

- Issue 5(a)** Should specific terms and conditions be included in the ICA for inter-selective router trunking? If so, what are the appropriate terms and conditions?
- Issue 5(b)** Should specific terms and conditions be included in the ICA to support PSAP-to-PSAP call transfer with automatic location information (ALI)? If so, what are the appropriate terms and conditions?

Intrado is proposing terms and conditions to be included in the interconnection agreement for inter-selective router trunking. Intrado explains that inter-selective router trunking is trunking deployed between selective routers that allows 911 calls to be transferred between selective routers and, thus, between the PSAPs served by the selective routers. Intrado contends that AT&T must ensure its network is interoperable with another carrier's network for the provision of 911 services. Intrado avers that the establishment of inter-selective router trunking as requested by Intrado will ensure that PSAPs are able to communicate with each other and still receive access to essential ANI/ALI information (Intrado Ex. 1 at 33-34). Intrado argues that interoperability using the capabilities inherent in each 911 service provider's selective router and ALI database system enables call transfers to occur with the ANI and ALI associated with the emergency call to remain with the voice communication when a call is transferred from one 911 service provider to another (Intrado Ex. 1 at 34).

Other than the public safety benefits, Intrado avers that this Commission, in its order certifying Intrado as a CESTC, recognized that interconnection between 911 service providers is necessary to ensure transferability across county lines and call/data transferability between PSAPs (Intrado Ex. 1 at 35).

AT&T argues that Intrado's proposed language requiring AT&T to implement the capability for PSAP-to-PSAP call transfers with ALI everywhere does not belong in an interconnection agreement, and should not be done with fixed contract terms between AT&T and Intrado. Rather, AT&T contends, the PSAPs at issue must be involved in the negotiations and all three parties must work together to formulate a written agreement. AT&T avers that not all PSAPs desire this capability for PSAP-to-PSAP call transfers and when they do formally request such call transfer capability, they may not all want to set it up in the same way (AT&T Ex. 2 at 49-50). AT&T also points out that unlike facility and trunking arrangements in a Section 251/252 interconnection agreement, these facilities and trunks would be deployed not to effectuate interconnection between AT&T and Intrado, but rather solely to meet a specific request of the E911 customers, who will not be a party to this agreement (AT&T Ex. 2 at 52).

While Intrado agrees that counties and PSAPs should be involved and advised on the inter-tandem functionality that is desired and, therefore, should be deployed between

the parties, Intrado does not agree that formal written PSAP approval is necessary before the deployment of inter-selective router trunks. Each party, Intrado argues, is responsible for its PSAP or county customers and can provide them with any information it deems appropriate (Intrado Ex. 1 at 35).

AT&T contends that implementing this capability would require AT&T to incur costs for facilities, trunks, database storage, extensive translations, and testing. Moreover, AT&T regards this work as highly specialized and, consequently, there are few technicians that are trained and qualified to work on 911 translations. The work, AT&T explains, is not routine business (AT&T Ex. 2 at 50). AT&T claims that Intrado is not willing to bear any of these costs and instead wants to shift the costs to AT&T. AT&T explains that today, if AT&T were to incur the costs to implement selective router-to-selective router call transfers, the requesting PSAP would compensate AT&T for those costs. Under Intrado's proposal, AT&T avers, AT&T would be required to incur all the costs to implement this capability, regardless of whether any PSAP requested it, yet neither the PSAP nor Intrado would compensate AT&T for any of its costs (AT&T Ex. 2 at 50-51). AT&T argues that such costs should only be incurred at the PSAP's request, since there would otherwise be no need to incur the expense of providing facilities and trunks for a capability that the PSAP did not request or intend to use (AT&T Ex. 2 at 52).

Intrado, on the other hand, states that its position is consistent with prior Commission findings. Intrado avers that the Commission in Case No. 07-1216-TP-ARB determined that interconnection agreements should contain the framework for interconnection and interoperability of the parties' networks through inter-selective routing and rejected requiring that PSAPs provide input into the inter-selective router arrangements to be established between Intrado and Embarq (Intrado Ex. 1 at 35-36).

While AT&T acknowledges the Commission required a similar approach in Case No. 07-1216-TP-ARB, AT&T contends the Commission decision overlooks the key factor of compensation, since there is no mechanism for Embarq to recover any of its costs of implementing Intrado's proposal from either Intrado or any PSAP. AT&T points out that the Commission expressly recognized that PSAPs should have a say in how call transfer capability is implemented and necessarily required the affected PSAPs to be consulted before any such capability is implemented and be allowed to participate in the planning (AT&T Ex. 2 at 53). AT&T contends that this decision makes sense and is consistent with AT&T's proposal with the exception that the Embarq decision includes PSAP-to-PSAP call transfers as part of a Section 251/252 interconnection agreement and will prevent Embarq from recovering its costs from the involved PSAP (AT&T Ex. 2 at 54).

AT&T avers that it would not refuse to implement the facilities and trunks required for PSAP-to-PSAP call transfers if Intrado's language is not accepted. AT&T contends that its proposed language would require both Intrado and AT&T to work together and enter

into a separate agreement--with the assistance of the PSAPs and necessary government agencies--to effectuate such an arrangement. AT&T contends that accepting its proposed language would require AT&T to work with Intrado and allow PSAPs to remain in the picture to ensure that the specific functionalities that they request are provided in a manner acceptable to them (AT&T Ex. 2 at 52-53).

ISSUES 5(a) and 5(b) ARBITRATION AWARD

In the Commission's previous awards, as in this one, the Commission determined that Section 251(a) of the Act is the applicable statute relative to the scenario in which Intrado and an ILEC each serve as primary providers of 911 service to different PSAPs and transfer calls between each carrier's selective routers in order to route properly a 911 call (inter-selective routing). The Commission has also concluded previously, as it does here, that it is appropriate to include terms and conditions for Section 251(a) arrangements in the parties' arbitrated interconnection agreement. In Case No. 07-1199-TP-ACE, the Commission required that each designated CESTC shall interconnect with each adjacent countywide 911 system to ensure transferability across county lines (Case No. 07-1199-TP-ACE, Finding and Order issued February 5, 2008, at 9). Additionally, the Commission required that each CESTC be required to ensure call/data transferability between Internet protocol (IP) enabled PSAPs and non-IP PSAPs within the countywide 911 systems it serves, and to other adjacent countywide 911 systems, including those utilizing non-IP networks which are served by another 911 system service provider (*Id*). As this call transfer capability is effectuated via inter-selective router trunking, the Commission determined in Case No. 07-1216-TP-ARB, that it has effectively required the availability of inter-selective router trunking between adjacent countywide 911 systems and between Intrado and other 911 carriers. Thus, the Commission concurred with Intrado that the interconnection agreement should contain the framework for interconnection and interoperability of the parties' 911 networks through inter-selective routing. The Commission sees no reason to deviate from this determination in this instance. While both parties and the Commission agree that PSAP input is important, the Commission agrees with Intrado that the interconnection agreement should contain the framework for establishing the interconnection and interoperability of the parties' networks to ensure inter-selective router capabilities can be provisioned once requested by an Ohio county or PSAP.

The Commission notes that the decision to include terms and conditions for inter-selective routing in Case No. 07-1216-TP-ARB, did not exclude Embarq from receiving compensation for implementing PSAP-to-PSAP call transfers from either the PSAP or Intrado. Similarly, the Commission finds our decision here to include inter-selective routing terms and conditions does not preclude AT&T from receiving compensation for implementing PSAP-to-PSAP call transfers, where it provides that functionality.

Issue 6 Should reciprocal requirements for trunking forecasting, ordering and service grading be included in the agreement?

With regard to Issue 6(a), trunking forecasting, the Revised Joint Issues Matrix filed on February 2, 2009, indicates that this issue has been resolved.

With regard to Issue 6(b), the ordering process, Intrado, in its initial brief, points out that it has provided a detailed description of its ordering process, that it has stated that its processes are compliant with the ATIS-OBF Access Service Request process, much like AT&T uses today, and that its witness had already acknowledged that Intrado would accept language indicating that its ordering system would be consistent with industry standard terms. Intrado finally states that AT&T can change its ordering systems as easily as Intrado can, and notes that the rates that Intrado can charge are limited to those included in the interconnection agreement (Intrado Br. 59-60). In its reply brief, Intrado references the arbitration award in Case No. 07-1216-TP-ARB to support its contention that Intrado's proposed language be included in the agreement (Intrado Reply Br. 27).

