BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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 dba Embarq and United Telephone Company of Indiana dba Embarq, Pursuant to Section 252(b) of the Telecommunications Act of 1996.	)	Case No. 07-1216-TP-ARB

ARBITRATION AWARD

The Commission, considering the petition, the evidence of record, posthearing briefs, and otherwise being fully advised, hereby issues its arbitration award.

APPEARANCES:

Cahill, Gordon & Reindel LLP by Ms. Cherie R. Kiser and Ms. Angela F. Collins, 1990 K Street, N.W., Suite 950, Washington, D.C. 20006, and Ms. Rebecca Ballesteros, 1601 Dry Creek Drive, Longemont, Colorado 80503, on behalf of Intrado Communications, Inc.

Mr. Joseph R. Stewart, 50 West Broad Street, Suite 3600, Columbus, Ohio 43215, and Ms. Susan S. Masterton, 1313 Blair Stone Road, Tallahassee, Florida 32301.

I. BACKGROUND

Under Section 252(b)(1) of the Telecommunications Act of 1996 (the Act),[1] if parties are unable to reach an agreement on the terms and conditions for interconnection, a requesting carrier may petition a state commission to arbitrate any issues which remain unresolved, despite voluntary negotiation under Section 252(a) of the Act.

On August 22, 2007, the Commission adopted carrier-to-carrier rules in Case No. 06-1344-TP-ORD, *In the Matter of the Establishment of Carrier-to-Carrier Rules*.[2] Under Rule 4901:1-7-09(G)(1), Ohio Administrative Code (O.A.C.) an internal arbitration panel is assigned to recommend a resolution of the issues in dispute if the parties cannot reach a voluntary agreement.

1 The Act is codified at 47 U.S.C. Sec. 151 et. seq.

2 The carrier-to-carrier rules became effective November 30, 2007.

II. HISTORY OF THE PROCEEDING

Rule 4901:1-7-09(A), O.A.C., specifies that any party to the negotiation of an interconnection agreement may petition for arbitration of open issues between 135 and 160 days after the date on which a local exchange carrier (LEC) receives a request for negotiation. According to the Petition for Arbitration filed by Intrado Communications, Inc. (Intrado), by letter submitted on May 18, 2007, Intrado formally requested United Telephone Company of Ohio and United Telephone Company of Indiana (collectively, Embarq) to commence negotiations for an interconnection agreement. The parties agreed to extend the arbitration deadline to November 28, 2007. Intrado timely filed a petition on November 28, 2007, to arbitrate the terms and conditions of interconnection with Embarq pursuant to Section 252 of the Act. In its petition, Intrado presented 33 issues for arbitration. Embarq filed its response to the petition for arbitration on December 21, 2007.

A prehearing conference was held on January 8, 2008, at which time the parties agreed to continue to negotiate for the purpose of reducing the number of issues in dispute. The parties also agreed to prepare a matrix of resolved and unresolved issues upon completion of the negotiations. The matrix was filed on March 10, 2008.

On December 21, 2007, Embarq filed a motion to dismiss and a memorandum in support or, in the alternative, a motion to hold in abeyance Intrado's petition for arbitration. In support of its motion, Embarq asserted that (1) Intrado failed to negotiate in good faith, (2) Intrado's petition is procedurally deficient, and (3) Intrado raises issues that are not subject to arbitration under the Act. Alternatively, Embarq requested that Intrado's petition be held in abeyance until such time that the Commission addressed Intrado's certification status in Case No. 07-1199-TP-ACE, *In the Matter of the Application of Intrado Communications Inc. to Provide Competitive Local Exchange Services in the State of Ohio* (07-1199). On January 8, 2008, Intrado filed its opposition to the motion to dismiss as well as a motion for oral argument. On April 15, 2008, Embarq filed a notice of a partial withdrawal of its motion of December 21, 2007.

On March 10, 2008, Intrado filed a notice with the Commission reflecting that the parties had agreed to waive the statutory deadlines set forth in Section 252 of the Act in order for the attorney examiner to establish a procedural schedule in this matter. On April 23, 2008, the attorney examiner issued an entry scheduling a hearing from May 27-29, and establishing a briefing schedule.

On May 20, 2008, the parties filed arbitration packages containing exhibits and the written testimony of their respective witnesses. On the same date, the parties filed a matrix setting forth the issues to be arbitrated and the parties' respective positions regarding the identified issues. The arbitration hearing was held on May 27-29, 2008. Intrado presented the testimony of the following four witnesses: (1) Carey Spence-Lenss, (2) Thomas Hicks, (3) Cynthia Clugy, and (4) John Melcher. Embarq presented the testimony of (1) James Maples and (2) Edward "Ted" Hart.

Initial briefs were filed by the parties on June 12, 2008. Reply briefs were filed by the parties on June 20, 2008. Also on June 20, 2008, AT&T Ohio filed a reply brief[3] and Intrado filed a motion to strike AT&T Ohio's reply brief and memorandum in support.

III. ISSUES FOR ARBITRATION

Issue 1: Is Intrado entitled to Section 251(c) interconnection and Section 252 arbitration?

Intrado asserts that all of its proposed interconnection arrangements and services are within the scope of Section 251(c) and, thus, are subject to Section 252 of the Act. In support of its position, Intrado contends that through its requests in this proceeding, it is seeking to exercise its rights to local interconnection for the purpose of provisioning telephone exchange services, as provided for pursuant to Section 251(c). In support of its position, Intrado points out that the Commission, pursuant to its Finding and Order in 07-1199, determined that Intrado is: (1) a telecommunications carrier offering telecommunications service under federal law, (2) a telephone company and a public utility company under state law, (3) entitled to all rights and obligations of a telecommunications carrier pursuant to Sections 251 and 252 of the Act (See June 12, 2008, Joint Issues Matrix).

Intrado explains that, pursuant to its certification as a competitive emergency services telecommunications carrier, it seeks to offer Ohio counties and Public Safety Answering Points (PSAPs) with a competitive alternative for their 9-1-1/E9-1-1 services, which have traditionally been provided by incumbent local exchange companies (ILECs) such as Embarq (Initial Br. at 2). Intrado posits that it cannot offer its 9-1-1/E9-1-1 services to Ohio PSAPs without interconnecting to the public switched telephone network (PSTN) (Tr. II, 26, 137, 138; Tr. III, 74; *Implementation of Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶10 [1996], aff'd by AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 [1999]) (*Local Competition Order*). Specifically, the company submits that it cannot offer its competitive 9-1-1/E9-1-1 service offering in Ohio until such time that it establishes a mutually beneficial interconnection and interoperability arrangement with the ILEC entities that controls access to the public switched telephone network and, thus, control access to a significant majority of the local exchange markets that make 9-1-1 calls to Intrado served PSAPs (Intrado Ex. 4 at 13). According to Intrado, such arrangements will allow Embarq's end users to reach the PSAPs served by Intrado and vice versa (*Id.* at 12).

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3 This matter is subsequently addressed in the outstanding procedural matter section of this Arbitration Award.

Rather than access to unbundled network elements being one of the primary reasons for seeking interconnection, Intrado states that it seeks interconnection pursuant to Section 251(c) of the Act in order to achieve interoperability between the networks and for connecting the networks for the mutual exchange of traffic (Reply Br. at 9 citing Tr. II, 49, 50, 86, 87). To the extent that it seeks unbundled network elements from Embarq, Intrado represents that it will meet the applicable eligibility criteria inasmuch as it will be offering an eligible telecommunications service over such facilities (*Id.* citing *In the Matter of the Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities,* 20 FCC Rcd 14853, ¶127 [2005]) (*Wireline Broadband Order*). According to Intrado, Section 251(c) of the Act provides the most suitable mechanism for ensuring that it obtains the interconnection and interoperability that it needs to provide its 9-1-1/E9-1-1 services to Ohio counties and PSAPs while, at the same time, promoting the reliability and redundancy critical to public safety (Initial Br. at 3).

Intrado submits that Section 251(c) of the Act was intended to facilitate "vigorous competition" and that this statutory provision and the Federal Communications Commission's (FCC) rules eliminate barriers to entry that would prevent a new entrant carrier, such as Intrado, from offering services and allowing them a fair opportunity to compete in the marketplace (*Id.* at 3 citing *Local Competition Order,* ¶¶16, 18). Consistent with this premise, Intrado submits that, just like other sectors in the telecommunications industry, PSAPs should similarly get to benefit from the competitive benefits of Section 251(c) of the Act (*Id.* at 3 citing Intrado Ex. 1 at 3, 4).

