BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY ON REHEARING

The Commission, considering the arbitration award issued October 8, 2008, the applications for rehearing filed by Intrado Communications, Inc. and Cincinnati Bell Telephone Company on November 7, 2008, and the memoranda contra filed by Intrado Communications, Inc. and Cincinnati Bell Telephone Company on November 17, 2008, issues its entry on rehearing.

(1) On October 8, 2008, the Commission issued an award that decided six issues presented for arbitration by Intrado Communications, Inc. (Intrado) and Cincinnati Bell Telephone Company (CBT).

(2) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matter determined by the Commission within 30 days after the entry of the order upon the journal of the Commission.

(3) Intrado and CBT filed applications for rehearing on November 7, 2008, to contest the Commission's decision. In its application for rehearing, Intrado requests that the Commission reconsider its award for the following reasons:

(a) It fails to find that interconnection between a competitor like Intrado and an incumbent local exchange carrier (ILEC) is subject to Section 251(c) of the Telecommunications Act of 1996 (the Act);[1]and

(b) It fails to adopt Intrado's proposed interconnection arrangements to ensure it receives interconnection from CBT that is at least

[1] Codified at 47 U.S.C. §251 et seq.

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equal in quality to that which CBT provides to itself and other parties interconnecting to its own network. Furthermore, Intrado seeks clarification of the award to confirm that Intrado is entitled to obtain unbundled network elements (UNEs) pursuant to Section 251(c) to provide service to its public safety answering point (PSAP) customers.

In its application, CBT requests rehearing of the Commission's award in this proceeding with respect to issue 6. Specifically, CBT claims that the Commission erred where:

(a) It erroneously stated that when CBT interconnects with Intrado to deliver 9-1-1 traffic to Intrado's selective router, such interconnection would be pursuant to Section 251(a) and not Section 251(c); and

(b) In the alternative, if such interconnection is pursuant to Section 251(a) of the Act, the Commission has no authority to establish rates for trunk ports in this arbitration.

(4) In its application for rehearing regarding its first assignment of error, Intrado states that the Commission's conclusion in its certification order[2] is correct in deciding that Intrado is entitled to Section 251(c) rights as a provider of 911/E911 service because Intrado is a telecommunications carrier providing telephone exchange service. Intrado claims that the Commission erred as a matter of law, in this arbitration, when it determined that Section 251(c) does not apply in interconnection arrangements with CBT when Intrado is the designated 911/E911 service provider. By ruling in this manner, Intrado argues that the Commission strips Intrado of the rights it is entitled to under Section 251(c). Moreover, Intrado accuses the Commission of creating a double standard whereby Section 251(c) applies to Intrado in some circumstances but not in others. Intrado argues further that the Commission's decision is contrary to the law and its underlying policy to promote competition.

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2 *In the Matter of the Application of Intrado Communications Inc. to Provide Competitive Local Exchange Services in the State of Ohio*, Case No. 07-1199-TP-ACE (Finding and Order issued February 5, 2008) (07-1199).

(5) It is Intrado's interpretation that Section 251(c) applies whenever a competitor seeks to interconnect with an ILEC, assuming the competitor is a telecommunications carrier providing telephone exchange service. Intrado maintains that it neither matters that Intrado is the 911/E911 service provider, nor does it matter on which network the interconnection takes place. Intrado contends that the Commission's decision runs afoul of the Act and its underlying purpose. Moreover, Intrado asserts that the Commission provides no legal or public policy reasons to justify what Intrado considers a novel interpretation.

According to Intrado, Section 251(c) applies whenever a competitor, like Intrado, seeks interconnection from an ILEC, like CBT, even when the competitor is the designated 911/E911 service provider. Intrado is concerned that the Commission's interpretation may result in an ILEC refusing to comply with its obligations under Section 251(c). To be clear, Intrado believes that Section 251(c), not Section 251(a), governs all ILEC-competitor interconnections. Intrado emphasizes that Section 251(a) governs non-incumbent carrier interconnections and ILEC-to-ILEC interconnections.

Explaining the underlying policy, Intrado states that the Federal Communications Commission (FCC) understood that ILECs enjoyed dominion over the telecommunications industry and the marketplace. ILECs have no incentive to negotiate with competitors on even terms. It is Intrado's understanding that Congress and the FCC designed Section 251 to equalize the unequal bargaining power between ILECs and competitive local exchange carriers (CLECs). Section 251(c) achieves the goal of equalizing bargaining power by providing all competitors access to the public switched telephone network on equal terms. Section 251(c) requires that an ILEC 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.