AT&T notes in its initial brief that the process by which AT&T would order services from Intrado is "outside the scope of a Section 251(c) interconnection agreement" (AT&T Br. 38, citing Case No. 07-1216-TP-ARB at 39). AT&T states that the "only appropriate ordering process for use in the interconnection agreement is AT&T's ordering process." AT&T finally concludes that even if Intrado conformed its web-based ordering process to industry standards, AT&T "would be forced to incur additional costs to implement that system solely for Intrado's own benefit." In its reply brief, AT&T points out that while its ordering system was developed as a result of collaborative processes, and can be changed only through a formal process, Intrado's was developed unilaterally and can be changed at any time. AT&T further indicates that Intrado should use the ordering system that "every other carrier uses" (AT&T Reply Br. 42). Finally, AT&T quotes the arbitration award issued in Case No. 07-1216-TP-ARB to support its contention that Intrado's language should be rejected.

ISSUE 6(b) ARBITRATION AWARD

The Commission finds it interesting to note that on Issue 6(b), the ordering process, both parties quote the same paragraph from the arbitration award issued in Case No. 07-1216-TP-ARB, yet reach opposite conclusions. The paragraph in question reads:

The establishment of ordering processes via a website is consistent with industry standards. Therefore, Intrado's proposed language regarding the process by which Embarq will order services from Intrado is appropriate for inclusion in the interconnection agreement. Notwithstanding this determination, the Commission finds that Intrado's proposed language is overbroad inasmuch as it simply states "as posted on INTRADO

COMM's website." The Commission is well aware how readily the information posted on a website can be changed. Therefore, consistent with Embarq's concerns, including those regarding unilateral changes to the ordering process, and the need for industry standard forms and procedures, the parties are directed to negotiate supplemental interconnection agreement language relative to the ordering process in order to provide more clarity and efficiency as to the implementation of the ordering process. In doing so, the parties should be mindful that all ordering processes should be consistent with existing industry standards, where applicable, consistent with Rule 4901:1-7-22(C), O.A.C., and that any changes to the ordering process will be subject to prior mutual agreement.

Case No. 07-1216-TP-ARB, Arbitration Award issued September 24, 2008, at 39.

Intrado, in focusing on the first sentence, maintains that its language should be adopted (Intrado Reply Br. 27). AT&T, focusing on the remainder of the paragraph, concludes that *Intrado's language must be rejected.*

While AT&T opines that there would be additional costs involved in developing processes to handle a unique Intrado ordering process, it has not provided specific support for that opinion, or an estimate of the costs involved. Additionally, the Commission notes that the proposed interconnection agreement requires that Intrado incur costs to obtain "operating system software and hardware to access AT&T 22-STATE OSS functions." AT&T goes so far as to specify what the hardware and software should be and indicates that those requirements may change, requiring the expenditure of additional costs simply so Intrado can order services from AT&T. Additionally, AT&T requires carriers to use web-based interfaces for certain ordering and pre-ordering processes. Intrado has not objected to incurring those costs or using a web-based process as a part of doing business, nor have any other carriers to the Commission's knowledge. From this, it would appear that incurring certain costs or using another carrier's web-based interface, in order to purchase facilities or services from another carrier is not unusual.

AT&T is correct in noting that there is a disparity in terms in the ability to change ordering processes. The Commission is very familiar with the long-running collaborative process that resulted in the current system. However, the Commission notes that it is not strictly correct to state that "all other carriers" use the Telcordia EXACT ordering system. It is clearly accurate to say that all other carriers use that system to place orders with AT&T. However, that does not address the question of how AT&T will place orders with Intrado, should the need arise. While AT&T seems to oppose the inclusion of any language that implies that it may at some point have to order services or facilities from Intrado, as a practical matter it well may have to do so. In that event, it would seem prudent for AT&T to seek the protection offered by establishing criteria in this agreement for that capability.

Neither party seems to oppose the development of interconnection agreement language that would render a result similar to that required in Case No. 07-1216-TP-ARB. The parties are, therefore, instructed to develop supplemental interconnection agreement language relative to the ordering process in order to provide more clarity and efficiency as to the implementation of the ordering process. In doing so, the parties should be mindful that all ordering processes should be consistent with existing industry standards, where applicable, consistent with Rule 4901:1-7-22(C), O.A.C., and that any changes to the ordering process will be subject to prior mutual agreement. These requirements are consistent with other arbitrations awards where this issue has arisen. Consequently, Intrado may be well served to discuss its ordering system with all affected carriers so that a single system might be developed.

Issue 7(a): Should the ICA include terms and conditions to address separate implementation activities for interconnection arrangements after the execution of the interconnection agreement? If so, what terms and conditions should be included?

AT&T initially states that the issue is whether, and to what extent the parties should document their physical architecture plans in a signed agreement. AT&T argues that documenting architecture plans in a signed agreement protects both parties, by "ensuring everyone has the same understanding of rights and responsibilities and has committed to a jointly understood plan." AT&T notes that this is a process routinely followed by CLECs. AT&T characterizes Intrado's objection as a misconception that the documentation process would constitute an amendment to the interconnection agreement, and further notes that Intrado's witness Hicks acknowledged that the language proposed by AT&T would not lead to an amendment of the interconnection agreement. Moreover, AT&T contends that he conceded that documenting the parties' plans would prevent future disputes. AT&T states that Intrado objects to using the standard forms used by AT&T to provide needed network information (AT&T Br. 39-40).

Intrado acknowledges that it may be beneficial to document the parties' physical architectures, but states that there is no need to "provide notices, to complete additional forms, or to sign separate agreements beyond the interconnection agreement to establish interconnection with AT&T." In its reply brief, Intrado maintains that AT&T's initial brief provides "nothing new beyond its pre-filed testimony and its issue statements" (Intrado Reply Br. at 29).

ISSUE 7(a) ARBITRATION AWARD

AT&T's assertion that this issue arises from Intrado's perception that the proposed signed documentation regarding the parties' physical architecture plans requires an

amendment to the interconnection agreement is supported on the record. The testimony of Intrado's witness indicates that this is Intrado's understanding (Intrado Ex. 2 at 38).

Given the importance of 911 and E911 systems to public safety, the Commission deems it appropriate to ensure that at least the level of documentation and coordination occurring between AT&T and any CLEC should occur between AT&T and Intrado. To this end, AT&T's proposed language with regard to CESIM 2.1, CESIM 5.1, CESIM 5.3, NIM 2.1, NIM 4.1, NIM 4.2, and NIM 4.3 are to be included in the final agreement.

With regard to CESIM 2.4, while there is no evidence on the record arguing for either party's specific language, Intrado's proposed language (which would require some form of notice 30 days prior to a request to change the physical architecture plan) appears to imply that either party must request permission of the other in order to make changes to its own physical architecture. Intrado's proposed language, therefore, implies additional unspecified time for approval. AT&T's proposed language (which would require 30 days notice of any intent to change the physical architecture plan), appears to be more expeditious, and is consistent with the use of "intent" with regard to notice timeframes in similar language appearing in existing approved interconnection agreements. On those bases, AT&T's proposed language should be allowed to stand.

**Issue 10 What are the proper definitions for the following terms:
(a) Competitive Emergency Services Telecommunications
Carrier; (b) CLEC; and (c) Interconnection?**

Intrado disagrees with AT&T's proposed definitions of "CESTC," "CLEC," and "Interconnection." Being a newly created classification, AT&T states that there has been no prior definition of CESTC. The parties now want to include a definition in the interconnection agreement. Toward that end, the parties have fashioned competing language. In its definition, AT&T designates a CESTC as a "telecommunications service" provider (AT&T Ex. 1 at 43). Intrado, on the other hand, opts to define a CESTC as a "telephone exchange service" provider (Intrado Ex. 2 at 27). AT&T, over Intrado's objection, wants to include language to define the scope of Intrado's certification. AT&T proposes to accomplish this by including language from the Commission's Certification Order (AT&T Ex. 1 at 43). In particular, AT&T focuses on a portion of the Certification Order where it states that the Commission restricted the scope of Intrado's service to the transmission of telephonic messages in its capacity of maintaining the selective router and directing 911 traffic to the appropriate PSAP. AT&T contends that its proposed language mirrors the Commission's language. Intrado's proposed language, on the other hand, AT&T regards as too broad and inconsistent with the Commission's Certification Order (AT&T Br. 41-42, AT&T Reply Br. 47).

Intrado objects to AT&T's proposal because it believes that it goes beyond the Commission's statement in Case No. 07-1199-TP-ACE. According to Intrado, AT&T's definition indicates that a CESTC is only permitted to maintain a selective router and direct 911 traffic to the appropriate PSAP. Intrado emphasizes that the Certification Order does not contain such a limitation. Moreover, there are activities that a CESTC may undertake that are not accounted for by AT&T's definition. Examples include maintaining the ALI database, call transfer, or notification services. Because of these additional activities, Intrado believes it is more accurate to state that a CESTC provides telephone exchange services (Intrado Ex. 2 at 27, Intrado Br. 61-62).