Intrado responds to Embarq's contention that determining whether Intrado is entitled to Section 251 rights depends on the type of service that it provides. Specifically, Intrado states that the Commission, in 07-1199, previously determined that the company is entitled to Section 251(c) rights with respect to the 9-1-1/E9-1-1 service that Intrado will provide to PSAPs. Therefore, Intrado concludes that there is no need for the Commission to address every service that Intrado provides in order to determine whether Intrado is entitled to Section 251(c) rights (*Id.* at 21, 22 citing Tr. III, 44). Further, Intrado submits that, regardless of the technology used by the end user to make the 9-1-1 call, the company's service should be considered as a complete 9-1-1/E9-1-1 service offering provided by Intrado to PSAPs and that such provisioning is a telecommunications service (Initial Br. at 24; Intrado Ex. 5, 15).

Further, Intrado questions why Embarq recognizes that Section 251(c) of the Act applies to competitors when Embarq is the 9-1-1/E9-1-1 service provider, but does not recognize that it applies when Intrado provides a competitive 9-1-1/E9-1-1 service (Reply Br. at 3, 4). Intrado asserts that there is no basis in law or public policy for such a distinction (*Id.* at 2, 3). Rather, Intrado opines that Section 251(c) governs ILEC/competitive local exchange company (CLEC) interconnection and that Section 251(a) is applicable to interconnection between two non-incumbent carriers (*Id.* at 4 citing *In the Matter of the 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 [2002]) (*Virginia Arbitration Order*). Intrado insists that to conclude otherwise would undermine the intent of Sections 251 and 252 of the Act to ensure that all competitors get access to the public switched telephone network on equal terms. In support of its position regarding ILEC/CLEC interconnection, Intrado references the FCC's determination that commercial agreements are not feasible given the ILECs' incentives and superior bargaining power (*Id.* at 6, 7 citing *Local Competition Order*, ¶15).

Regarding Embarq's claim that 9-1-1 interconnection is governed by Section 251(a) of the Act, Intrado responds that Section 251(c) of the Act is the appropriate mechanism for Intrado to secure nondiscriminatory access to, and interconnection with, Embarq's networks for the provision of 9-1-1 and E9-1-1 services (*Id.* at 22, 23 citing *Revision of the Commission's Rules to Endure Compatibility with Enhanced 9-1-1 Emergency Calling Systems; Petition of City of Richardson, Texas*, 17 FCC Rcd 24282 [2002]). Intrado states that, pursuant to Section 251(c)(2) of the Act, Embarq must provide Intrado with interconnection that is at least equal in quality to the interconnection that Embarq provides to itself for the routing of 9-1-1 and E9-1-1 calls (*Id.* at 23 citing the *Virginia Arbitration Order*, ¶652). Intrado states that both the FCC's and Commission's rules likewise set forth a similar requirement (Intrado Reply Br. at 5 citing 47 C.F.R. §51.305(a)(3) and Rule 4901:1-7-06[A][5], O.A.C.).

While Embarq agrees that Intrado is a telecommunications carrier entitled to interconnection pursuant to Section 251(a), Embarq disagrees with Intrado's assertions that each and every type of arrangement proposed by Intrado qualifies as a telephone exchange service entitling it to Section 251(c) interconnection and access to unbundled network elements (Embarq Reply Br. at 7). Embarq submits that a determination as to whether Section 251(a) or Section 251(c) applies in a given scenario is important for the purpose of establishing the applicable rights and obligations for providing and obtaining interconnection, as well as the appropriate pricing methodologies for such services (Embarq Initial Br. at 3). Embarq asserts that although Intrado presents its arbitration petition as a simple request for Section 251(c) interconnection in order to enable Intrado to provide competitive 9-1-1 services, the arbitration petition encompasses a variety of distinctive scenarios for interconnection between the two companies, each with its own unique ramifications (*Id.*). According to Embarq, these scenarios include:

(1) When Embarq is the 9-1-1 service provider to the PSAP.

(2) When Intrado is the 9-1-1 service provider to the PSAP.

(3) When Intrado and Embarq each serve a different PSAP and transfer calls between each other.

In support of its position, Embarq relies on the Commission's determination that decisions regarding the appropriateness and scope of any specific request for interconnection are to be addressed in the context of Intrado's ongoing arbitration proceedings, based on case-specific facts of Intrado's actual proposal (*Id.* at 5 citing 07-1199, Entry on Rehearing, at 14). Embarq notes that its standard agreement has a section which is devoted to non-Section 251 services and that the parties could have addressed some of Intrado's proposed scenarios in that section (*Id.* at 4).

While Embarq acknowledges that Section 251(c) applies in the first scenario delineated above, Embarq contends that it is not germane to this proceeding inasmuch as Intrado has indicated that it does not intend to provide services to individuals who would need access to 9-1-1 services (*Id.* citing Tr. I, 45). Specific to the second scenario described above, Embarq opines that Section 251(a) applies to Embarq's interconnection to Intrado's network when Intrado is the primary 9-1-1 provider to a PSAP and that interconnection should occur pursuant to commercial agreements (*Id.* at 5). Embarq explains that under this scenario, Embarq is the requesting carrier and seeks interconnection at a point on Intrado's network in order to fulfill its obligation to provide its end users with access to 9-1-1 service (Embarq Ex. 5 at 54). Therefore, Embarq asserts that Section 251(c) is not applicable in this situation due to the fact that it involves an ILEC interconnecting with a non-ILEC entity (Embarq Initial Br. at 6). In light of this position, Embarq does not believe that it is required, pursuant to Section 251(c), to provide the loop between the Embarq central offices and the PSAP as an unbundled network element (*Id.* at 8). In the event that Intrado seeks loops to each PSAP as an unbundled network element, Embarq explains that, pursuant to such a request, Intrado will be required to collocate at each central office where a specific PSAP's loop terminates (Embarq Reply Br., 14).

To the extent that Section 251(c) does apply to the second scenario, Embarq believes that the requirements imposed on ILECs under that provision do not support the type of interconnection arrangement requested by Intrado (*Id.*). For example, Embarq states that in a Section 251(c) interconnection arrangement, the requesting carrier is entitled to select the point of interconnection, within the ILEC's network and that each carrier is responsible for its facilities on its side of the point of interconnection (*Id.* at 6, 7 citing 47 C.F.R. §51.3; Rule 4901:1-7-06, O.A.C.); Embarq Ex. 5 at 91). Additionally, Embarq points out that, if Section 251(c) applies, it would only be required to provide access to existing copper loops, DS1 loops, DS3 loops, DS1 dedicated transport, DS3 dedicated transport, or dark fiber transport. Further, Embarq questions the practicality of Intrado's request given the requirements for obtaining unbundled network elements (e.g., collocation at Embarq's end offices) in comparison to the commercial arrangements that were offered to Intrado (*Id.* at 8, 9; Embarq Ex. 5 at 22).

In regard to the third scenario described above, Embarq asserts that Section 251(a) applies to inter-selective routing between PSAPs served by Embarq and Intrado. Embarq explains that inter-selective routing involves a "peering arrangement between two carriers, each of which is a primary provider of 9-1-1 services to a PSAP in a different geographic area" (Embarq Initial Br. at 7, Tr. III, 25). According to Embarq, peering arrangements involve the cooperative efforts of the affected PSAP customers for the purpose of connecting two wireline 9-1-1 networks without any involvement of the public switched network (Embarq Reply Br. at 18 citing Embarq Ex. 5 at 51, Tr. III, 70). Therefore, Embarq does not consider peering agreements to involve interconnection of a competing carrier's network with the ILEC's network for the purpose of facilitating ongoing competition (*Id.*). Based on this classification, Embarq believes that the proposed agreement should be treated as a Section 251(a) agreement, and not a Section 251(c) agreement (Embarq Initial Br. at 7, 8; Embarq Ex. 5 at 52, 53).

