervening history omitted), *aff’d* by *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

Section 251(c) is applicable whenever a competitor seeks to interconnect with an ILEC, so long as that competitor is a “telecommunications carrier” and is providing “telephone exchange service” (which the Commission has already found to be true of Intrado Comm).¹² This is the case regardless of who is providing service to whom or on whose network the connection is to take place. Once interconnection is requested by a competitor, the ILEC is obligated to negotiate an agreement for the mutual exchange of traffic; it is not the case (as the Commission suggests) that the competitor requests the exchange of traffic one way and the ILEC then requests the exchange of traffic the other way. The Act does not leave the Commission with the discretion to adjust its requirements or determine that the ILEC is only required to comply with its 251(c) obligations in certain circumstances. The Commission does not provide any legal or public policy reason to justify this novel interpretation of Section 251(c), the interpretation runs afoul of the plain language and purpose of the Act, and it should be reversed on rehearing.

The interconnection at issue when Intrado Comm is the 911/E911 service provider is between an ILEC (CBT) and a competitor who is a telecommunications carrier providing telephone exchange service (Intrado Comm). Section 251(c) applies *whenever* a competitor like Intrado Comm seeks interconnection from an ILEC like CBT, even when Intrado Comm is the designated 911/E911 service provider. The Act and the rulings of the Federal Communications Commission (“FCC”) are clear that all ILEC-competitor interconnection is governed by Section 251(c), not Section 251(a).¹³ Specifically, the FCC has stated that ILECs are required by Section 251(c)(2) to allow competitors to interconnect while interconnection arrangements between

¹² 47 U.S.C. § 251(c)(2).

¹³ *Local Competition Order* ¶ 997.

“non-incumbent carriers” are governed by Section 251(a).¹⁴ This statement reaffirmed the FCC’s earlier findings that the interconnection obligations of ILECs when dealing with other ILECs are governed by Section 251(a).¹⁵ ILEC-to-competitor relationships are governed by Section 251(c).¹⁶

In enacting Section 251, the FCC was cognizant of the historical reality that ILECs exercised complete dominion over the telecommunications industry and the associated marketplace and thus had no incentive to enter into business arrangements with competitors on fair and commercially reasonable terms.¹⁷ In order to foster competition — which is the grounding principle of the Act — Congress and the FCC specifically designed Section 251 and the implementing rules to address the unequal bargaining power manifest in negotiations between ILECs and competitors.¹⁸ The goal of Section 251(c) is to provide all competitors access to the public switched telephone network (“PSTN”) on equal terms, to equalize bargaining power, and to ensure that new entrants can compete with incumbent providers.¹⁹ The FCC specifically recognized that the “commercial negotiation” of Section 251(a) interconnection

¹⁴ *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, et al.*, 17 FCC Rcd 27039, n.200 (2002) (“Virginia Arbitration Order”).

¹⁵ *Local Competition Order* ¶ 220.

¹⁶ *Local Competition Order* ¶ 997.

¹⁷ *Local Competition Order* ¶ 10.

¹⁸ *Local Competition Order* ¶ 15 (the “statute addresses this problem [of the incumbent’s “superior bargaining power”] by creating an arbitration proceeding in which the new entrant may assert certain rights”); *see also id.* ¶ 134 (noting that because the new entrant has the objective of obtaining services and access to facilities from the incumbent and thus “has little to offer the incumbent in a negotiation,” the Act creates an arbitration process to equalize this bargaining power).

¹⁹ S. Rep. No. 104-23, at 20 (1995).

would not be feasible given the ILECs’ “incentives and superior bargaining power.”²⁰

Commercial negotiations would not provide competitors with the interconnection necessary for competitors to “compete directly with the [ILEC] for its customers and its control of the local market.”²¹

To that end, Section 251(c) requires an ILEC to enter into an agreement with a new entrant on just, reasonable, and nondiscriminatory terms to enable the competitor’s customers to place calls to and receive calls from the ILEC’s subscribers.²² Section 251(a) — which the Commission applies to Intrado Comm’s request for interconnection in certain scenarios — provides no such protection.²³ The reason is obvious — Section 251(a) is designed to address situations where carriers with equal bargaining power (two incumbents or two non-incumbents) seek to interconnect their networks. Because parties with equal bargaining power do not require the protections provided by Section 251(c), Section 251(a) does not require them. In short, the key to determining whether interconnection should be governed by 251(a) or 251(c) is the bargaining power of the parties. When parties with equal bargaining power seek interconnection, Section 251(a) applies; when parties with unequal bargaining power (like Intrado Comm and CBT) seek interconnection, Section 251(c) applies.

By ruling that Intrado Comm is limited to Section 251(a) interconnection in certain scenarios, the Commission has impermissibly and unreasonably restricted the rights and protections Intrado Comm is entitled to as a competitive telecommunications carrier providing

²⁰ *Local Competition Order* ¶ 15.