The parties agree that there should be a definition of CLEC but disagree on how to define it. Intrado proposes that the definition of CLEC be based upon the definition of CLEC found in Rule 4901:1-7-01(D), O.A.C. (Intrado Ex. 2 at 28, Intrado Br. 62). AT&T prefers to define CLEC in terms of a carrier's certification as a CLEC. In contrast, AT&T criticizes Intrado's language because it provides that any non-incumbent LEC can be a CLEC whether it has a certificate or not. It is AT&T's opinion that a carrier must be granted a certificate as a CLEC in AT&T's territory in order to obtain end user-specific products and services. As an example, AT&T believes that a carrier certified in one ILEC's territory would not without proper certification be a CLEC in another ILEC's territory for purposes of an interconnection agreement (AT&T Ex. 1 at 45). By its language, AT&T wants to preserve the distinction between a CLEC that provides basic local exchange service to end users and a CESTC that serves PSAPs but has no relationship with end users (AT&T Br. 42, AT&T Reply Br. 47-48). AT&T adds that its language proposal is particularly necessary if the Commission finds in issue 2(b) that the interconnection agreement must include CLEC provisions. To take advantage of CLEC provisions in the interconnection agreement, AT&T states that a carrier must have a CLEC certificate (AT&T Ex. 1 at 44-45, AT&T Br. 42-43).

The parties disagree on the definition of "interconnection." Intrado would rely on the definition contained in AT&T's generic template agreement. The template agreement defines interconnection in accordance with the Act. To Intrado, interconnection is the physical linking of the parties' networks for the mutual exchange of traffic (Intrado Ex. 2 at 28, Intrado Br. 63). AT&T disagrees. AT&T contends that its language proposal captures Intrado's unique characteristics. AT&T claims that Intrado is unique because it only provides 911/E911 services. It is a CESTC, not a CLEC. Distinguished from other carriers, Intrado and AT&T will interconnect at selective routers, not at an end office or tandem office (AT&T Br. 43, AT&T Reply Br. 48). AT&T is concerned that Intrado's definition could lead to a required interconnection at an end office or tandem office. AT&T, therefore, prefers to narrow the definition (AT&T Ex. 1 at 46, AT&T Br. 43).

ISSUE 10 ARBITRATION AWARD

The parties do not come to a complete agreement on the definition of a CESTC. Each proposes language ostensibly affecting the scope of Intrado's activities. The parties propose the following competing language for the definition of a CESTC in GTC §1.1.50 of the interconnection agreement:

"Competitive Emergency Services Telecommunications Carrier" means a telephone company certificated by the Commission to offering competitive local emergency Telecommunications Telephone Exchange Services on a county-wide basis, and which certification is restricted in scope to the transmission of a telephonic message in its capacity of maintaining the Selective Router and directing 911 traffic to the appropriate PSAP within AT&T-OHIO's franchised area.⁷

Both parties contend that their proposed language best tracks the Commission's Certification Order.

In its Certification Order, the Commission specifically concluded that Intrado, as a CESTC, is a "telecommunications carrier" pursuant to 47 U.S.C. §153(44) and is a provider of "telecommunications service" pursuant to 47 U.S.C. §153(51). From this and other findings, the Commission concluded that Intrado is "engaged in the provision of telecommunications." Given our findings in this arbitration award, it would be more accurate and consistent with the Certification Order to say that "Competitive Emergency Services Telecommunications Carrier" means a telephone company certificated by the Commission engaged in the provision of competitive local emergency Telephone Exchange Services on a county-wide basis.

In its definition of a CESTC, AT&T proposes language restricting the scope of Intrado's certification. It was not our intent in the Certification Order to limit the scope of Intrado's certification in any manner related to the maintenance of a selective router. Instead, the Commission merely referred to Intrado's activity of maintaining a selective router and directing 911 traffic to the appropriate PSAP as a basis for finding that Intrado is, by law, a telephone company and a public utility. AT&T's suggested language limiting Intrado's certification should, therefore, be omitted.

The parties disagree on what the definition of CLEC should be. AT&T advocates that a carrier must receive certification from the Commission as a requisite for being a

⁷ The parties agreed upon language is in normal font. Intrado's proposed language is in bold italics. AT&T's proposed language is bold underline font.

CLEC. Intrado, on the other hand, recommends that Rule 4901:1-7-01(D), O.A.C., should serve as the definition of CLEC. Rule 4901:1-7-01(D), O.A.C., reads as follows:

“Competitive local exchange carrier” (CLEC) means, with respect to a service area, any facilities-based and nonfacilities-based, local exchange carrier that was not an incumbent local exchange carrier on the date of the enactment of the Telecommunications Act of 1996 (1996 Act), or is not an entity that, on or after such date of enactment, became a successor or assign of an incumbent local exchange carrier.

AT&T rejects Intrado’s proposal because it does not take into account whether a carrier has a certificate of public convenience and necessity.

We find that Intrado’s proposed language, being entirely consistent with our rules, is the more appropriate definition of CLEC. It is common place and accepted practice for CLECs to negotiate the terms of an agreement with an ILEC prior to the CLEC being authorized to provide service in the ILEC’s territory.⁸ For this reason, we find that AT&T’s prerequisite of certification is contrary to practice. Nevertheless, with respect to services and facilities that a CLEC may seek from an ILEC during negotiations, the CLEC may not employ those services and facilities until the CLEC obtains certification from the Commission.

At issue is whether “interconnection” should be broadly defined or whether, in this interconnection agreement interconnection should be restricted to interconnection between selective routers. AT&T would have the Commission define interconnection to mean interconnectivity between the selective routers of the parties. The Code of Federal Regulations, however, defines interconnection broadly. It is the “linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic.”⁹ We find no persuasive reason for deviating from interconnection as it is defined by the Act and the rules and regulations of the FCC. It is one thing to restrict interconnection to selective routers, to the exclusion of end offices and tandem offices; it is another to redefine a commonly used term. AT&T’s proposed language goes too far.

⁸ Case No. 07-1216-TP-ARB, Arbitration Award issued September 24, 2008, at 13; Rule 4901:1-6-10(E)(3), O.A.C..

⁹ 47 C.F.R. 51.5 (Terms and Definitions)

Issue 13(a): What subset of traffic, if any, should be eligible for intercarrier compensation when exchanged between the parties?

AT&T indicates that the issue here concerns the definitions of "Section 251(b)(5) traffic," "ISP-Bound Traffic," and "Switched Access Traffic" (AT&T Br. 43). AT&T states that it proposes to define these terms consistent with the originating and terminating points of the call, and maintains that this is how traffic is normally classified for purposes of reciprocal compensation (*Id.*). AT&T also states that its definitions with regard to these terms are consistent with the Commission's decision in a previous arbitration case, and that the law relevant to these definitions has not changed since that decision (*Id.* at 44, citing *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, Arbitration Award issued January 25, 2006, at 8-10 (*TelCove*). AT&T opines that its language is more specific and is consistent with applicable law and should, therefore, be adopted (AT&T Br. 43).

Specifically, AT&T proposes to define "Section 251(b)(5) Traffic" and "ISP-Bound Traffic" in terms of their originating and terminating points and in the same manner as traffic in which the originating end user and terminating end user are either both located in the same ILEC local exchange area or both located in neighboring ILEC local exchange areas within the same common mandatory local calling area (*Id.* 44-45). Similarly, AT&T proposes to define "Switched Access Traffic" based on the originating and terminating points, indicating that "Switched Access Traffic" must be traffic in which the originating and terminating points are within different local exchanges (*Id.* 44-45).

AT&T notes that "Reciprocal compensation is the most fertile source of inter-carrier disputes, and the law regarding reciprocal compensation is likely the area most subject to ongoing changes" (AT&T Reply Br. 49). AT&T indicates that if the proposed language is affected by an FCC decision prior to contract execution, AT&T would be willing to revisit the affected definitions (*Id.*).

AT&T identifies a further issue with regard to language in sections IC 1.2 and IC 3.5. AT&T takes the position that "Intrado has requested a wireline interconnection agreement, and Intrado should not be delivering wireless traffic to AT&T over local interconnection trunks pursuant to this agreement" (AT&T Br. 46). AT&T further notes that it has a different interconnection agreement "that accommodates the differing and unique requirements of wireless services" (*Id.*).