ISSUE 1 ARBITRATION AWARD

Pursuant to its April 2, 2008, Entry on Rehearing in 07-1199, the Commission clarified its prior determination, in its February 5, 2008, Finding and Order, that Intrado is a telephone company pursuant to Section 4905.03, Revised Code, and Rule 4901:1-7-01(S), O.A.C, for purposes of Chapter 4901:1-7, O.A.C. and Sections 251 and 252 of the Act (07-1199, Entry on Rehearing at 13, 14) Specifically, the Commission stated that, while it recognizes that Intrado is entitled to the rights and obligations of a telecommunications carrier pursuant to Sections 251 and 252 of the 1996 Act, this determination addresses only the fundamental question as to Intrado's right as a telephone company under Rule 4901:1-7-01(S), O.A.C., to request an interconnection agreement pursuant to Chapter 4901:1-7, O.A.C., and Section 251 and 252 of the 1996 Act. The Commission further explained that its decision in the certification proceeding did "not address the appropriateness and scope of any specific request for interconnection and that such decisions are to be addressed in the context of Intrado's ongoing arbitration proceedings, based on the case-specific facts of Intrado's actual proposal" (*Id.* at 14).

Consistent with the above determination, in addressing Issue 1, the Commission must focus its attention on the conditions placed upon Intrado's certification and the specifics of its request in this arbitration proceeding. First, the Commission points out that, rather than being granted all of the rights and privileges of a competitive local exchange company, Intrado's certification was restricted to that of a competitive emergency services telecommunications carrier. As a result of this prior decision, the Commission notes that the scope of Intrado's certification was limited to the company's operations relative to "the routing, transmission, and transport of traditional and nontraditional emergency call traffic to the appropriate PSAP or to allow for the handoff to a different 9-1-1 service provider, such as an ILEC for call completion to the appropriate PSAP" (Finding and Order at 5).

In analyzing Issue 1 and determining the applicable portion of Section 251, the Commission focuses on the fact that, consistent with its language, Section 251(c) applies to the situation in which a telecommunications carrier seeks to interconnect with the ILEC for the purpose of the transmission and routing of telephone exchange service and exchange access. Based on the record in this case, the Commission agrees with Embarq that it is necessary to review the following three different scenarios under which Intrado will be provisioning telecommunications services in the state of Ohio in order to appropriately arbitrate the disputed issues:

(1) When Embarq is the 9-1-1 service provider to the PSAP.

(2) When Intrado is the 9-1-1 service provider to the PSAP.

(3) When Intrado and Embarq each serve a different PSAP and transfer calls between each other.

Inasmuch as Intrado's certification is limited to the routing, transmission, and transport of traditional and nontraditional emergency call traffic to the appropriate PSAP that it is serving, and does not extend to the provisioning of end user traffic that would initially need to be transported to a selective router, the first scenario referenced above is not applicable to Intrado's current certification. In the second scenario whereby Intrado is the 9-1-1 service provider to the PSAP, the Commission notes that it is the ILEC (e.g., Embarq) that will be required to seek interconnection with Intrado for the purpose of allowing for the completion of Embarq's customers' emergency service calls to the PSAP. Therefore, Section 251(c) of the Act is not the applicable statutory provision for the purpose of interconnection under this scenario inasmuch as Section 251(c) establishes the obligations of ILECs with respect to satisfying the requests of other telecommunications carriers. The delineated obligations include those related to the interconnection of the requesting carrier with the ILECs' networks. Consistent with this discussion, the Commission determines that the disputed issues related to the scenario in which Intrado is the 9-1-1 service provider to the PSAP, should be addressed pursuant to Section 251(a) of the Act, which establishes the duty of a telecommunications carrier (e.g., Intrado) to interconnect directly or indirectly with the facilities of other telecommunications carriers. While reaching this determination, the Commission recognizes that Section 251(c) of the Act is applicable with respect to Intrado's request to obtain unbundled loops from Embarq for the purpose of serving each of the PSAPs situated in Embarq's service territory, which will be discussed in further detail in the context of Issue 19.

The Commission also determines that Section 251(a) of the Act is the applicable statute relative to the third scenario in which Intrado and Embarq each serve as primary provider of 9-1-1 service to a different PSAP and transfer calls between each carrier's selective routers in order to properly route a 9-1-1 call (inter-selective routing). In reaching this determination, the Commission relies on the fact that inter-selective routing involves a cooperative peering arrangement between the two carriers. Inasmuch as peering arrangements do not involve interconnection of a competing carrier's network with an ILEC's network, Section 251(c) does not apply. This issue will be discussed in further detail in the context of Issue 14.

Consistent with the aforementioned determinations, the Commission concludes that Intrado is entitled to arbitration pursuant to Section 252(b) of the Act. In reaching this determination, the Commission notes that Section 252(b) of the Act delegates to state commissions the authority to arbitrate disputes pertaining to a request for interconnection, services, or network elements pursuant to Section 251 of the Act, not limited to disputes pursuant to Section 251(c) of the Act. Specifically, the Commission notes that once a request for voluntary interconnection is made pursuant to Section 251(a) of the Act, a petition for a Section 252(b) arbitration can be made 135 days following the interconnection request. In addition to the above discussion, the Commission opines that it is administratively efficient to address both requests pursuant to Sections 251(a) and (c) of the Act in the context of the same arbitration proceeding in order for the Commission to engage in the appropriate regulatory oversight and to ensure that the ultimate interconnection agreement is in the public interest.

Issue 2: Can Embarq deny Intrado its rights under Sections 251(c) and 252 of the 1996 Act and Ohio law by claiming that Intrado: (1) does not offer telephone exchange services or exchange access and (2) does not serve retail end users?

Intrado explains that the Commission has already ruled that the company is engaged in the provision of telephone exchange service when it provides 9-1-1/E9-1-1 service to Ohio counties and PSAPs (Intrado Initial Br. at 10 citing 07-1199, Finding and Order at 7). The company states that the service addressed in 07-1199 is the same service for which the company seeks interconnection with Embarq in this case. To the extent that Embarq is now seeking Commission reconsideration of its prior determination that Intrado's proposed service is a telecommunications service, Intrado submits that such an argument should be denied due to the fact that it is an inappropriate attempt by Embarq to seek rehearing of its prior determination (*Id.* at 15).

Specifically, Intrado states that when it provides its complete 9-1-1/E9-1-1 service offering to Ohio counties and PSAPs, Intrado is a telecommunications carrier providing telephone exchange service (*Id.* citing Intrado Ex. 5 at 13). In support of its position, Intrado references the FCC's determination that "telephone exchange service is not limited to traditional voice telephony, but includes[s] non-traditional means of communicating information within a local area" (*Id.* citing *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, ¶17 [1999]) (*Advanced Services Order*). Intrado also points to the FCC's determination that "a key component of telephone exchange service is the intercommunication among subscribers within a local exchange area (*Id.* citing *Advanced Services Order,* ¶30). Specific to its operations, Intrado states that its services allow Ohio consumers to be connected with PSAPs and communicate with local emergency personnel (*Id.* at 15).

Intrado also contends that the FCC has determined that other nontraditional telephone exchange services (e.g., data transmissions) are classified as telephone exchange services. For example, Intrado highlights the fact that the FCC has determined that certain advanced DSL-based services are telephone exchange services when used to permit communications among subscribers within an exchange or within a connected system of exchanges (*Id.* at 11 citing *Advanced Services Order*, ¶20). Additionally, Intrado references the FCC's determination that the call-completion services offered by many competing directory assistance providers constitute a telephone service because it permits a community of interconnected customers to make calls to one another in the manner prescribed by the Act (*Id.* citing *Provision of Directory Listing Information Under the Telecommunications Act of 1934, as Amended*, 16 FCC Rcd 2736 (2001). Further, Intrado avers that the fact that the wireline 9-1-1 network is interconnected to, but separate from, the public switched telephone network does not change the classification of the services provided by Intrado. In support of its position, Intrado references the FCC's determination that:

> [T]he legislative text that Congress' redefinition of 'telephone exchange service' was intended to include in that term not only the provision of traditional local exchange service (via facilities ownership or resale), but also the provision of alternative local loops for telecommunications services, separate from the public switched telephone network in a manner 'comparable' to the provision of local loops by a traditional local telephone exchange carrier.

(*Id.* at 12 citing *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, ¶54 (1998).