²¹ *Local Competition Order* ¶ 55.

²² 47 U.S.C. § 251(c)(2)(D).

²³ 47 U.S.C. § 251(a).

telephone exchange service. There is no question that the “interconnection obligations under Section 251(a) differ from the obligations under Section 251(c).”²⁴ For example, the FCC determined that Section 251(c) specifically imposes obligations on ILECs to interconnect with competitors, but that this type of direct interconnection is not required under Section 251(a).²⁵

Moreover, interconnection under Section 251(a) would not provide Intrado Comm with interconnection on just, reasonable, and nondiscriminatory terms, or access to UNEs and collocation arrangements. Intrado Comm is entitled to Section 251(c) rights by virtue of its status as a competitive telecommunications carrier providing telephone exchange service, and without these rights, it will face barriers that could make it impossible for it to compete in the marketplace. Intrado Comm does not have equal bargaining power with CBT and thus should not be limited to only the rights provided by Section 251(a).²⁶ This is precisely the result the Act was designed to avoid and the Commission’s ruling — in promoting its novel determination that Intrado Comm’s entitlement to Section 251(c) is dependent not on its status as a competitive telecommunications carrier providing telephone exchange service, but on the fact specific details of the requested interconnection — is unreasonable and contrary to law.

²⁴ *Local Competition Order* ¶ 997.

²⁵ *Local Competition Order* ¶ 997.

²⁶ By stripping Intrado Comm of the rights and protections provided by Section 251(c), the Commission is impermissibly treating Intrado Comm like an ILEC with equal bargaining power with CBT. The ability to treat a non-incumbent carrier as an ILEC is strictly limited to the situations outlined in Section 251(h). The Commission has never found — nor could it — that Intrado Comm satisfies the conditions set forth in Section 251(h). Treating Intrado Comm as an ILEC is thus contrary to the requirements of the Act. Likewise the Commission cannot find CBT is entitled to CLEC treatment without a formal finding pursuant to Section 251(h) that it is no longer an ILEC.

II. THE COMMISSION ERRED WHEN IT FOUND INTRADO COMM'S INTERCONNECTION PROPOSAL WAS NOT SUPPORTED BY SECTION 251(c)(2)(C)

In the *Embarq Arbitration Award*, the Commission determined that it could not reach the issue of whether Intrado Comm's proposed interconnection arrangements were supported by the equal in quality requirements of Section 251(c)(2)(C) given the Commission's decision that interconnection between Intrado Comm and Embarq was governed by Section 251(a) when Intrado Comm is the designated 911/E911 service provider.²⁷ In the *CBT Arbitration Award*, by contrast, the Commission undertakes an analysis of Intrado Comm's interconnection proposal based on 251(c)(2)(C) even though it made a determination that the Parties' interconnection relationship was governed by 251(a), not 251(c).²⁸ The Commission's findings in this respect should therefore be reversed as a matter of law because they are inconsistent with its findings in the *Embarq Arbitration Award*.

Moreover, the Commission's findings should be reversed as a matter of fact because they are not based on the record developed in this proceeding. There is no record evidence, nor does the Commission point to any, demonstrating that Intrado Comm's proposal for dedicated trunking to geographically diverse points on Intrado Comm's network is "superior" to the interconnection that CBT provides to itself and demands of other carriers.²⁹ The interconnection requested by Intrado Comm is precisely the quality of interconnectivity CBT provides itself when it is functioning as the designated 911/E911 provider.³⁰

²⁷ *Embarq Arbitration Award* at 33. As discussed in Section I., this determination is an error of law and should be reversed.

²⁸ *CBT Arbitration Award* at 9.

²⁹ *CBT Arbitration Award* at 9.

³⁰ Volume II Transcript at 63, lines 17-23 (Fite) ("We have trunking from each one of CBT's end offices

Intrado Comm is entitled, pursuant to Section 251(c), to interconnectivity “that is at least equal in quality to that provided by the [ILEC] to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection.”³¹ The FCC’s rules echo this requirement and state that the equal in quality requirement is not limited to the quality perceived by end users because creating such a limitation may allow ILECs to discriminate against competitors in a manner imperceptible to end users while still providing the ILEC with advantages in the marketplace.³² The Commission’s carrier-to-carrier rules likewise require CBT to provide interconnection to Intrado Comm “with quality at least equal to that provided by [CBT] to itself or to any subsidiary, affiliate, or any other party to which it provides interconnection.”³³ Moreover, the FCC specifically determined that Section 251(c)(2) requires ILECs (like CBT) to provide competitors (like Intrado Comm) interconnection that is at least equal in quality to the interconnection the ILEC provides itself for routing 911 and E911 calls to PSAPs.³⁴

CBT uses dedicated, diversely routed trunking within its own network to ensure its end user customers dialing 911 reach CBT’s PSAP customers.³⁵ CBT also imposes similar

going diverse routes to both of the selective routers. . . . All of CBT switches connect to both of them.”); *see also* Intrado Comm Petition for Arbitration, Attachment 4 at Section 3.8.2(a) (“CBT will also provide CLEC with trunking from the CBT Central Office to the CBT Control Office(s) with sufficient capacity to route CLEC’s originating E9-1-1 calls over Service Lines to the designated primary PSAP or to designated alternate locations. Such trunking will be provided at the rates set forth in Pricing Schedule.”); *id.* at Section 3.8.2(b) (“CLEC will provide itself, or lease from a third person, the necessary trunking to route originating E9-1-1 traffic from CLEC’s Switches to the CBT Control Office(s).”).