Intrado notes that the parties' interconnection agreement should be consistent with the rulings of the FCC with respect to intercarrier compensation, and further states that AT&T's language presents numerous problems and is generally inconsistent with the

current rules applicable to intercarrier compensation (Intrado Br. 65). Intrado observes that there have been numerous FCC and court decisions affecting intercarrier compensation since the *TelCove* decision.

Specifically, Intrado notes that in the *ISP Remand Order*¹⁰ the FCC concluded that, except for traffic under Section 251(g) of the Act, "all telecommunications traffic" is subject to reciprocal compensation, and argues that this makes AT&T's reliance on direct or indirect references to "local" traffic inappropriate.

Further, Intrado posits that AT&T's proposed definition of "Switched Access Traffic" appears to include interconnected VoIP services, and states that the FCC has not specifically identified whether VoIP traffic is an information service or a telecommunications service. Intrado argues that this language would "impose obligations on Intrado in the context of an agreement that it has admitted by its own pleadings to the FCC are not required" (Intrado Br. 68).

Finally, Intrado argues that AT&T's proposed language would limit reciprocal compensation to traffic determined to be "wireline" or "dialtone," neither of which are defined in the interconnection agreement. Intrado states that Intrado may deliver wireless traffic to AT&T to the extent Intrado is providing telecommunications services to a wireless provider and that wireless provider's customers call an AT&T customer. Intrado notes that AT&T's proposed language at Appendix Intercarrier Compensation §3.5 indicates that third party traffic may be exchanged between the parties (*Id.* 69).

ISSUE 13(a) ARBITRATION AWARD

The treatment of ISP-bound traffic has been decided and re-decided a number of times in recent years. In 1999, the FCC found that ISP-bound traffic was jurisdictionally interstate, since users contact websites across state lines.¹¹ Because the FCC had previously determined that Section 251(b)(5) applied only to local traffic,¹² the FCC concluded that ISP-bound traffic was not subject to reciprocal compensation. In March of 2000, the D.C. Circuit Court remanded the matter without vacating the FCC's decision,

¹⁰ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, ¶54 (2001).

¹¹ *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689 (1999) (Declaratory Ruling).

¹² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 16013, paras. 1033-34 (1996) (subsequent history omitted) (Local Competition First Report and Order).

requiring a better explanation of how the FCC's jurisdictional analysis related to the question of whether ISB-bound traffic was subject to Section 251(b)(5).¹³

In April of 2001, the FCC released an order on remand that abandoned the earlier conclusion that Section 251(b)(5) traffic was local traffic and concluded that ISP-bound traffic was excluded from Section 251(b)(5) by virtue of Section 251(g) of the Act.¹⁴ In order on remand, the FCC maintained that Section 251(g) preserved the existing pre-1996 Act compensation structure for "exchange access, information access, and exchange services for such access." The FCC concluded that ISP-bound traffic was "information access" and, therefore, exclusively subject to the FCC's jurisdiction as interstate traffic under Section 201 of the Act. Noting that ISP-bound traffic tended to be one-way and, therefore, subject to regulatory arbitrage, the FCC imposed a unique compensation regime for ISP-bound traffic¹⁵, pending the final resolution of the Intercarrier Compensation Notice of Proposed Rule Making (NPRM).¹⁶

In May of 2002, the D.C. Circuit Court again remanded to the FCC without vacating the decision. The Court indicated that the FCC's rationale was inadequate¹⁷ but that there was a "non-trivial likelihood" that the FCC had the authority to establish the compensation system for ISP-bound traffic (*Id.* 434). Most recently, in November of 2008, the FCC concluded that "although ISP-bound traffic falls within the scope of Section 251(b)(5), this interstate, interexchange traffic is to be afforded different treatment from other Section 251(b)(5) traffic pursuant to our authority under sections 201 and 251(i) of the Act."¹⁸

AT&T's proposed definition of ISP-Bound traffic, as being between parties in the same "Local Exchange Area" or "mandatory local calling area," runs contrary to the trend in the FCC's decision making on the subject. It is certainly contrary to the November 2008 Remand Decision, in which the FCC explicitly identified ISP-bound traffic as "interstate, interexchange traffic." While, as AT&T has noted, reciprocal compensation is an area

¹³ *Bell Atlantic*, 206 F.3d at 1 and 5.

¹⁴ *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, (2001) (ISP Remand Order),

¹⁵ *Id.*, paras. 74-77.

¹⁶ *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) (Intercarrier Compensation NPRM).

¹⁷ *WorldCom*, 288 F.3d at 429

¹⁸ *In the Matter of; High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Lifeline and Link Up, Universal Service Contribution Methodology, Numbering Resource Optimization, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, IP-Enabled Services Order on Remand and Report and Order and Further Notice of Proposed Rulemaking 2008 WL 4821547, F.C.C., Nov 05, 2008, (NO. WC05-337, CC96-45, WC03-109, WC06-122, CC99-200, CC96-98, CC01-92, CC99-68, WC04-36) (November, 2008 Remand Decision) at para. 6 [Emphasis added]*

fraught with conflict, in this instance, the FCC has established a single form of intercarrier compensation for ISP-bound traffic, independent of whether that traffic is considered "local." AT&T's proposed definition at Section IC 5.1 is, therefore, not to be included in the final arbitration language. Intrado's proposed definition provides sufficient clarity, pending a final determination from the FCC on intercarrier compensation.

While AT&T's definition of "ISP-Bound traffic" appears in the interconnection agreement resulting from the *TelCove* arbitration, the definition was not presented as an issue in that arbitration. In fact, the only discussion in *TelCove* relating to ISP-bound traffic was in the context of an issue regarding the handling of Foreign Exchange (FX)/Virtual NXX traffic, which may include ISP-bound traffic. Therefore, AT&T's reliance on the *Telcove* arbitration for resolution of this issue, especially in light of the recent FCC ruling, is misplaced.

As a result of the foregoing, the Commission will require that the parties utilize Intrado's proposed language at sections IC 5.1 and GTC 1.1.86, with the requirement that the November 2008 Remand Decision also be referenced.

With regard to AT&T's proposed definition of Section 251(b)(5) traffic appearing at Section IC 4.1, Intrado argues that it is similarly impaired by the FCC's decision in the ISP Remand Order to "no longer construe Section 251(b)(5) using the dichotomy set forth in the Declaratory Ruling between "local" traffic and interstate traffic."¹⁹ However, in this instance, for Section 251(b)(5) traffic other than ISP-Bound Traffic, the FCC's and the Commission's rulings have provided additional clarity regarding the term "reciprocal compensation" found in Section 251(b)(5). In particular, as noted by AT&T, the FCC rule, 47 C.F.R. §51.701(b)(1), states that Section 251(b)(5) reciprocal compensation does not apply to traffic that is interstate, or intrastate exchange access, or exchange services for such access. Furthermore, Rule 4901:1-7-12(C)(1), O.A.C., defines traffic subject to reciprocal compensation consistent with the FCC rules. AT&T's proposed definition in this case is the same one adopted by the Commission in the *Telcove* arbitration in regard to an issue arbitrated in that proceeding.²⁰ Thus, in order to provide the clarity previously provided by the FCC and this Commission, we direct the parties to incorporate AT&T's definition for Section 251 (b) (5) traffic at §IC 4.1 and exclude Intrado's proposed definition at §GTC 1.1.124. However, as the intercarrier compensation, including Section 251(b)(5) traffic, remains an open item,²¹ the Commission expects the parties to avail themselves of the interconnection agreement's change in law provisions should the FCC or this Commission provide further guidance.

¹⁹ ISP Remand Order at para 54

²⁰ See, *Telcove* arbitration, Issue 37.

²¹ November, 2008 Remand Decision at ¶ 38 - 41

With regard to the disputed language in Section IC 1.2 and Section IC 3.5, while the parties are disputing Intrado's ability under this agreement to deliver wireless traffic to AT&T subject to reciprocal compensation, this appears to be a spurious issue.

Section 3.9 of the Intercarrier Compensation attachment (language not in dispute in this arbitration) clearly states that "This Attachment is not meant to address whether the Parties are obligated to exchange any specific type of traffic." Therefore, the question of whether Intrado may or may not deliver wireless traffic to AT&T cannot be addressed by language changes to this attachment.

Section IC 1.2 identifies that the appendix under discussion here applies to "...traffic originated over the originating carrier's facilities or over local circuit switching purchased by CLEC from AT&T..." Given that Intrado is not, and does not appear to intend to become registered as a CMRS carrier, and local circuit switching is inherently wireline, this would already seem to limit the Appendix IC to wireline traffic, with or without AT&T's proposed inclusions.