Intrado opines that the classification of a service is dependent on the nature of the service being offered to customers, including what the customer perceives to be the integrated finished product (*Id.* at 18 citing *National Cable & Telecommunications Association v. Brand X Internet Services*, 125 S.Ct. 2688, 2704 (2005). Intrado avers that it is eligible for interconnection under Section 251(c) to provide 9-1-1/E9-1-1 service to Ohio counties and PSAPs even if its 9-1-1/E9-1-1 service includes an information service, so long as it is offering telecommunications services through the same arrangement (*Id.* at 19 citing *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, ¶995).

Intrado submits that the classification of the facilities that it utilizes should have no bearing on Intrado's rights for interconnection pursuant to Section 251(c) (Reply at 7). Notwithstanding Intrado's incorporation of Internet protocol within its network, Intrado rejects Embarq's claim that the services offered by Intrado should be considered as information, and not telecommunications, services (Intrado Initial Br. at 16 citing *Petition for Declaratory Ruling that AT&T's Phone-to -Phone IP Telephony Services are Exempt from*

Access Charges, 19 FCC Rcd. 7457 [2004]). Intrado posits that the use of Internet Protocol-based network components does not transform its network into a "next generation" network (Tr. I, 34).

Intrado avers that the FCC has consistently focused on a "function over facilities" approach to regulation with the emphasis on the nature of the service provided to consumers, rather than an analysis that focuses on the technical attributes utilized to provide the service (Reply Br. at 8 citing *In the Matter of the Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853, ¶5 [2005]). In particular, Intrado states that the FCC has specifically noted that "Congress did not limit the definition of telecommunications to circuit-switched wireline transmission but, instead, defined that term on the basis of the essential functionality provided to end users" (Intrado Reply Br. at 8 citing *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶98 [1998]; 47 U.S.C. §153[46]).

Intrado also dismisses any claim that it provides interconnected VoIP services. Intrado points out that the FCC has defined interconnected VoIP services as a service that: (1) enables real-time, two-way voice communications, (2) requires a broadband connection from the end user's location, (3) requires Internet protocol-compatible customer premises equipment, and (4) permits end users generally to receive calls that originate on the public switched telephone network and terminate to the public switched telephone network (Intrado Initial Br. at 19, 20 citing 47 C.F.R. §9.3). Intrado asserts that its service offering does not meet the definition of interconnected VoIP inasmuch as it does not require the PSAP to have a broadband connection or Internet protocol-compatible customer premises equipment. Therefore, Intrado concludes that its service offering is properly classified as a telecommunications service (*Id.* at 20 citing Intrado Ex. 4 at 9, 10).

As further support for its position that its service should be classified as a telephone exchange service, Intrado contends that Embarq cannot argue that Intrado's 9-1-1 service offering is not a telephone exchange service when Embarq classifies its own comparable service as a telephone exchange service and seeks to provide service to PSAPs in the same manner as Intrado (*Id.* citing United Telephone Company of Ohio dba Embarq, P.U.C.O. No. 5 General Exchange Tariff, Section 32, Original Sheet 5; Tr. III, 48, 146). In support of its position, Intrado cites to the FCC's general policy that "all telecommunications carriers that compete with each other should be treated alike regardless of the technology used" (Intrado Reply Br. at 8 citing *Local Competition Order*, ¶993). Intrado submits that, inasmuch as Ohio counties and PSAPs are receiving 9-1-1/E9-1-1 service from both Embarq and Intrado, there is no reason for Intrado's 9-1-1/E9-1-1 service offering to be treated differently simply because it may use different facilities than Embarq to offer its services (*Id.* at 8, 9).

Additionally, Intrado points out that Embarq's tariff reflects that PSAPs must "[s]ubscribe to additional local exchange service at the PSAP location for administrative purposes, for placing outgoing calls and for receiving other emergency calls, including calls which might be related by Telephone Company operators" (Intrado Initial Br. at 13 citing United Telephone Company of Ohio dba Embarq, P.U.C.O. No. 5 General Exchange Tariff, Section 32, Revised Sheet 2). While 9-1-1 calls are largely one-way in nature, Intrado notes that the 9-1-1 trunks may be used for two-way traffic purposes (*Id.* at 14). Intrado analogizes its 9-1-1 service to that of facsimile communications, which the FCC determined to be telephone exchange services even though they are predominantly one-way (*Id.* citing *Advanced Services Order*, ¶21).

With respect to Embarq's proposed Section 2.2, Intrado asserts that, inasmuch as the Commission determined that the company is entitled to all rights and obligations of Section 251, the resulting interconnection agreement should not be limited to Intrado's provision of 9-1-1/E9-1-1 services to PSAPs (Intrado Initial Br. at 28, 29 citing Tr. II, 57). Therefore, Intrado believes that Embarq's proposed Section 2.2 should be rejected (*Id.* at 28). In support of its position, Intrado represents that, due to the fact that it may seek to expand its certification and offer additional local exchange services in the future, there is no reason to limit the interconnection agreement to only those services that Embarq views as necessary for Intrado's provision of 9-1-1/E9-1-1 services to Ohio's counties and PSAPs. Intrado states that competitors often have provisions in their interconnection agreements that are not utilized by the competitor (*Id.* at 28, 29 citing Tr. III, 42). Further, Intrado argues that interconnection arrangements should not be restricted by ILECs based on the types of services that the competitor intends to initially provide (*Id.* at 29 citing *Local Competition Order*, ¶995). With respect to Embarq's proposed Section 2.2, Intrado believes that the proposed language will result in additional disputes between the parties (*Id.*). Specifically, Intrado states that it does not agree to the list of recommended deletions proffered by Embarq (*Id.* citing Embarq Ex. 5 at 13-15).

In regard to Intrado's contention that its combined, integrated service offering must be treated as a telephone exchange service on the basis that some of the components of the integrated service involve telecommunications, Embarq responds that providing a service that involves telecommunications is not the same as a providing a telecommunications service. Rather, Embarq considers Intrado's proposed service to be an information service (Embarq Reply Br. at 7, 8; Embarq Ex. 5, 56). In support of its position, Embarq points out "that the integrated services being purchased by PSAPs are not necessarily comprised, in their entirety and in all respects, as telephone exchange service" (Embarq Reply Br. at 8). Embarq conjectures that PSAPs know that they are not purchasing local dial-tone. Embarq also points out that emergency services are unique inasmuch as they are not subject to reciprocal compensation (*Id.*).

In support of its proposed Section 2.2, Embarq asserts that it does not have an obligation to provide services to Intrado which are inconsistent with Intrado's certification. To the extent that proposed Section 2.2 is not accepted, Embarq has alternatively identified specific provisions of the proposed interconnection agreement that it believes must be removed inasmuch as they extend beyond those authorized by Intrado's certification (Embarq Ex. 5 at 13-15).

ISSUE 2 ARBITRATION AWARD

With respect to the arguments raised specific to the issue of whether Intrado is engaged in the provision of telephone exchange services or exchange access service, the Commission agrees with Intrado that this issue was already generically addressed in the context of Intrado's certification proceeding (07-1199) and that, for the most part, Embarq has reiterated its position as previously stated in 07-1199. Therefore, Embarq's arguments with respect to this issue are denied and the Commission determines that Embarq cannot generically deny Intrado its rights under Sections 251(c) and 252 of the 1996 Act and Ohio law by claiming that Intrado does not offer telephone exchange services or exchange access and does not serve retail end users. Each request for Section 251(c) unbundling and Section 252 arbitration is to be considered on an individual basis pursuant to an analysis of the issues as discussed *infra*.

Regarding Embarq's proposed language (Section 2.2) for the purpose of limiting the requisite interconnection agreement to just that which Intrado is certified to offer, the Commission agrees with Embarq that Intrado should not be allowed to avail itself of services or facilities that exceed the scope of Intrado's certification. Embarq's proposed Section 2.2 properly captures this limitation for the purposes of the final interconnection agreement to be entered into as a result of this proceeding. Such language is consistent with the Commission's Rule 4901:1-6-10(E)(3), O.A.C., which provides for the negotiation of an interconnection agreement prior to granting of certification. Although Intrado analogizes its position to that of CLECs that maintain provisions in their tariff despite the fact that they do not offer all such services, the Commission is not persuaded by Intrado's arguments. Specifically, the Commission notes that Intrado is currently certified as a competitive emergency services telecommunications carrier, and not as a CLEC. In light of its restricted certification, the scope of its permitted offerings is limited in nature and cannot be expanded until such time that its certification has been expanded accordingly. Therefore, the applicable clarifying interconnection agreement language (i.e., Section 2.2) is appropriate.