By contrast, Intrado states that Section 251(a) applies where the parties to an agreement have equal bargaining power. Equal bargaining power occurs when both parties are CLECs or when both parties are ILECs. With equal bargaining power, neither party needs the protections provided by Section 251(c). Intrado

emphasizes that it does not have equal bargaining power with CBT and, therefore, Section 251(c) should apply.

Intrado argues that the Commission has limited Intrado to Section 251(a) when Intrado is the provider of 911/E911 service. By doing so, Intrado claims that the Commission has restricted impermissibly and unreasonably the rights and protections that Intrado would be entitled to as a competitive telecommunications carrier. As an example, Intrado declares that under Section 251(a), Intrado could be denied interconnection on just, reasonable, and nondiscriminatory terms. Moreover, Intrado believes that it could be denied access to unbundled network elements (UNEs) and collocation arrangements. Such a result, according to Intrado, is unreasonable and contrary to law. Intrado claims the rights provided by Section 251(c) by virtue of its status as a competitive telecommunications carrier providing telephone exchange service.

(6) CBT, in its memorandum contra, points out that Intrado fails to identify which, if any, of the six contested issues considered by the Commission in this arbitration it claims was decided incorrectly or what contract language Intrado seeks in lieu of that ordered by the Commission. CBT explains that Intrado has not shown how the Commission's decision has led to any improper terms appearing in the parties' interconnection agreement. It is CBT's opinion that Intrado must show that the Commission's application of a Section 251(a) analysis, rather than the application of Section 251(c), led to the inclusion of improper terms in the agreement.

Moreover, CBT claims that the Commission granted Intrado all the rights it would receive had the Commission applied Section 251(c), including the ability to arbitrate all contested issues. CBT also claims that Intrado has failed to identify any contract term that results in a competitive disadvantage. For these reasons, CBT concludes that Intrado has failed to identify any issue upon which it should be granted rehearing.

(7) Upon review of Intrado's rehearing arguments relative to its first assignment of error, the Commission finds that Intrado fails to raise any new arguments for the Commission's consideration. As discussed in the Commission's award in this

matter and its entry on rehearing issued in Case No. 07-1216-TP-ARB (07-1216)[3], Section 251(c) provides protections to ensure a CLEC customer can place calls to and receive calls from customers of an ILEC. Based on Intrado's current certification it will not be engaged in the transmitting of calls to the ILECs' subscribers (See 07-1199, Finding and Order issued February 5, 2008 at 1, 5, and as discussed in further detail below). It is appropriate, therefore, to apply Section 251(a) to Intrado when it is the designated provider of 911/E911 services.

In response to Intrado's arguments regarding the existence of unequal bargaining power between Intrado and the ILECs when Intrado is the provider of 911/E911 service, it will be CBT seeking to "interconnect" with Intrado to terminate its end user's 9-1-1 calls to the appropriate Intrado-served PSAP. Under those conditions, the ILEC becomes dependent on Intrado for access to facilities that it must have in order to provide a component of basic local exchange service under Ohio law. In fact, neither party can impede the other's ability to operate in the market by refusing interconnection, since providing access to 9-1-1 or E9-1-1 service is a requirement under Ohio law. Once Intrado serves a PSAP, CBT will have no choice but to interconnect with Intrado in order to ensure that its end users have the capability of completing 9-1-1 emergency calls to the PSAP. The bargaining power, when Intrado is the designated wireline 911/E-911 service provider, appears to be equal.

Additionally, we previously determined that competitive emergency services telecommunications carriers (CESTCs) are generally entitled to all rights and obligations of a telecommunications carrier pursuant to Sections 251 and 252 of the Act. We did not, however, specifically state that only Section 251(c) is applicable, as Intrado repeatedly suggests (07-1199 at 5, 07-1199 Entry on Rehearing issued April 2, 2008 at 14).

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3 *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.

Finally, we agree with CBT that Intrado has not provided evidence of any harm from the application of Section 251(a) or the resulting contract language approved by the Commission. Therefore, rehearing is denied.

(8) Regarding its second assignment of error, Intrado, in its rehearing application, states that the Commission's award in this proceeding is inconsistent with the award issued in 07-1216. Intrado states that in 07-1216 the Commission did not reach the issue of whether Intrado's proposed interconnection arrangement was supported by the equal in quality requirement of Section 251(c)(2)(C). The Commission explained that Section 251(a) governed the interconnection between Intrado and Embarq when Intrado was the designated 911/E911 service provider. Intrado states that the award in this proceeding, on the contrary, analyzes Intrado's proposal based upon Section 251(c)(2)(C) notwithstanding that the Commission determined that the interconnection is governed by Section 251(a). In either case, Intrado finds an error of law.