While Intrado argues that Section IC 3.5 may give it the right to transit wireless traffic to AT&T under this agreement, the language in question discusses the obligation to enter into intercarrier compensation arrangements with third party carriers, regardless of whether that third party carrier has purchased local switching on a wholesale (non-resale) basis. Here again, the inclusion or exclusion of the words "wireline" or "dialtone" do not appear either to impart or remove the ability of Intrado to deliver non-911 wireless traffic to AT&T, as that is not the subject at hand in the section.

Finally, Section 251(a) of the Act requires all carriers to handle transit traffic. However, transit traffic is not subject to reciprocal compensation. While generally the transit traffic carrier is an ILEC, the Act does not so limit the definition. Under Rule 4901:1-7-13 (D) O.A.C., transit traffic is under a different compensation regime than reciprocal compensation. Rule 4901:1-7-13, O.A.C., applies to Intrado's transiting of any traffic, regardless of source, to AT&T. Therefore, it appears that AT&T's proposed language does not and cannot have the limiting effect with which Intrado is concerned, because the limitations lie elsewhere in the interconnection agreement or in law. However, the exclusion of this language from Intrado's interconnection agreement, while it is generally present in CLEC agreements with AT&T, may possibly discriminate against another carrier not a party to the agreement. On this basis, therefore, AT&T's proposed language is to be included for sections C 1.2 and IC 3.5.

With regard to the language proposed by AT&T for sections IC 16.1 and ITR 12.1, there are two issues: the language discussing IP-enabled services and the differentiation between "local exchange service" and "local dialtone." As to the former issue, it is true that, as Intrado notes, the FCC has yet to make a conclusive statement as to whether IP-

enabled services are information or telecommunications services. However, until such a determination is made, the Commission notes that the language in question addressing the use of IP-protocol is, as was noted in the *TelCove* arbitration, technologically neutral, in that it treats calls using IP-based technologies in a consistent manner with those that do not. Thus, AT&T's proposed language for switched access traffic should be adopted, consistently with the Commission's decision in the *TelCove* arbitration. Should the FCC issue a decision at some point indicating that IP-enabled services are universally information services, or makes some other distinction, the parties can avail themselves of the change in law provisions of the agreement.

As a final matter encompassed by this issue, the parties are disputing the difference in language between the words "local dial tone" and "telephone exchange service" in sections IC 16.1, ITR 2.14, and ITR 12.1 which address traffic between AT&T and a potential Intrado CLEC. While neither party addresses this specific difference in language in the record, the Commission notes that this appears similar to the question regarding the language in sections IC 1.2 and IC 3.5. Similarly, the language proposed by AT&T appears commonly in its existing interconnection agreements. The Commission also notes that its resolution of the disputed language in Section IC 3.5 makes the phrase "local telephone exchange service" synonymous with "dialtone." Since the language proposed by AT&T, appearing in other interconnection agreements, is sufficiently clear to render the meaning of the language in the affected sections clear, the Commission will here require the language proposed by AT&T for these sections.

Issue 13(b) Should the parties cooperate to eliminate misrouted access traffic?

AT&T avers that the parties have agreed that, with some exceptions, Switched Access Traffic will be delivered over Feature Group Access trunks. To the extent Switched Access Traffic is improperly routed to local interconnection trunks, the parties have agreed to work cooperatively to identify such traffic with the goal of removing it from the local interconnection trunks. AT&T, however, contends that Intrado's purported agreement to assist AT&T in the endeavor rings hollow in light of Intrado's objection to language requiring it to join AT&T in seeking relief from a court or commission in order to prevent or stop misrouted traffic (AT&T Ex. 1 at 52-53). AT&T contends that adopting Intrado's position will enable traffic washing and related access avoidance schemes by third parties that are delivering such improper traffic to AT&T via Intrado. AT&T avers that its language provides the appropriate course of action for the parties to follow when Switched Access Traffic is improperly routed to local interconnection trunks and should be adopted (AT&T Ex. 1 at 53-54).

Intrado claims that AT&T's proposed language attempts to define broadly Switched Access Traffic and address how such traffic may be exchanged between the parties.

Intrado contends that AT&T's definition and related language regarding Switched Access Traffic would impose more onerous restrictions on that traffic than are currently found in the FCC's rules. Intrado avers that the FCC is currently reviewing Switched Access Traffic issues and, given the uncertainty in this area, Intrado would prefer to rely on applicable law rather than include terms and conditions that may be contrary to current requirements (Intrado Ex. 2 at 29).

Intrado contends that it is willing to work with AT&T to eliminate misrouted access traffic. However, Intrado believes AT&T's proposed language would require Intrado to engage in self-help mechanisms or block traffic, actions that are inconsistent with FCC requirements (Intrado Ex. 2 at 30). Intrado contends that the FCC disfavors self-help policies and has indicated that carriers may not block traffic, because it is not in the public interest (Intrado Br. 69-70). Intrado claims that if AT&T sees the need to take action against another carrier, AT&T is free to do so without the assistance of Intrado (Tr. Vol II at 43). Intrado contends that it should not be forced to join AT&T in court or state commission proceedings at AT&T's whim and Intrado's expense (Tr. Vol. I at 143). Intrado points out that AT&T's own witness admits that Intrado is under no obligation to assist AT&T in taking action against other carriers (Tr. Vol. II at 43-44)

AT&T contends that its language would merely require that, if all other efforts to stop misrouted traffic from being sent over the parties' networks fails, Intrado will join AT&T in going to the proper court or agency to seek authority to stop misrouted calls (Appendix IC §16.2). Intrado claims that AT&T's proposed language would require Intrado to agree to exercise self-help remedies or block misrouted access traffic (Intrado Br. 69). AT&T contends that the disputed language in Appendix IC §16.2 requires nothing of the kind (AT&T Reply Br. 51).

ISSUE 13(b) ARBITRATION AWARD

Each party claims, with regard to the language in dispute in Issue 13(b), dire results clearly not contemplated in the language at hand. AT&T's proposed language does not specify what actions Intrado should take on its own to stop improperly routed traffic. Intrado's language refers to "applicable law," and thus does not contemplate the avoidance of access charges.

The Commission concurs with Intrado. By agreeing to proposed contract language requiring Intrado to work cooperatively with AT&T to identify and remove third-party switched access traffic that is inappropriately routed over local interconnection trunk groups, Intrado will be required, at a minimum, to follow all FCC and Commission directives regarding misrouted access traffic. The Commission further agrees with Intrado that it is not necessary to include language that would require Intrado and AT&T to file a joint complaint or "any other appropriate action with the applicable Commission."

AT&T's language also presumes that the joint request will seek the removal or blocking of such traffic, rather than appropriate routing and compensation.

The Commission reminds AT&T that it is free to take whatever action it deems necessary against Intrado or the third-party for the resolution of such issues. The Commission will determine how such issues will be resolved. It is not necessary for the contract language to predetermine a course of action.

Furthermore, Intrado is correct that the requirements for Switched Access Traffic, as a subset of all intercarrier compensation, are currently under review by the FCC. Therefore, the Commission approves Intrado's proposed language for IC §16.2 and ITR §12.2.

Issue 15: Should the interconnection agreement permit the retroactive application of charges that are not prohibited by an order or other change in law?

AT&T proposes in Appendix IC §4.2.1 that retroactive treatment would apply to traffic exchanged as "local calls." AT&T maintains that, because local calls are subject to reciprocal compensation, "local calls" is the appropriate classification of traffic to which a retroactive adjustment should apply (AT&T Br. 47). AT&T further maintains that Intrado's opposition to AT&T's proposal makes no sense because "local calls" are the calls subject to reciprocal compensation, and thus, "local calls" is the appropriate classification of traffic to which the retroactive adjustment would apply (AT&T Ex. 1 at 54-55, AT&T Br. 47, AT&T Reply Br. 53,).

Intrado agrees that the interconnection agreement should include terms and conditions to address changes in law. Intrado, however, disagrees with AT&T's proposed language discussing how such modifications will be implemented. Intrado notes that AT&T's language indicates that retroactive compensation adjustments will apply "uniformly" to all traffic exchanged as "local" calls under the agreement, and expresses concern that this language could allow AT&T to make retroactive compensation adjustments for traffic that is not affected by a change of law. Intrado states that it has, therefore, proposed language that would limit the application of retroactive compensation adjustments to those specifically ordered by intervening law (Intrado Ex. 2 at 30, Intrado Br. 70).