Issue 3: Is Intrado entitled to arbitration pursuant to Section 252 of the Act?

Intrado believes that Section 251(c) of the Act is specifically suited to address the issues of unequal bargaining power and the need to protect competitive carriers from experiencing unreasonable delays in entering the marketplace (Intrado Ex. 4 at 13). Intrado asserts that consistent with Section 251 of the Act, ILECs must enter into interconnection agreements on just, reasonable, and nondiscriminatory terms in order to enable their competitors' customers to place and receive calls from ILEC's subscribers (Intrado Initial Br. at 9 citing *Local Competition Order* ¶¶10, 11, 13).

In response to Embarq's contention that the requested interconnection arrangements should be treated as Section 251(a) agreements that are not subject to the requirements of Section 252 of the Act, Intrado states that use of a non-Section 252 agreement violates the Act's requirement that interconnection agreements be filed with state commissions pursuant to 47 U.S.C. §252(e)(1) and 47 U.S.C. §252(h) (Intrado Initial Br. at 26). Intrado explains that, unlike commercial agreements in which both parties have equal bargaining power and an incentive to reach an agreement, such is not the case relative to the interactions between ILECs and competitive emergency services telecommunications carriers. Therefore, Intrado requests that, pursuant to Sections 251(c) and 252 of the Act, the Commission should assert its jurisdiction over the interconnection agreement that is the subject of this proceeding (*Id.* at 8, 9, 24, 25). In support of its position, Intrado states that the FCC has determined that the 1996 Act requires that all interconnection agreements must be submitted to state commissions for approval pursuant to Section 252(e) of the Act. Intrado believes that such action is necessary in order to promote Congress' stated goal of opening up local markets to competition, permit interconnection on just, reasonable, and nondiscriminatory terms, and to ensure that such agreements do not discriminate against third parties (*Local Competition Order* ¶¶ 165, 167, 168).

Intrado seeks a single interconnection agreement with Embarq in order to cover the parties' entire interconnection relationship (Tr. II, 54). To the extent that an agreement contains provisions that do not squarely fall under Section 251(c) of the Act, Intrado believes that such provisions may still be included in a Section 251(c) interconnection agreement and remain subject to arbitration pursuant to Section 252 (Initial Br. at 27 citing *Coserv Limited Liability Corporation v. Southwestern Bell Telephone Company*, 350 F.3d 482 [5th Cir. 2003]). In support of its position, Intrado points out that Embarq's own interconnection template includes provisions that Embarq has identified as "non-Section 251 services." For example, Intrado points out that "Embarq has agreed to include the terms and conditions for interconnection with its Wireline E9-1-1 network along with the terms for other types of interconnection in a single Section 251 interconnection agreement" (*Id.* citing Embarq Ex. 5 at 45, 47).

In response to Intrado's contention that non-Section 251(c) obligations can be addressed in an interconnection agreement negotiated and arbitrated pursuant to Section 251(c) and Section 252, Embarq concurs with Intrado's position provided that the non-Section 251 provisions are clearly delineated as such in the interconnection agreement (Embarq Reply Br. at 19).

ISSUE 3 ARBITRATION AWARD

As discussed *supra* in our discussion of Issue 1, the Commission finds that both the Section 251(a) and the Section 251(c) unresolved issues should be raised in the context of this arbitration proceeding. Consistent with this determination, the Commission concludes that the ultimate determinations reached by the Commission should be incorporated within the same interconnection agreement to be filed at the conclusion of this proceeding. Specifically, it is administratively efficient for the parties to bring both their Section 251(a) and 251(c) unresolved issues to the Commission for resolution in the context of one single, comprehensive interconnection agreement. In support of this determination, the Commission references the fact that, pursuant to Section 252(e), "**[a]ny** interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission" (Emphasis added). Furthermore, Section 252(c)(1) of the Act provides that state commissions shall: "ensure that such resolution and conditions meet the requirements of [S]ection 251, including the regulations prescribed by the Commission pursuant to Section 251." In referencing these provisions, the Commission highlights the fact that they encompass all Section 251 interconnection agreements, and not just those pertaining to Section 251(c) of the Act.

Commission oversight and resolution of disputes raised in this proceeding are of significant public interest due to the fact that the identified issues directly impact the provisioning of uninterrupted emergency 9-1-1 service in the state of Ohio. The submission of all unresolved issues to the Commission at one time and in the context of one interconnection agreement, will best allow for the development and Commission oversight of the competitive 9-1-1 emergency service market based on nondiscriminatory rates, terms, and conditions. Finally, as noted *supra*, Embarq, itself, agrees that it is appropriate to encompass the parties' entire interconnection relationship pursuant to a single interconnection agreement, provided that the non-Section 251(c) provisions are clearly delineated as such in the interconnection agreement. Consistent with the Commission's decision relative to this issue, the parties should properly delineate in the final interconnection agreement those provisions that are specifically Section 251(a)-related and those provisions that are specifically Section 251(c)-related.

Issue 4: Whether the agreement should contain a definition of "end user" and what definition should be used?

Intrado proposes a specific definition for "end user" because, while Embarq's template language contains the term "end user," it implies that an "end user" is only associated with the interconnection of traditional dial tone networks and the person who picks up a telephone to complete a call (Intrado Ex. 2 at 4; Tr. I, 170). Inasmuch as Intrado is interconnecting the competing 9-1-1 network with PSAPs, Intrado seeks to expand the definition of "end user" as follows: "'End user' means the individual that subscribes to (subscriber of record) and/or uses the telecommunications services provided by Embarq or Intrado Comm." Intrado opines that its proposed definition includes Intrado's current PSAP end user customers, as well as any other customers that Intrado may serve in the future with expanded certification (Intrado Ex. 2 at 4; Intrado Initial Br. at 54). According to the company, among other possible purchasers of its services, are governmental entities, other entities that purchase services from either of the parties at retail, and carriers that purchase services for their own use or consumption (Intrado Ex. 2 at 4).

Additionally, Intrado states that its proposed definition for "end user" is similar to the definition of "customer" in Rule 4901:1-7-01 (E), O.A.C., in that both definitions refer to an entity purchasing telecommunications services from the parties. Intrado observes that under Rule 4901:1-7-01(E), O.A.C.:

> "Customer" means any person, firm, partnership, corporation, municipality, cooperative organization, government agency, etc. that agrees to purchase a telecommunications service and is responsible for paying charges and for complying with the rules and regulations of the telephone company.

Intrado contends that the parties are co-carriers that will operate in Ohio under the Commission's carrier-to-carrier rules, which include Rule 4901:1-7-01(E), O.A.C. Therefore, given that its proposed definition is consistent with the Commission's definition of "customer," Intrado submits that its definition of "end user" should be adopted by the Commission (Intrado Initial Br. at 55, 56).

Intrado dismisses Embarq's argument that it cannot use the definition of "end user" or the proposed interconnection agreement itself for the purpose of serving wholesale customers. Rather, Intrado contends that the Commission has previously determined that ILECs, such as Embarq, must interconnect with competitors for the exchange of wholesale traffic. Specifically, Intrado references Case No. 06-1257-TP-ARB, *In the Matter of the Petition of Sprint Communications Company L.P. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with The Chillicothe Telephone Company*, Arbitration Award (February 28, 2007)("*Sprint Arbitration Award*") and Case No. 04-1494-TP-UNC, *et.al.*, *In the Matter of the Application and Petition in Accordance with Section II.A.2.b. of the Local Service Guidelines filed by: The Champaign Telephone Company, Telephone Service Company, The Germantown Independent Telephone Company and Doylestown Telephone Company*, Finding and Order (January 26, 2005); Order on Rehearing (April 13, 2005) (collectively, "*MCI Proceeding*"). In particular, Intrado asserts that the Commission has previously rejected the position that a wholesale provider is not acting as a telecommunications carrier when it provides wholesale services. Rather, Intrado asserts that the Commission has determined that a wholesale provider "is acting in a role no different from other telecommunications carriers whose network could interconnect with the [ILEC's] network so that traffic can be terminated to and from each network and across networks" (*MCI Proceeding*, Finding and Order at 4, 5).