³¹ 47 U.S.C. § 251(c)(2)(C).

³² 47 C.F.R. § 51.305(a)(3); *Local Competition Order* ¶ 224.

³³ Rule 4901:1-7-06(A)(5), O.A.C.

³⁴ *Virginia Arbitration Order* ¶ 652.

³⁵ CBT Hearing Exhibit No. 9, Pre-Filed Testimony of Robert P. Fite on behalf of Cincinnati Bell Telephone Company LLC at 3, line 7 (“Each end office switch is directly connected to a central tandem switch. A portion of the tandem switch is dedicated to use as a 911 selective router.”).

requirements on competitors when it is the designated 911/E911 service provider by requiring competitors to use dedicated trunking to route their end users' 911 calls destined for CBT's PSAP customers to CBT's selective router.³⁶ The interconnection CBT provides itself and imposes on competitors connecting to its network to terminate 911 calls to CBT's PSAP customers is no different from what Intrado Comm seeks when it is the 911/E911 service provider.

The type of interconnection Intrado Comm seeks from CBT is to treat CBT with parity in the manner in which the ILECs have treated themselves and other carriers when the ILEC is the 911/E911 service provider. Neither the Commission nor CBT has demonstrated why the interconnection arrangements CBT provides itself and imposes on other competitors when CBT is the designated 911/E911 service provider are not equally applicable when Intrado Comm is the designated 911/E911 service provider. Accordingly, the Commission's findings should be reversed.

III. THE COMMISSION SHOULD CLARIFY THAT INTRADO COMM IS ENTITLED TO UNBUNDLED NETWORK ELEMENTS PURSUANT TO SECTION 251(C) TO SERVE ITS PSAP CUSTOMERS

In the *Embarq Arbitration Award*, the Commission determined that Intrado Comm was entitled to purchase UNE loops under Section 251(c) for the delivery of traffic to PSAPs subject to the limitations contained in the FCC's rules.³⁷ In this proceeding, CBT's witness

³⁶ Intrado Comm Petition for Arbitration, Attachment 4 at Section 3.8.2(a) ("CBT will also provide CLEC with trunking from the CBT Central Office to the CBT Control Office(s) with sufficient capacity to route CLEC's originating E9-1-1 calls over Service Lines to the designated primary PSAP or to designated alternate locations. Such trunking will be provided at the rates set forth in Pricing Schedule."); *id.* at Section 3.8.2(b) ("CLEC will provide itself, or lease from a third person, the necessary trunking to route originating E9-1-1 traffic from CLEC's Switches to the CBT Control Office(s).").

³⁷ *Embarq Arbitration Award* at 48.

acknowledged that Intrado Comm would be able to purchase local loops from CBT at UNE rates under Intrado Comm's existing certification status.³⁸

In the *CBT Arbitration Award*, however, the Commission appears to indicate that Intrado Comm is only entitled to UNEs pursuant to Section 251(c) when Intrado Comm seeks to expand its certification status to offer dialtone services to end user customers other than PSAPs.³⁹

Intrado Comm therefore requests that the Commission clarify that Intrado Comm is entitled to obtain UNEs from CBT pursuant to Section 251(c) under its current certification status to provide services to Intrado Comm's PSAP customers. This clarification would be consistent with both the *Embarq Arbitration Award* as well as the Commission's *Certification Order* in which it found that Intrado Comm was entitled to all rights under Section 251(c).⁴⁰

³⁸ Volume II Transcript at 60, lines 3-15 (Pedicord).

³⁹ *CBT Arbitration Award* at 22.

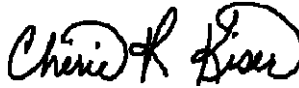
⁴⁰ *Certification Order* at Finding 7.

CONCLUSION

For the foregoing reasons, the Commission should grant rehearing, and vacate and clarify the *CBT Arbitration Award* to the extent requested herein.

Respectfully submitted,

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Dated: November 7, 2008

Its Attorneys

CERTIFICATE OF SERVICE

I, Angela F. Collins, certify that on this 7th day of November 2008, the foregoing Application for Rehearing of Intrado Communications Inc. was served on the following via electronic mail.



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Summary: App for Rehearing Intrado Communications Inc. Application for Rehearing electronically filed by Angela F Collins on behalf of Intrado Communications Inc.