ISSUE 15 ARBITRATION AWARD

The parties wish to craft language that will govern the retroactive application of charges in the event that there is a change in law, specifically a modification or nullification of the FCC's ISP Compensation Order. Intrado rejects AT&T's proposed language because it believes the language is too broad and could allow AT&T to make

retroactive compensation adjustments for traffic that is not affected by a change in law. To prevent this possibility, Intrado proposes to limit adjustments to traffic affected by intervening law. AT&T rejects Intrado's proposed language as redundant and unnecessary.

By its proposed language, AT&T seeks to ensure that retroactive treatment is applied only to traffic exchange as "local calls." AT&T's reasoning is that only local calls are subject to reciprocal compensation and, therefore, are the only type calls that would be subject to a retroactive adjustment.

The parties proposed language appears in IC Section 4.2.1 and reads as follows:

Should a regulatory agency, court or legislature change or nullify the AT&T-OHIO's designated date to begin billing under the FCC's ISP terminating compensation plan, then the Parties also agree that any necessary billing true ups, reimbursements, or other accounting adjustments shall be made symmetrically and to the same date that the FCC terminating compensation plan was deemed applicable to all traffic in that state exchanged under Section 251(b)(5) of the Act. By way of interpretation, and without limiting the application of the foregoing, the Parties intend for retroactive compensation adjustments, to the extent they are ordered by Intervening Law, to apply uniformly to all traffic among AT&T-OHIO, CLEC and Commercial Mobile Radio Service (CMRS) carriers in the state where traffic is exchanged *to which Intervening Law applies as local calls within the meaning of this Appendix.*²²

Noting the reference to "Intervening Law" appearing earlier in the provision, we find merit in AT&T's criticism of Intrado's proposed language as redundant and unnecessary. Accordingly, Intrado's proposed language should be excluded. The record does not show that Intrado objects to AT&T's assertion that only local calls would be subject to any change in the ISP Compensation Plan. Nor do we find otherwise. Moreover, we find no merit in Intrado's concern that AT&T could use this provision to make retroactive compensation adjustments for traffic that is not affected by a change in law. The language "within the meaning of this Appendix limits the scope appropriately to local calls affected by the FCC's ISP Compensation Plan. AT&T's language should, therefore, be incorporated into the interconnection agreement.

The parties agreed upon language is in normal font. Intrado's proposed language is in bold italics. AT&T's proposed language is bold underline font.

Issue 24: What limitation of liability and/or indemnification language should be included in the ICA

Intrado rejects AT&T's proposed limitation of liability language for being overly broad. According to Intrado, AT&T's language protects it from being liable to Intrado, Intrado's end users, or any other person for losses arising out of the provision of access to 911 services. Intrado claims that AT&T's language also protects it from errors, interruptions, defects, failures, or malfunctions of 911 and seeks protection from fraud, even if committed by AT&T. Intrado, by its language proposal, intends to make AT&T liable for errors, interruptions, defects, failures, or malfunctions that are attributable to AT&T (Intrado Ex. 2 at 30-31, Intrado Br. 71). Intrado believes AT&T's language goes too far. Intrado contends that, typically, carriers cannot limit their liability for errors caused by gross negligence or willful misconduct. Intrado clarifies that its proposed language employs the phrase "attributable to AT&T" to refer to situations that are not otherwise protected by existing law and tariffs (Intrado Br. 71).

AT&T, on the other hand, does not agree that it should be liable for personal injury, death, or destruction of property for any errors, interruptions, defects, failures, or 911 service malfunctions that arise from the normal course of business. AT&T wants to protect itself from matters beyond its control. Reviewing Intrado's tariff, AT&T finds that it includes extensive limitation of liability language that protects Intrado in similar circumstances (AT&T Ex. 1 at 56).

In support of its proposed limitation of liability language, AT&T states that limits on liability for 911 service are appropriate. Moreover, AT&T believes that limits on liability are critical to allow carriers to provide 911 service. Otherwise, the cost and risk of providing 911 service would be too great. AT&T also seeks to protect itself from end user fraud. AT&T sees no reason to be held liable for the fraudulent conduct of Intrado's end users. Instead, AT&T proposes that Intrado accept responsibility for its end users' fraud (AT&T Ex. 1 at 57-58).

Particularly troubling to AT&T is the phrase that assigns liability that is "attributable to AT&T." AT&T condemns that language as vague and ambiguous and appears to impose broader liability on AT&T than would apply under normal fraud law. To AT&T, the language is too indefinite and could be read to assign liability to AT&T for losses that are beyond its control. Moreover, AT&T declares that the language is unnecessary because Intrado cannot identify any scenario where a customer's fraudulent behavior could be attributed to AT&T. A better solution, suggested by AT&T, is for Intrado protect itself from liability by incorporating protective language in its own tariff (AT&T Br. 48-49).

Intrado rejects AT&T's claim that "attributable to AT&T" is vague and ambiguous. Intrado claims that it sufficiently defended its support for its proposed language in its brief. In further support of its proposed language, Intrado points out that the limitation of liability language is from AT&T's own template interconnection agreement. To grant AT&T unlimited protection from liability, alleges Intrado, is inconsistent with Ohio law and AT&T's tariff (Intrado Reply Br. 27-28).

AT&T reiterates that broad limitation of liability is essential in the provision of 911 service. Without limitation of liability, the risks and costs of providing the service would be prohibitive. AT&T reads Intrado's proposal to include the phrase "attributable to AT&T" as broadening, not limiting, AT&T's exposure to liability. Intrado's interpretation is that the language would limit AT&T's liability except where there is gross neglect or wanton and willful misconduct. AT&T disagrees. AT&T finds the language vague to the point of conceivably exposing AT&T to greater liability. AT&T believes that it could conceivably be held liable for the fraud of an Intrado customer. Conversely, AT&T claims that Intrado cannot identify any *circumstances where its customer's fraud could be attributed to AT&T*. For that reason, AT&T concludes that Intrado's language is unnecessary and should be excluded (AT&T Reply Br. 53-54).

ISSUE 24 ARBITRATION AWARD

By including the term "attributable to AT&T," Intrado seeks to hold AT&T liable for 911 service failures rooted in AT&T's acts or omissions. Intrado rejects AT&T's proposed language because it appears to protect AT&T even from errors caused by gross negligence or willful misconduct. AT&T, on the other hand, believes that Intrado's suggested language is vague and overbroad, to the point of increasing beyond typical standards AT&T's exposure to liability.

We agree with AT&T that, as a matter of public policy, 911 service providers should be afforded broad limitation of liability to allow the provision of 911 service. Without such protection, the potential risk and liability exposure inherent in 911 service would be prohibitive. However, Intrado believes that AT&T's language goes too far, protecting AT&T from even those errors caused by gross negligence or willful misconduct. Intrado's proposed language attempts to reign in what it regards as absolute freedom from liability resulting from AT&T's proposal. Contrarily, AT&T reads Intrado's language to do the opposite of its intent. Instead, of limiting AT&T's liability, AT&T contends that Intrado's language broadens AT&T's exposure to liability, even including acts beyond AT&T's control.

The parties agree that limitation of liability language should be included in the interconnection agreement. They differ on the language to effectuate limitation of liability. AT&T does not advocate for its protection from losses resulting from gross negligence or

willful misconduct. Nor would we endorse such a position. AT&T only argues that Intrado's proposed language fails to achieve the purpose of limiting liability to any errors except those caused by gross negligence or willful misconduct.

Limitation of liability in the provision of 911 service must be broad, yet it should not provide absolute immunity. To achieve the purpose of limiting of liability to within an acceptable degree, we recommend that the parties include the following language in GTC §15.7 of their interconnection agreement: AT&T shall not be liable to CESTC, its End User or any other Person for any Loss alleged to arise out of the provision of access to 911 service or any errors, interruptions, defects, failures or malfunctions of 911 service, unless such loss is attributable to gross negligence or willful misconduct.

This language determines AT&T's liability by its conduct, not by its status as a party. We agree with AT&T that an interpretation of Intrado's proposed language could expose AT&T to liability for any loss traceable to its actions, even where its acts or omissions are merely inadvertent. Our language limits AT&T's liability to within acceptable standards without granting it complete immunity.

Issue 29(b) Is AT&T permitted to impose unspecified non-recurring charges on Intrado Comm?

Intrado argues that any charges applied to Intrado via the interconnection agreement must be developed pursuant to the process established by Sections 251 and 252 and must be set forth in the interconnection agreement. Intrado argues that it cannot agree to pay for services or products when it does not know the rate to be charged. Intrado avers that it does not plan to order products or services that are not contained in the interconnection agreement, which should resolve AT&T's concerns through the Section 252 process with approval by the Commission.