According to Intrado, it is entitled, pursuant to Section 251(c)(2)(C), FCC rules, and the Commission's carrier-to-carrier rules to interconnectivity "that is at least equal in quality to that provided by the [ILEC] to itself or to any subsidiary, affiliate or other party to which the carrier provides interconnection." Intrado believes that the interconnection CBT provides itself and imposes on competitors connecting to its network to terminate 911 calls to CBT's PSAP customer is no different from what Intrado seeks when it is the 911/E911 service provider.

(9) CBT, in its memorandum contra, points out that while the Commission may have applied Section 251(a) to Intrado's interconnection proposals, the Commission also performed the analysis requested by Intrado itself when Intrado wanted its proposals judged under Section 251(c)(2)(C) in both 07-1216 and this case. CBT notes that Intrado claims that the Commission's analysis under Section 251(c)(2)(C) is incorrect but fails to point out which issues or contract language it claims should be different. CBT avers that Intrado has failed to find error and is simply rehashing its unsuccessful arguments to overturn the Commission's finding that Intrado's demand for dedicated trunking to geographically diverse points on Intrado's network is "superior" to the interconnection CBT

provides to itself and other carriers. In fact, CBT states that Intrado will receive exactly the same interconnection as CBT provides itself and others. CBT notes that Intrado is complaining about CBT's internal network design, not the quality of interconnection with Intrado. According to CBT, nothing in the Act, the FCC's or Commission's rules mandates how CBT must design its network for traffic originating from CBT's customers.

(10) With respect to Intrado's interconnection proposals, the Commission strongly disagrees with Intrado that the CBT award is inconsistent with our analysis in 07-1216. As noted earlier, the Commission is consistent in its finding in both cases that Intrado's interconnection proposals are best addressed pursuant to Section 251(a). While it is true that in the Embarq Award the Commission did not reach as far as to analyze the proposals pursuant to Section 251(c), the additional analysis provided in the CBT award was simply in response to Intrado's arguments and was used to further support why Section 251(c), and in particular Section 251(c)(2)(C), would not be applicable. However, the fact remains that the result of the Commission's determination is the same. The fact that this determination can be supported via two different articles of law is not an error of law. Rehearing on Intrado's second assignment of error is therefore denied.

(11) In its first assignment of error regarding issue 6, CBT states that the Commission relied on an erroneous decision in 07-1216 to decide that when Intrado is the 911/E911 service provider, the ILEC must request interconnection with Intrado to terminate its traffic to an Intrado PSAP customer under Section 251(a). From there, CBT avers, the Commission concluded, in its award for issue 6, that Intrado could charge CBT for interconnection trunk ports under Section 251(a) when CBT interconnects to Intrado's network.

Pointing to what it perceives to be a contradiction in the Commission's decision, CBT notes that the Commission has confirmed that under Section 251(c) a requesting carrier's point of interconnection must be on the ILEC's existing network. Furthermore, according to CBT, the Commission appropriately confirmed that an ILEC is under no obligation to construct facilities to interconnect with another carrier's network.

Nevertheless, in issue 6, CBT points out that the Commission stated that Intrado's trunk port would be CBT's point of interconnection (POI) on Intrado's network. However, under Section 251(c), Intrado can only interconnect on CBT's existing network, which does not include Intrado's selective router. To CBT, it is an error for the Commission to assume that CBT would have to request interconnection on Intrado's network under Section 251(a). Because CBT is an ILEC and Intrado is a CESTC, with no greater rights than a CLEC, CBT argues that the interconnection should be governed by Section 251(c), not by Section 251(a). CBT emphasizes that Section 251(c) is applicable whenever a competitor seeks to interconnect with an ILEC. CBT emphasizes that it has not requested interconnection to Intrado, pursuant to either Section 251(a) or (c). CBT notes that Intrado initiated a formal request for arbitration under Section 251(c). Moreover, according to CBT, Intrado did not present any issues arising under Section 251(a).

CBT notes that a POI is for the mutual exchange of traffic, not a one-way arrangement. According to CBT, it is contrary to law and Section 3.2.2 of the interconnection agreement that the parties maintain separate POIs. CBT claims that it is entitled to use the same POI that Intrado establishes within CBT's network as the location where CBT can deliver its traffic to Intrado. Moreover, this obviates the need for CBT to seek interconnection under Section 251(a) and the need for CBT to establish a POI on Intrado's network. To compel CBT to establish a POI on Intrado's network would conflict with the Act. CBT proclaims that the FCC and Congress refused to require ILECs to build out or establish POIs on competitors' networks. CBT notes, however, that it is not filing rehearing of the decisions of the Commission with regard to issues 2, 3, and 4 which require the establishment of a POI on Intrado's network because the Commission appropriately adopted CBT's language for these issues.