Intrado adds that the Commission confirmed that a wholesale provider "offer[s] telecommunications for a fee directly to the public, regardless of the facilities used," and is, thus, entitled to interconnection under Section 251(c) of the Act (*Sprint Arbitration Award* at 9, 10). Consistent with these prior determinations, Intrado asserts that the Commission has previously approved an interconnection agreement definition of "end user" that is broad enough to include the provision of wholesale services. Therefore, Intrado submits that its definition is consistent with Commission precedent and is appropriate for adoption (Intrado Initial Br. at 56, 57).

As additional support for its position, Intrado avers that its proposed definition includes other entities that, under federal law, may appropriately be considered as "end users." Intrado notes that the FCC recognizes that wholesale services are included in the definition of "telecommunications service" and that the term "telecommunications service" was not intended to distinguish between retail and wholesale (e.g., In *the Matter of the Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended* 11 FCC Rcd 21905, ¶264 [1996]). Intrado points out that a provider of wholesale telecommunications service is a telecommunications carrier and is, therefore, entitled to interconnection under Section 251 of the Act (e.g., *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide wholesale Telecommunications Services to VoIP Providers*, 22 FCC Rcd 3513, ¶15 (2007) (*Time Warner Order*). While the FCC, in the *Time Warner Order*, did not directly address the issue of Section 251(c) rights, Intrado states that the Act and the FCC rulings do not distinguish between a "telecommunications carrier" for purposes of Sections 251(a),(b), or (c) (Intrado Initial Br. at 57, citing *Time Warner Order* at fn. 18). Further, Intrado observes, as the Commission confirmed in the *MCI Proceeding* and *Sprint Arbitration Award*, that it will be acting as a "telecommunications carrier" that provides "telephone exchange service" when it provides wholesale service. Therefore, Intrado asserts that its definition of "end user" is appropriate (*Id.* at 57, 58).

Contrary to Embarq's contentions, Intrado asserts that entities like Vonage are properly classified as "end users" because they purchase service from telecommunications carriers similar to other businesses or persons that obtain local exchange services from a local exchange carrier (e.g., *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd 9151, ¶11 [2001]; *In the Matter of Amendments of Parts 60 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, fn. 8, 53 [1988]). Finally, Intrado notes that Vonage and other interconnected VoIP service providers have not been classified as carriers by the FCC and are, instead, considered to be "end users" for regulatory purposes (e.g., *Universal Service Contribution Methodology*, 21 FCC Rcd 7518, ¶58 (2006). In sum, Intrado believes that its proposed definition of "end user" is consistent with FCC rulings and reflects the concept that a wholesale purchaser or a carrier could be considered as an "end user" of one of the parties (Intrado Initial Br. at 57, 58).

Embarq states that its template agreement and many of its existing contracts do not define the term "end user," but, instead, determine its meaning through the context of the interconnection agreement (Embarq Initial Br. at 10). Embarq adds that, according to the

National Emergency Number Association (NENA) Master Glossary of 9-1-1 Terminology, an "end user" means the individual that makes the 9-1-1 call (Embarq Ex. 5 at 61, 62). Embarq also observes that PSAPs purchase retail services and, like a government agency, can be classified an "end user" (*Id.* at 68). Finally, Embarq references Intrado's representation that the only "end users" it anticipates as purchasers of its tariffed services will be PSAPs (Embarq Initial Br. at 10, 11.) With the aforementioned in mind, Embarq proposes this definition of "end user":

> For the purposes of this agreement "end user" means the individual that makes the 9-1-1 call or the PSAP receiving the call for the purpose of initiating the emergency or public safety response.

Embarq believes that the above definition includes the ultimate consumer who subscribes to and receives a retail service, as well as PSAPs which also purchase services at retail (Embarq Ex. 5 at 61, 62, 68; Embarq Initial Br. at 11).

Embarq opines that Intrado's proposed definition is overly broad, ambiguous, and exceeds Intrado's stated intent (*Id.* at 10). Embarq asserts that Intrado's definition "would improperly allow Intrado to consider its wholesale carrier customers as 'end users,' as well as carrier-like entities such as Vonage" (Embarq Ex. 5 at 62). If the term "end user" is permitted to refer to wholesale carriers and companies like Vonage, Embarq believes that there will be "additional and unnecessary confusion," because Intrado proposes to substitute the term "end user" into parts of the interconnection agreement where such language is not really applicable, given Intrado's limited certification (*Id.* at 63, 64).

Embarq also contends that, because a local loop is a facility between an Embarq wire center and an "end user," expanding the definition of "end user" to include carriers and carrier-like entities will provide Intrado with an opportunity to define facilities between Embarq and such companies as local loops. Embarq adds that a local loop is defined by the FCC as a transmission facility between an ILEC central office and the loop demarcation point at the "end user" customer premises. Thus, states Embarq, if Intrado convinces the Commission that a carrier is an "end user," Embarq will be forced to provide local loop network elements instead of transport (*Id.* at 64, 65). Embarq notes that the FCC has established pricing for network elements at cost, which may be less than tariffed alternatives. By seeking to improperly classify transport as a local loop network element, Embarq believes that Intrado will manipulate the regulations to secure a price advantage (*Id.* at 65, 66).

Finally, with respect to carriers like Vonage, which provide interconnected VoIP service to "end users," Embarq notes that in the FCC's VoIP 9-1-1 proceeding, the FCC ordered interconnected VoIP providers to provide 9-1-1 access to their "end users." Thus, Embarq contends that when Intrado sells 9-1-1 service to carriers like Vonage, Intrado is not selling service to an "end user," but is selling wholesale services to a company that acts like a carrier and sells telephone-like services to "end users." Embarq adds that this is consistent with the FCC's definition of wholesale and retail services, whereby a wholesale transaction refers to a transaction of a service or product as an input for further sale to an "end user," while a retail transaction is for the customer's own personal use or consumption. (Embarq Ex. 5 at 66, 67, referring to *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Second Report and Order, 14 FCC Rcd 19237, 19423, ¶13 [1999]).

ISSUE 4 ARBITRATION AWARD

The Commission finds that Intrado's proposed definition of "end user" is overly broad inasmuch as it includes customers that Intrado may possibly serve in the future conditioned upon an eventual expansion of its current certification. When granting certification for Intrado, the Commission determined that, at this time, Intrado is not a CLEC that "provides basic local exchange service to end user subscribers who have affirmatively selected Intrado or have other alternative providers available" (See 07-1199, Finding and Order, February 5, 2008, p. 5). Rather, Intrado was designated a competitive emergency services telecommunications carrier because of its stated intent to serve as a competitive 9-1-1 service provider, offering services that, in the Commission's words, "involve the routing, transmission, and transport of traditional and nontraditional emergency call traffic to the appropriate PSAP or to allow for the handoff to a different 9-1-1 service provider, such as an ILEC, for call completion to the appropriate PSAP" (*Id.*). While Intrado may, at some future time, apply for and receive expanded Commission certification for the purpose of becoming a CLEC, it currently does not have certification to provide services to carriers and carrier-like entities on a retail or wholesale basis.

In addition, the Commission notes that the decisions and rules cited by Intrado in support of its contention that wholesale customers are "end users" for the purpose of interconnection are not on point. The definition of "customer" as it appears in Rule 4901:1-7-01, O.A.C, must, as a matter of course, include wholesale customers, as it defines the term in the context of the Commission's rules governing carrier-to-carrier (i.e., wholesale) operations. In understanding how the term "end user" is generally interpreted in this context, it is useful to review the definitions under Rule 4901:1-8-01, O.A.C. (9-1-1 Service Program Rules). 4901:1-8-01(E), O.A.C., defines the E9-1-1 database as:

> "E9-1-1 database" means the database maintained by each service provider which provides **end user** telephone number and location information for the initial load and ongoing updates to the [Automatic Location Identification] ALI database held by the database management system provider. (Emphasis added)

Therefore, in the context of 9-1-1 and related services, it is clear that the general understanding of the term "end user" in the Commission's rules is the customer making a

9-1-1 call, for whom the 9-1-1 databases would need to provide telephone number and location information.