According to AT&T, this issue involves what pricing should apply when Intrado orders and AT&T inadvertently provisions products and services that are not contained in the interconnection agreement. AT&T explains that the parties have already agreed that AT&T's obligation to provide products and services to Intrado is limited to those for which rates, terms, and conditions are contained in the interconnection agreement. AT&T also avers that the parties have agreed that, to the extent Intrado orders a product or service not contained in the interconnection agreement, AT&T would reject that order (AT&T Ex. 1 at 63). AT&T is proposing language that would require Intrado to pay the standard generic rate that a CLEC would pay for that same product or service when there is no access tariff (AT&T Ex. 1 at 64). AT&T points out that these provisions are only relevant when Intrado orders something it is not entitled to pursuant to the interconnection agreement. Therefore, AT&T contends, it should not have to go through the process of proposing rates pursuant to Sections 251 and 252 of the Act, as proposed by

Intrado (AT&T Ex. 1 at 64). AT&T states that its proposed language is entirely appropriate considering that Intrado has ordered a product or service for which it had no contract terms, but that AT&T provisioned anyway (AT&T Ex. 1 at 64).

AT&T further contends that it should be allowed to reject new orders for the same product or services until rates, terms, and conditions are incorporated into the interconnection agreement. AT&T avers that it should not be required to continue providing service outside the interconnection agreement simply because it did so once (AT&T Ex. 1 at 64). If the order were for a UNE, AT&T claims that Intrado could submit a bona fide request (BFR) in accordance with Appendix UNE's BFR provisions. AT&T further avers that if the order were for a product or service still available in AT&T's access tariff, Intrado could seek to amend the interconnection agreement to incorporate relevant rates terms and conditions (AT&T Ex. 1 at 63).

ISSUE 29(b) ARBITRATION AWARD

The Commission agrees with AT&T that it should not have to go through the process of proposing rates when it provisions a product or service on Intrado's behalf that is not contained in the parties' interconnection agreement. The Commission believes that doing so would equate Intrado's ordering of a service not contained in the interconnection agreement to a BFR or a request to amend the interconnection agreement, which it is clearly not. However, as AT&T has agreed that it would reject orders for services not contained in the interconnection agreement, Intrado is not solely to blame if such a situation arises. Therefore, the Commission finds that the response to the situation must be balanced between the parties.

It is true that the interconnection agreement contains provisions for adding additional, products, services, terms, and conditions. However, in a situation where Intrado orders a product or service for which terms and conditions are not contained in the interconnection agreement, the Commission finds that AT&T does not have to propose rates pursuant to the process established by Sections 251 and 252 of the Act. This is particularly appropriate since the product or service may not be a UNE subject to the pricing requirements of Section 252(d).

The Commission, therefore, will allow AT&T to charge Intrado what it charges CLECs for the same product or service. However, if AT&T has provisioned Intrado's order, even though it agreed to reject such orders, the Commission finds that Intrado should only be required to pay the lowest price in effect at that time for Ohio CLECs and not necessarily the generic rate.

We have found that a request to provision a service not contained in the interconnection agreement does not equate to a BFR or a request to amend the

interconnection agreement. Moreover, taking into consideration the parties' agreement that AT&T can reject orders for products and services not contained in the interconnection agreement, the Commission finds that AT&T should be allowed to reject future orders for the product or service until such time as terms and conditions are incorporated into the interconnection agreement.

Consistent with these findings, the parties are instructed to include AT&T's proposed language for Pricing Sections 1.9.1 and 1.9.2 with the language of 1.9.1. The language should be revised to reflect pricing for orders that are not contained in the interconnection agreement. Pricing should be at the lowest rate in effect at that time for Ohio CLECs.

Issue 31: How should the term "End User" be defined and used in the interconnection agreement?

Intrado defines the issue in terms of whether Intrado's PSAP customers are "end users." It is Intrado's position that PSAPs and other public safety agencies that Intrado will serve are retail end users. Intrado points out that PSAPs or municipalities purchase services from ILECs at retail rates from retail tariffs. Moreover, Intrado asserts that ILECs grant such PSAPs and municipalities end user status. Intrado, therefore, asks for similar treatment. Intrado advocates that PSAPs should be regarded as end users whether served by Intrado or AT&T (Intrado Ex. 2 at 32-33). In support of its position, Intrado refers to the Commission's decision in Case No. 07-1216-TP-ARB, where Intrado states that the Commission found that PSAPs are properly considered end users (Intrado Br. 63-64).

AT&T proposes language that would restrict end users to AT&T's residence and business retail customers because those are the only customers that will be placing calls to 911. Intrado's customers, on the other hand, will include other carriers for which Intrado aggregates 911 traffic and Intrado's PSAP customers. AT&T rejects Intrado's position because none of Intrado's customers will be able to dial 911. AT&T notes from the arbitration award in Case No. 07-1216-TP-ARB that the Commission distinguished between dial tone end users and PSAP end users. It is AT&T's understanding that the Commission in the Intrado Certification Order defined end user to refer to customers of basic local exchange service that can dial 911. To support its position, AT&T notes that the National Emergency Number Association (NENA) defines end user as the 911 caller. AT&T mentions that the parties' interconnection agreement incorporates several NENA definitions. AT&T explains that its definition of end users is not the same as the NENA definition. AT&T explains that its generic definition for "end user" is intended for CLECs that offer basic local exchange service. AT&T believes a different definition is needed for Intrado's interconnection agreement where it is limited to the offering of 911/E911 services. AT&T would agree to withdraw its definition and substitute the NENA definition. In further support of its position, AT&T believes that the general term

"customer" is more appropriate because Intrado will not be providing service to end users. In addition, the word "customer," AT&T argues, provides a level of liability protection against all Intrado customers. Finally, AT&T warns that if non-911 appendices are included in the interconnection agreement under issue 2(b), Intrado may have customers that are not end users (AT&T Ex. 1 at 65-68, AT&T Br. 51-53).

In its reply brief, AT&T argues that consistency demands that end users be distinguished from Intrado's customers. As an example, AT&T points to provisions in the interconnection agreement where "end user" is used in the context of intercarrier compensation. AT&T adds that there are other provisions that are unrelated to the service that a PSAP receives (AT&T Reply Br. 56).

Noting Intrado's reliance of Case No. 07-1216-TP-ARB for the idea that PSAPs are properly considered end users, AT&T contends that Intrado's reliance is misplaced. AT&T cites language from the award in Case No. 07-1216-TP-ARB that states that Intrado's proposed definition of end user is too broad given the limitations of its current certification. Another distinction, AT&T points out, is that in Case No. 07-1216-TP-ARB Embarq, an ILEC, agreed to include PSAP customers in the definition of "end user." The Commission, for its part, adopted the parties' definition of end user that included PSAP customers. AT&T, therefore, does not regard Case No. 07-1216-TP-ARB as binding precedent (AT&T Reply Br. 56-57).

ISSUE 31 ARBITRATION AWARD

In Case No. 07-1216-TP-ARB, the Intrado and Embarq presented for arbitration the issue of "Whether the agreement should contain a definition of "end user" and what definition should be used?"²³ The arbitration award issued in Case No. 07-1216-TP-ARB set out the following definition of "end user" for the interconnection agreement between Embarq and Intrado:

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 911 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.

We find no facts or arguments that would cause us to vary from the award in Case No. 07-1216-TP-ARB. Moreover, the reasoning for our decision in Case No. 07-1216-TP-ARB is equally applicable in this proceeding.

²³ Case No. 07-1216-TP-ARB, Arbitration Award issued September 24, 2008, Issue 4.

In Case No. 07-1216-TP-ARB, we considered the definition of "customer" as it appears in Rule 4901:1-7-01, O.A.C., and noted that the Commission's rules governing carrier-to-carrier (i.e., wholesale) operations compel that the term "customer" include wholesale customers. We also rejected Intrado's request to expand the definition of end user to include wholesale customers. Similarly, AT&T's proposal that "customer" be used to refer to Intrado's PSAP end users would be overly broad because of its inclusion of wholesale customers, as "customer" is defined by our carrier-to-carrier rules. We must, therefore, reject AT&T's use of the word "customer" to distinguish Intrado's PSAP customers from AT&T's end users.

To shed additional light, the Commission considered the definition of end user as it appears in Rule 4901:1-8-01, O.A.C., (911 Service Program Rules). Rule 4901:1-8-01(E), O.A.C., in addition to describing the E911 database, also identifies an "end user" as the customer who makes a 911 call (Case No. 07-1216-TP-ARB, Arbitration Award issued September 24, 2008, p. 19-20). As in Case No. 07-1216-TP-ARB, "end user," for the purpose of this interconnection agreement shall mean the retail, end-use, dial tone customer of either Intrado or AT&T or the PSAP served by either party. Where it is necessary to avoid ambiguity, the parties shall use "End User" to refer to the retail, dial tone customer, whereas "PSAP End User" may refer to the PSAP.