(12) In its memorandum contra, Intrado acknowledges that it agrees with CBT in certain respects but claims that CBT's application for rehearing contains several legal and factual inaccuracies. Intrado agrees with CBT that Section 251(c) of the Act governs the parties' interconnection agreement. To Intrado, it is clear from the Act and FCC rulings that Section 251(c) is applicable whenever a competitor seeks to interconnect with an ILEC. In

further agreement with CBT, Intrado summarizes that Section 251(a) governs interconnection between ILECs or between two CLECs. Section 251(c), on the other hand, always governs ILEC-to-competitor relationships. The applicability of Section 251(a) is not contingent upon which party requests interconnection.

Intrado strongly disagrees with other points asserted by CBT. Intrado does not recognize an agreement to interconnect on CBT's network when Intrado is the 911/E911 service provider. Intrado, in its memorandum contra, interprets Section 3.2.2 differently from CBT's interpretation. According to Intrado, Section 3.2.2 merely states that CBT may use the same POI that Intrado establishes on CBT's network to send traffic to Intrado's network. Intrado contends that this provision applies to interconnection generally. Pointing to Section 3.8.7, Intrado highlights a provision that specifically addresses the interconnection and exchange of traffic when Intrado is the designated 911/E911 service provider. Relying on this provision, Intrado states that CBT has agreed to transport its end users' 911 calls to the mutually agreed POI on Intrado's network. The POI will be used exclusively to terminate 911/E911 traffic. Intrado states that the Commission upheld this provision in its arbitration award, with the limitation that CBT was not required to transport traffic outside its serving territory.

(13) The Commission finds that, while CBT admits that it is not filing rehearing on the issues that give rise to issue 6 (issues 2, 3, and 4), its rehearing application reads as such. In particular, the Commission award for issue 2 requires the establishment of a single POI for the termination of 911 calls on Intrado's network under certain circumstances and, therefore, issue 6 simply allows Intrado to charge for trunk ports associated with that POI. Specifically, issue 6 as originally presented to the Commission for resolution is as follows: "What should each party *charge* the other party for facilities, features and functions necessary for the mutual exchange of 911 service and E-911 service traffic" (emphasis added). Intrado is correct that Section 3.8.7 of the contract submitted by both parties requires CBT to transport its end users 911 calls to a POI on Intrado's network for the termination of its customers' emergency calls to PSAP served by Intrado. Intrado is also correct that the

Commission upheld this provision of the contract with the limitation that CBT is not required to transport 911 traffic outside of its local access transport area (LATA). This finding was a direct result of the Commission's arbitration award for issue 2, again an issue for which CBT did not seek rehearing.

While we also agree with Intrado that the language in Section 3.3.2 applies to a POI on CBT's network for the exchange of traffic generally and Section 3.8.7 applies to 911 traffic terminated to Intrado specifically, CBT assumes that Intrado will automatically request a POI on CBT's network pursuant to Section 3.3.2. It is entirely possible that, under its current certification, Intrado will not request a POI on CBT's network, since its current certification does not involve carrying calls to CBT's network for termination, and there is no clear indication from the record that Intrado would have any other reason for requesting a POI on CBT's network. Unlike the typical interconnection arrangement between an ILEC and a CLEC, Intrado may find itself in control of some portion of the facilities CBT needs to terminate its customers' 911 calls. As a practical matter, then, if Intrado is the designated Wireline 911/E911 carrier for a PSAP serving CBT's customers, CBT may well need to request a POI from Intrado, in the absence of a POI requested by Intrado. Since this is the exact scenario contemplated by Section 3.8.7 of the contract, Intrado is permitted to charge CBT for the port terminations on its selective router consistent with the Commission's award for issue 6. CBT's rehearing on this assignment of error is, therefore, denied.

(14) In its second assignment of error regarding issue 6, CBT states that even if the Commission believes that Section 251(a) controls the terms of CBT's delivery of traffic to Intrado, establishing a rate that CBT must pay for interconnection trunk ports on Intrado's selective router is an error of law. Given that Section 252(b)(4) limits the Commission to arbitrate only those issues presented, CBT concludes that the Commission overstepped its authority by discussing pricing under Section 251(a).