With regard to the decisions in the *MCI Proceeding* cited by Intrado, the Commission is not persuaded that these decisions support Intrado's position regarding expanding the term "end user" to encompass wholesale customers. In the *MCI Proceeding*, the question before the Commission was the extension of a rural exemption in the face of a bona fide request from a certified CLEC, and the question of whether that CLEC was entitled to use the interconnection agreement to terminate calls that were originated from or destined for the customers of upstream providers who were wholesale customers of the CLEC. While this decision has some bearing on this arbitration, it does not affect the definition of "end user," as none of the parties in that proceeding attempted to indicate that the definition of "end user" was at issue in the case. For all parties in that proceeding, "end user" continued to mean an end-user retail customer.

Similarly, Intrado's reliance on the *Sprint Arbitration Award* is misplaced. While that award addressed the term "end user," it did not consider expanding the term to encompass a wholesale customer. Rather, the decision addressed the issue of whether the interconnecting CLEC must provide the complete service to the "end user" or merely a portion of the service. The Commission concluded that the interconnecting CLEC could provide a portion of the "end user's" service to a wholesale customer, while the interconnecting CLEC's wholesale customer provided the complete service to an "end user" (*Sprint Arbitration Award* at 9, 10).

In sum, the Commission finds that, given Intrado's current certification, Intrado's proposed definition of "end user" is overly broad, particularly given Intrado's assertions during hearing that it seeks to currently serve only PSAPs. While Embarq agrees that the meaning of "end user" should include PSAPs in addition to the customary meaning of "end user," it appears that, given the Commission's Award in Issue 2, Embarq's definition may well be too narrow, requiring a future amendment if the nature of Intrado's certification changes. Therefore, the Commission finds the following definition of "end user" to be appropriate for the purpose of this interconnection agreement:

> For the purposes of this agreement "End User" means the retail, end-use, dial tone customer of either party, or the PSAP served by either party receiving 9-1-1 calls for the purpose of initiating the emergency or public safety response. Where one or the other form of end-user is specifically required, "End User" shall refer to the retail, dial tone customer, while "PSAP End User" shall refer to the PSAP.

Issue 6: Whether audits should be performed by independent, third-party auditors

Intrado proposes the following language regarding audits:

> . . . Subject to each Party's reasonable security requirements and except as may be otherwise specifically provided in this Agreement, either Party, at its own expense, <u>may perform an audit through an independent third party of</u> the other Party's books, records and other documents directly related to billing and invoicing in any twelve (12) month period for the purpose of evaluating the accuracy of the other Party's billing and invoicing. "Audit" shall mean a comprehensive review of bills for services performed under this Agreement. "Examination" shall mean an inquiry into a specific element of or process related to bills for services under this Agreement. Either party (the "Requesting Party") may perform one (1) Audit per twelve (12) month period commencing with the Effective Date . . . . (Emphasis added.)

Intrado asserts that an independent third-party requirement will ensure that Intrado "is not unduly burdened or exposed to audit abuse" (Intrado Initial Br. at 61). Intrado contends that audits are costly, forcing a carrier to direct resources toward the audit, thereby disrupting normal business activity and exposing its processes to a direct competitor. Intrado adds that in the event there is an audit by a third party, the auditing party should cover the cost of the audit. According to Intrado, such a provision in the interconnection agreement creates incentive to avoid frivolous audits (Intrado Initial Br. at 61). Intrado adds that audit power can be easily abused, particularly when the parties involved do not hold equal market positions. Further, Intrado opines that audits "can be used to stifle competition by creating financial burdens on new entrants and distracting resources to the audit" (Intrado Ex. 2 at 5). Intrado believes that the language requiring the use of a third party for audits "is especially appropriate where the parties to a contract are direct competitors" (*Id.* at 5).

Intrado observes that Embarq's template language recognizes a distinction between an "audit' and an "examination," presenting a continuum for addressing billing disputes between the parties, with either party also able to use dispute resolution provisions of the interconnection agreement. Intrado explains that an "examination" is intended to be used for specific document requests or billing inquiries, while an "audit" is a comprehensive review of bills rather than a specific inquiry. Intrado adds that both parties have agreed that neither party may request an "audit" more frequently than once during any twelve month period, while an "examination" may be performed by either party as deemed necessary, with the assistance of the other party (*Id.* at 6; Intrado Initial Br. at 61). Further, Intrado opines that the dispute resolution process suggests that dispute resolution would be invoked first prior to any formal examination or audit process (*Id.* at 62). Therefore, Intrado concludes that the need for an independent third-party auditor would be rare, thus negating Embarq's concerns about the expense of a third-party audit (*Id.*).

In support of its position, Intrado represents that "similar third-party audit provisions are common in incumbent interconnection agreements," including the template interconnection agreements of many ILECs operating in Ohio (*Id.* at 63). Further, Intrado asserts that "the Commission has found language for the use of a third-party auditor reasonable and the division of costs reasonable (See e.g., *In the Matter of TelCove Operations, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Ohio Bell Telephone Company d/b/a SBC Ohio,* Case No. 04-1822-TP-ARB, [January 25, 2000]). Similar to the Commission's concerns in 04-1822 regarding potential abuses by a competitor during an audit, Intrado believes that the Commission should adopt Intrado's proposed language (Intrado Initial Br. at 63).

Embarq's proposed language concerning audits is as follows:

> . . . Subject to each Party's reasonable security requirements and except as may be otherwise specifically provided in this Agreement, either Party, at its own expense, may audit the other Party's books, records and other documents directly related to billing and invoicing in any twelve (12) month period for the purpose of evaluating the accuracy of the other Party's billing and invoicing. "Audit" shall mean a comprehensive review of bills for services performed under this Agreement. "Examination" shall mean an inquiry into a specific element of or process related to bills for services under this Agreement. Either party (the "Requesting Party") may perform one (1) Audit per twelve (12) month period commencing with the Effective Date . . .. (Emphasis added.)

Embarq asserts that a mandated, third-party audit is contrary to industry practice in Ohio. Further, states Embarq, it has negotiated many interconnection agreements that have been filed and approved in Ohio that do not contain a requirement that audits be conducted by independent third parties. In Embarq's opinion, Intrado has not established that such audits are consistent with industry practice in Ohio (Embarq Initial Br. at 13).

Embarq notes that Intrado's proposed language would require each party to hire an independent third-party auditor whenever a party wished to conduct an audit of the other party. Embarq considers such language to be unreasonable and states that Intrado's concerns regarding confidentiality and abuse of power to be "purely speculative" (*Id.* at 11). Embarq observes that although Intrado witness Clugy claims that audits can be abused, she was unaware of audits having been abused by any ILEC in Ohio or elsewhere (*Id.* at 12 citing Tr. 1 at 149). Embarq adds that its own witness Hart testified that no CLEC or other entity has ever complained that Embarq has used audits to financially intimidate or harass competitors (*Id.* citing Tr. II, 171). Further, despite Intrado's concerns that the parties do not hold equal positions in the competitive market, Embarq references the testimony of Intrado witness Spence-Lenss regarding the number of 9-1-1 calls made over Intrado's network and the number of subscriber records managed by Intrado (*Id.* at 12, citing Intrado Ex. 5 at 4). Embarq submits that this testimony demonstrates that Intrado is not a small operation that could be easily intimidated by an Embarq financial audit. Further, Embarq points out that, even if it wished to harass Intrado through an audit, the parties have already agreed that only one audit can be conducted during a twelve-month period (*Id.* at 13, citing Embarq Template Interconnection Agreement at Sec. 8.1).

Additionally, Embarq states that, to the extent that Intrado believes that it is being harassed through an audit, it could invoke the dispute resolution process under the interconnection agreement (Embarq Initial Br. at 12, 13). While not disagreeing that, under language agreed upon by both parties, an inquiry about one billing element is appropriate for an examination rather than an audit, Embarq witness Hart notes that the interconnection agreement does not specify whether dispute resolution must be used prior to an audit (Tr. II, 158, 159, 167). Embarq points out that mandated audits by third-party firms are "expensive and inefficient" and could cost from $20,000 to $30,000. With this in mind, Embarq believes that a party would be discouraged from pursuing an audit if the amount at issue was less than the predicted expense of the audit. Embarq also submits that audits conducted by independent third parties are not necessarily more effective than an audit conducted by one of the parties inasmuch as the parties' employees are more familiar than an outside firm with telecommunications billing system and how to extract the data (Embarq Initial Br. at 13, 14). In response to Intrado's concerns that an audit by Embarq representatives could jeopardize confidential information, Embarq states that the undisputed terms of the interconnection agreement "provide for maintaining the confidentiality of information exchanged between the parties" (*Id.* at 14). Additionally, Embarq witness Hart states that "the information subject to an audit would be information that would form the basis for an invoice [of Intrado bills to Embarq]. That's hardly secret information" (Embarq Ex. 4 at 8).