Issue 34(a) How should a non-standard collocation request be defined?

Issue 34(b) Should non-standard collocation request be priced on an individual case basis?

AT&T explains that the parties have agreed that non-standard collocation requests (NSCR) are requests from a Collocator that are beyond the terms, conditions, and rates set forth in the Physical Collocation Appendix. Therefore, AT&T argues, any collocation request that does not have rates, terms, and conditions set forth in the interconnection agreement are non-standard collocation requests (AT&T Ex. 1 at 69). AT&T argues that Intrado's proposed language, which states that NSCR charges would not apply if AT&T has existing similar arrangements with other communications service providers, is fraught with the potential for dispute. AT&T avers that while another carrier might have what Intrado would characterize as an arrangement "similar" to what Intrado requests, such an arrangement may actually be quite different and may impose on AT&T different provisioning costs. AT&T further contends that another carrier's collocation arrangement may have been engineered and provisioned several years prior to Intrado's request, making any associated pricing obsolete and inappropriate for application to Intrado. AT&T avers that if Intrado objects to AT&T's non-standard collocation charges because it believes them to be discriminatory, it may invoke dispute resolution pursuant to the interconnection agreement. AT&T contends that individual-case-basis pricing is

appropriate for any non-standard collocation arrangement; therefore, Intrado's proposed language should be rejected (AT&T Ex. 1 at 69-70).

Intrado contends that AT&T should not be permitted to impose non-standard charges on Intrado for arrangements that AT&T has provided to other service providers. Intrado avers that once AT&T provides one provider with a certain arrangement, it should no longer be considered non-standard and subject to varying costs based on AT&T's independent determination. Intrado avers that the FCC has found that if a particular method of interconnection is currently employed between networks or has been used successfully in the past, a rebuttable presumption is created that such a method is technically feasible for substantially similar network architectures. Intrado further avers that under such circumstances the FCC stated that ILECs bear the burden of demonstrating technical infeasibility (Intrado Br. 74-75, citing *In The Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499, Released August 8, 1996 at 204). Intrado, therefore, contends that AT&T should not be permitted to impose arbitrary costs on Intrado when AT&T has already provided a similar arrangement to another provider (Intrado Ex. 1 at 40-41).

ISSUES 34(a) AND (b) ARBITRATION AWARD

As the parties have agreed that a NSCR is a request for collocation that is beyond the terms, conditions, and rates established in the interconnection agreement, the Commission agrees with AT&T that any collocation request that does not have rates, terms, and conditions set forth in the interconnection agreement would logically be considered an NSCR. The Commission also finds the use of the term "similar arrangements" could lead to disparities between what the parties regard as similar arrangements.

The Commission also agrees with AT&T that the cost of provisioning similar arrangements several years ago may vary significantly from the cost of providing the same arrangement today. Intrado argues that the FCC's Local Competition Order established a rebuttable presumption of feasibility. While this point is addressed in the Local Competition Order, feasibility is not the same as the cost of provisioning. Since AT&T is not attempting to deny Intrado arrangements that are not part of the interconnection agreement that have been provided in the past, but only wishes to apply non-standard charges on an individual case basis, Intrado's argument about technical feasibility is moot.

In addition, the Commission finds that, similar to the FCC's argument for abandoning the "pick-and-choose rule,"²⁴ allowing a CESTC to select "similar

²⁴ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Second Report and Order*, 19 F.C.C.R. 13494, CC Docket No. 01-338, Released July 13, 2004

arrangements" established for another telecommunications carrier, where the only benefit may be price, may well inhibit the development of more creative solutions that will better meet the CESTC's needs.²⁵

Therefore, the Commission approves AT&T's proposed language allowing it to impose non-standard charges for collocation arrangements for which terms and conditions are not set forth in the interconnection agreement. The Commission concurs with AT&T that if Intrado objects to AT&T's non-standard collocation charges because it believes them to be discriminatory, it may invoke dispute resolution pursuant to the interconnection agreement. The Commission believes the dispute resolution process will be better able to determine whether similar arrangements exist and whether the prices previously charged for these similar arrangements are still relevant to the NSCR on an individual case basis.

Issue 36 Should the terms defined in the interconnection agreement be used consistently throughout the agreement?

Intrado states that the interconnection agreement defines certain terms. To the extent that the interconnection agreement defines a term, Intrado advocates that the term be capitalized throughout the interconnection agreement to denote a specifically defined term (Intrado Ex. 2 at 33, Intrado Br. 64-65). Intrado believes that consistent capitalization will reduce disputes concerning the meaning of certain terms. Of particular concern to Intrado is the capitalization of the term "end user." Intrado reveals that the parties have not come to an agreement on whether the term "end user" should be capitalized (Intrado Br. 65).

For its position, AT&T believes that words should be capitalized only when their use is consistent with the defined term. As an example, AT&T believes that the term "end user" should be defined relative to its customers, not end users of other carriers generally (AT&T Ex. 1 at 70). AT&T does not believe that capitalization is an appropriate issue for arbitration. Instead, AT&T believes the matter should be addressed when the parties create a conforming agreement for Commission approval (AT&T Br. 54, AT&T Reply Br. 58)).

ISSUE 36 ARBITRATION AWARD

Both parties agree that defined terms should be capitalized throughout the interconnection agreement. To that extent, we agree with the parties. Defined terms should be capitalized throughout the interconnection agreement. The point of contention between the parties is the capitalization of the term "end user." In Issue 31 we defined "end user" to mean the retail, end-use, dial tone customer of either party or the PSAP

²⁵ Id at ¶¶ 1 and 12.

served by either party receiving 911 calls for the purpose of initiating the emergency or public safety response. When used in this manner, "end user" should be capitalized. Where it is necessary to avoid ambiguity, the PSAP served by either party shall be capitalized and referred to as the "PSAP End User."

It is, therefore,

ORDERED, That Intrado and AT&T incorporate the directive set forth in this Arbitration Award within their final interconnection agreement. It is, further,

ORDERED, That, within 30 days of this Arbitration Award, Intrado and AT&T docket their entire interconnection agreement for review by the Commission, in accordance with Rule 4901:1-7-09(G)(5), O.A.C. If the parties are unable to agree upon an entire interconnection agreement within this time frame, each party shall file for Commission review its version of the language that should be used in a Commission - approved interconnection agreement. It is, further,

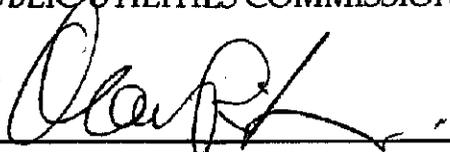
ORDERED, That nothing in this Arbitration Award shall be binding upon this Commission in any subsequent investigation or proceeding involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

ORDERED, That this Arbitration Award does not constitute state action for the purpose of antitrust laws. It is not our intent to insulate any party to a contract from the provisions of any state or federal law that prohibits restraint of trade. It is, further,

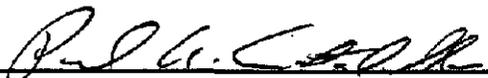
ORDERED, That this docket shall remain open until further order of the Commission. It is, further,

ORDERED, That a copy of this Arbitration Award be served upon Intrado, AT&T, their counsel, and all interested persons of record.

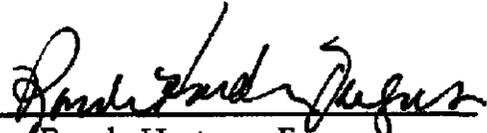
THE PUBLIC UTILITIES COMMISSION OF OHIO



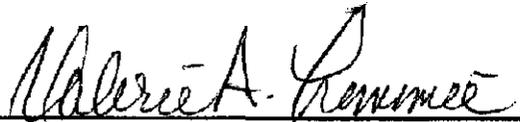
Alan R. Schriber, Chairman



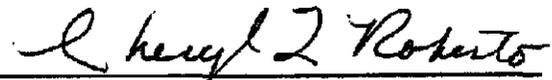
Paul A. Centolella



Ronda Hartman Fergus



Valerie A. Lemmie

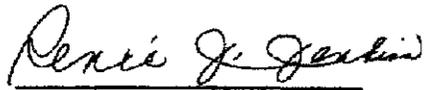


Cheryl L. Roberto

LDJ/CK/LS/MT/vrm

Entered in the Journal

MAR 04 2009



Renee J. Jenkins
Secretary