CBT points out that requests for interconnection under Section 251(a) would not be subject to the compulsory arbitration provisions of Section 252(b). By definition, Section 252(b)

arbitrations can only involve the specific requirements of ILECs found in Section 251(b) and (c). CBT states flatly that a state commission cannot compel arbitration of an interconnection agreement under Section 251(a) of the Act. Therefore, CBT concludes that the Commission exceeded its authority in setting port rates for Intrado under Section 251(a).

(15) Even though Intrado agrees with CBT that it did not raise the application of Section 251(a) as an open issue for arbitration, Intrado disagrees with CBT that a state commission cannot use its Section 252 arbitration and enforcement authority over Section 251(a) agreements. Intrado's reading of the Act leads it to the conclusion that the Section 252 arbitration process applies to all Section 251 agreements with ILECs.

(16) Even though neither party raised the application of Section 251(a) as an issue, the Commission is not barred by mere omission from applying applicable law. The Commission agrees with Intrado that a state commission can use its Section 252 arbitration and enforcement authority over all Section 251 agreements. Section 252 of the Act creates the availability of arbitration to the parties. The petition for arbitration was submitted under the auspices of Section 252 of the Act, which refers to the process of "Negotiation, Arbitration and Approval of Agreements" reached as a result of "... a request for interconnection, services, or network elements pursuant to section 251, ..." Section 252(c)(1) requires the Commission in resolving arbitration cases pursuant to 252(b) to "ensure that such resolution and conditions meet the requirements of Section 251, including regulations prescribed by the Commission pursuant to 251." Section 252(c)(2) requires this Commission to "establish any rates for interconnection, services, or network elements according to subsection (d)." Subsection (d) only gives instructions for pricing facilities and services covered by 251(c). Thus, while the language of the Act in Section 252 gives more detailed instruction with regard to 251(c), it requires the Commission to approve all interconnection agreements under any subsection of 251. Additionally, Section 252(e) of the Act states that "[a]ny interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission." Moreover, Section 252(e) gives the state commission explicit authority to reject an agreement (whether

arbitrated or not) in the event the agreement (or a portion of the agreement) either "discriminates against a telecommunications carrier not a party to the agreement" or the implementation of the agreement "is not consistent with the public interest, convenience or necessity." Clearly then, the Commission has the authority and the requirement to consider Section 251(a) where it is applicable. Therefore, CBT's request for rehearing of issue 6 is denied.

(17) As a final matter, Intrado seeks clarification from the Commission that it is entitled to UNEs pursuant to Section 251(c). Intrado points out that the Commission, in 07-1216, allowed Intrado to purchase UNE loops under Section 251(c). In addition, CBT's witness acknowledged that CBT would allow Intrado to purchase local loops at UNE rates.

Intrado is uncertain in this proceeding because it appears that the Commission will only allow Intrado to purchase UNEs pursuant to Section 251(c) when Intrado seeks to expand its certification status to offer dialtone services to end user customers other than PSAPs. Intrado, therefore, requests assurance that it may obtain UNEs from CBT under Section 251(c) in its current status as a CESTC.

(18) CBT objects to Intrado's request for clarification. CBT points out that UNEs were never an issue for arbitration. Moreover, no arbitration issues had any bearing on UNEs. CBT states that Intrado's rights with respect to UNEs are spelled out in Article 9 of the interconnection agreement. However, the parties did not dispute any contract provisions in Article 9. In light of these factors, CBT concludes that there is nothing for the Commission to clarify.

(19) CBT's objection to Intrado's request for clarification is well-founded. Pursuant to Section 4903.10, Revised Code, the Commission may only consider for rehearing those issues decided by the Commission in the arbitration award. Intrado never raised the availability of UNEs to Intrado as a CESTC as an issue in this proceeding. Moreover, no prior mention has been made concerning the impact of Article 9 of the interconnection agreement and Schedule 9.5, which, together, provide the terms for the provisioning of UNEs. Rehearing on this issue for the purpose of clarification must, therefore, be

> denied. However, the Commission notes that since Article 9 is included in the interconnection agreement, as long as Intrado abides by the contract requirements in that Article, Intrado may avail itself of UNEs to the extent that it has Commission authorization to provide that service. Should there be a future dispute in this regard, either party may bring that dispute forward pursuant to the contract's dispute resolution procedures at that time.

It is, therefore,

ORDERED, That the applications for rehearing filed by Intrado and Cincinnati Bell Telephone Company are denied in their entirety. It is, further,

ORDERED, That a copy of this Entry on Rehearing be served upon all parties and interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

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