ISSUE 6 ARBITRATION AWARD

While cognizant of Intrado's concerns that an audit by a competitor introduces the potential for abuse, the Commission observes that Intrado failed to offer evidence of any such improper actions by an ILEC in Ohio or elsewhere. Indeed, language agreed upon by both parties states that an audit is "subject to each Party's reasonable security requirements . . . ." Further, the Commission takes notice of Embarq's contention that, under language already agreed upon by the parties, only one audit can be conducted during a twelve-month period and that, if Intrado believed that it was being harassed through an audit, Intrado could resort to dispute resolution under the interconnection agreement.

In addition, while Intrado's witness Clugy's prefiled testimony includes templates from different interconnection agreements with language regarding third-party audits, the Commission notes that she was unable to testify with certainty that such language is currently in an interconnection agreement approved by this Commission (Tr. I, 146). As for the Commission's decision in the *TelCove* arbitration, the Commission observes that the approved language allows an audit to be conducted either by the auditing party's employees or an independent auditor acceptable to both parties, and that if the audited party requests the use of an independent auditor and the auditing party agrees, the audited party must pay one-fourth of the independent auditor's fees and expenses. In contrast, Intrado's proposed language makes mandatory the use of a third party for an audit and would make the auditing party fully responsible for payment of such an audit.

Given that Intrado's proposed language would make mandatory the use of a third party for audits, the Commission must examine the issue of the audit's expense. In particular, the Commission notes that both parties agree that third-party audits are costly. Additionally, as noted by Embarq witness Hart, the Commission recognizes that audits conducted by third parties are not necessarily more effective than audits conducted by employees of a competing telecommunications carrier, who are more familiar than a third party with the telecommunications billing systems and how to extract the data. Therefore, in light of the aforementioned issues, and considering that both parties have agreed that an audit is subject to each party's reasonable security requirements, the Commission determines that Embarq's proposed language regarding audits is more reasonable.

Issue 9-1: **Whether 9-1-1 Service and E9-1-1 Service should be included in the section regarding local interconnection? (Issue as defined by Intrado) Whether Section 55.1 of the interconnection agreement should include Intrado' proposed reference to 9-1-1 Service and E9-1-1 Service? (Issue as defined by Embarq)**

Issue 9-2: **Whether one-way trunks should be used by the parties for the interconnection of the parties' 9-1-1/E9-1-1 networks and E9-1-1 tandems through inter-selective router trunking?**

Issue 9-3: **Same as 9-2.**

While the parties have described the various areas of dispute in Issues 9-1 through 9-3 as two or three different technological issues, their actual arguments, as reflected in the Joint Issues Matrix, in testimony and on brief, revolve around the central question of whether proposed language in Section 55.1 and its associated subsections are appropriate for inclusion in a Section 251(c) interconnection agreement. While the technical issues regarding interconnection are dealt with pursuant to Issues 10, 13, and 14, here the Commission will deal with the question of the inclusion of the specific language proposed in Section 55.1 in this interconnection agreement.

Additionally, the Commission has already addressed the overall question of whether language appropriate to a Section 251(a) agreement belongs in this interconnection agreement (Issue 1), how such language should be handled within a this agreement (Issue

3), and the treatment of language regarding services that Intrado is not eligible to purchase under its current certification (Issue 2). Therefore, the Commission will deal here exclusively with arguments and discussion unique to Issues 9-1 through 9-3, and the implementation of the Commission's decisions in Issues 1, 2, and 3 and the proposed language in Section 55.1 and its subsections.

Intrado has proposed the following language for inclusion as Section 55.1 of the agreement:

> 55.1 The Parties shall reciprocally terminate Local Traffic, IntraLATA/InterLATA toll calls, and 9-1-1 service and E9-1-1 service calls originating on the other party's network as follows:

Intrado states that the proposed language is appropriate for inclusion in a Section 251(c) agreement inasmuch as 9-1-1 and E9-1-1 calls are like any other local exchange traffic and that the two-way call completion between Embarq and Intrado is "fundamentally no different than any other two-way communication occurring between two local carriers, one of which is the originating service provider and the other of which is the terminating carrier" (Intrado Initial Br. at 43). While acknowledging that a PSAP customer may have additional features, such as ANI (Automatic Number Identification) and ALI, Intrado states that fundamentally, ALI delivered to the PSAP is no different from a terminating customer who subscribes to Caller ID (*Id.*).

Embarq takes the position that the proposed language, though acceptable "in a commercial agreement," is inappropriate in an interconnection agreement, inasmuch as it is not applicable to the provisioning of service consistent with Section 251(c) (Joint Issues Matrix). Embarq states that the primary dispute between the parties pursuant to Issue 9 is the extent to which Section 251(c) applies when Intrado is the 9-1-1 service provider to the PSAP (Embarq Initial Br. at 14). Specifically, Embarq asserts that Intrado's proposed language is "entirely inappropriate" inasmuch as Intrado has attempted to insert 9-1-1 Service and 9-1-1 Service calls into a section of the interconnection agreement related to reciprocal termination of local traffic. Specifically, Embarq avers that the pertinent section of the interconnection for which Intrado is seeking inclusion of its language is intended to apply to nonemergency traffic that would be routed and exchanged in either direction (*Id.* at 14, 15). In support of its position, Embarq asserts that Intrado will not be sending any traffic to it due to the fact that is not certified to have any end users other than PSAPs. Therefore, Intrado will only terminate 9-1-1 calls that it receives from Embarq end users and will not originate any traffic for termination to Embarq (*Id.* at 15; Tr. II, 57). Finally, Embarq states that emergency calls are jurisdictionally "agnostic", and are not subject to reciprocal compensation. Therefore, Embarq concludes that inclusion of a reference to 9-1-1 traffic in the reciprocal termination section of an interconnection agreement is inappropriate. (*Id.*)

ISSUE 9.1 ARBITRATION AWARD

In its consideration of the Issues 1, 2, and 3, discussed *supra*, the Commission has previously dealt with the following questions:

1) Whether this interconnection agreement should include language dealing with aspects of interconnection that relate to Section 251(a)?

2) Whether this agreement should include language relating to Intrado offering services not covered under its current certification?

3) How Section 251(a) language should be handled in this interconnection agreement?

With regard to these questions, the Commission has concluded that (1) this interconnection agreement appropriately includes both Section 251(a) and (c) obligations of the parties, (2) the relevant portions of Section 251(a) should be appropriately indentified, and (3) some of the interconnection agreement language is only applicable provided that Intrado obtains Commission approval to expand its current certification.

Relative to proposed Section 55.1, the Commission is not persuaded that the language proposed by Intrado should be excluded from the resulting interconnection agreement. As a matter of public policy, it would be unreasonable for the Commission to approve an interconnection agreement that, for whatever reason, reflected that 9-1-1 traffic would not be reciprocally terminated. The proposed language addressed in Section 55.1 is appropriate under an agreement pursuant to either Section 251(a) or (c).

The Commission also dismisses the argument that the language proposed by Intrado for Section 55.1 should be excluded on the basis that Intrado will not be terminating traffic on Embarq's network. Without completely reiterating our entire discussion relative to Issue 2, the Commission notes that it previously determined that Embarq's proposed Section 2.2 is proper for this agreement and provides the appropriate limitations as to the services or facilities that Embarq must provide to Intrado consistent with scope of Intrado's certification.

Finally, the Commission is not persuaded by Embarq's argument that 9-1-1 traffic is not subject to reciprocal compensation and, therefore, should not be discussed under a section pertaining to reciprocal termination. The Commission notes that the issue of reciprocal <u>compensation</u> is a distinguishable from that of reciprocal <u>termination</u>. The former is a mechanism for parties to compensate each other for any traffic they may terminate on each other's networks; the latter is an agreement to actually terminate said traffic when and if it exists. As noted *supra*, the Commission finds that, to the extent that reciprocal 9-1-1 traffic exists or may exist in the future, the terms of this interconnection