STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Intrado, Inc.	**:**	
	:	
Petition for Arbitration pursuant to	**:**	
Section 252(b) of the Communications	**:**	**08-0545**
Act of 1934 as amended, to Establish	**:**	
an Interconnection Agreement with	**:**	
Illinois Bell Telephone Company.	**:**	

ARBITRATION DECISION

DATED: March 17, 2009

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ARBITRATION DECISION

By the Commission:

I. PROCEDURAL HISTORY

On September 22, 2008, Intrado, Inc. ("Intrado"), filed a Petition for Arbitration ("Petition") pursuant to subsection 252(b)[1] of the federal Telecommunications Act of 1996 ("Federal Act")[2]. The Petition seeks to create an interconnection agreement ("ICA") between Intrado and Illinois Bell Telephone Company ("AT&T"), an incumbent local exchange carrier ("ILEC") in certain geographic areas of Illinois. Intrado has certificates of telecommunications operating authority in Illinois, issued by this Commission.[3] Intrado asserts that AT&T has a duty under subsection 251(c)(2) of the Federal Act[4] to interconnect with it, so that Intrado can provide telecommunications services in areas in which AT&T also provides local exchange services. Intrado's principal intention is to provide services related to 911/E911 telecommunications (for brevity, "911 service") to Emergency Telephone Systems Boards ("ETSBs") for the operation of Public Safety Answering Points ("PSAPs"). Intrado presents several issues for arbitration.

AT&T filed its Response to Intrado's Petition ("AT&T Response") on October 17, 2008. In that filing, AT&T notes that it has added two issues for arbitration, as it is permitted to do under subsection 252(a)(4)(A) of the Federal Act[5]. The parties have settled numerous issues over the course of this litigation and this Arbitration Decision addresses only the remaining unresolved issues.

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[1] 47 U.S.C. § 252(b).
[2] 47 U.S.C. §§ 151 *et seq*.
[3] SCC Communications Corp., Application for a Certificate of Authority to Provide Telecommunications Services in the Stare of Illinois, Dckt. 00-0606, Order, Dec. 20, 2000 & Amendatory Order, Jan. 31, 2001. SCC subsequently became Intrado, Inc. Intrado is certificated to provide intrastate facilities-based and resold local and interexchange telecommunications services.
[4] 47 U.S.C. § 25(c)(2).
[5] 47 U.S.C. § 252(a)(4)(A).

Two Administrative Law Judges ("ALJ's") of the Commission conducted a pre-arbitration conference on October 1, 2008 and an evidentiary hearing on December 3, 2008, each in Chicago, Illinois. Appearances were entered at each hearing on behalf of Intrado, AT&T and Commission Staff ("Staff"). At the December 3 hearing, Intrado presented the testimony of Thomas Hicks, and Carey Spence-Lenss. AT&T presented the testimony of Patricia Pellerin and Mark Neinast. Staff presented the testimony of Jeffrey Hoagg, Marci Schroll, and Kathy Stewart, each of the Commission's Telecommunications Division. The ALJ's marked the evidentiary record "heard and taken" on February 4, 2008.

Intrado, AT&T and Staff each filed an Initial Brief ("IB") on January 5, 2009 and a Reply Brief ("RB") on January 20, 2009. An ALJ's Proposed Arbitration Decision was served on all parties on February 13, 2008. Intrado and Staff each filed Briefs on Exceptions ("BOE") on February 20, 2009 and Intrado, AT&T and Staff each filed Reply Briefs on Exceptions ("RBOE") on February 27, 2009.

II. JURISDICTION

Subsection 252 of the Federal Act provides that within a specified time period "after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues." Both Intrado's Petition and AT&T's Response assert that there are open issues between the parties. There is no dispute that the Petition was timely filed. Consequently, the Commission has jurisdiction to arbitrate the issues presented.

Section 252 of the Federal Act proscribes certain procedures, standards and outcomes for arbitrations conducted under that section. In addition, the Commission has adopted rules and procedures for such arbitrations in 83 Ill.Adm.Code 761. The foregoing federal and state provisions apply to this proceeding.

III. PROPOSED SERVICES & CURRENT AGREEMENTS

Intrado proposes to provide its 911 service through its Intelligent Emergency Network® ("IEN"), which would facilitate voice and data transmission and retrieve and deliver both Automatic Number Identification ("ANI") (the calling party's telephone number) and Automatic Location Information ("ALI") (the calling party's location) to PSAP customers. The three integrated elements of Intrado's system are switching (utilizing selective call routers or 911 tandems), call information databases (for ANI and ALI) and transport infrastructure between the PSAP and, respectively, the selective routers and the information databases.

Intrado's customers will be PSAPs and related public agencies, not the individual end-users that initiate 911 calls. With respect to wireline telecommunications, the physical components of Intrado's 911 service will not handle a 911 call until it has been relayed from the end office of the ILEC receiving the call. Consequently - and

regardless of whether Intrado is "interconnected" to AT&T within the meaning of subsection 251(c)(2) of the Federal Act - Intrado's 911 service must be physically linked to the public switched telephone network ("PSTN") in order to deliver wireline 911 calls to PSAPs. All telecommunications carriers have an interconnection duty under subsection 251(a)(1) of the Federal Act, and AT&T states that it would enter into a "commercial agreement" with Intrado, as it has with other carriers, to provide the necessary physical linkage. AT&T Ex. 1.0 (Pellerin) at 6. Intrado maintains that its 911 service qualifies for interconnection within the meaning of subsection 251(c)(2) and that Intrado is therefore entitled to the statutory benefits associated with such interconnection.

Intrado does not presently provide the 911 service involved in this proceeding in Illinois. Intrado Ex. 1 (Hicks) at 5. There are two current agreements between Intrado and AT&T for processing voice-over-Internet Protocol ("VOIP") traffic from third parties, under which AT&T supplies telephone exchange service and other services to Intrado. AT&T Ex. 1.0, Sch. PHP-9 (Intrado response to AT&T Data Request 5). There is also an expired ICA, by which Intrado could have transported 911 calls aggregated from third parties. *Id*. Intrado did not conduct operations under that ICA. AT&T Ex. 1.0 at 5; Tr. 160-61 (Pellerin).

IV. ISSUES FOR RESOLUTION

Issue 1:

Does Intrado have the right to interconnection with AT&T under Section 251(c) of the Act for Intrado's Provision of competitive 911/E911 services to PSAPs?

A. Parties Positions and Proposals

1. Intrado

Intrado maintains that AT&T is required by subsection 251(c)(2) of the Federal Act to provide interconnection to Intrado because, among other reasons, Intrado intends to furnish "telephone exchange service" within the meaning of subsection 251(c)(2)(A). There are two alternative definitions of "telephone exchange service" in the Federal Act[6], and Intrado avers that its proposed services comport with either alternative (Parts A and B). According to Intrado, the Federal Communications Commission ("FCC") has taken an expansive view of telephone exchange service, placing non-traditional arrangements such as DSL-based service and directory assistance call completion service within that category. Intrado contends that its proposed handling of 911/E911 transmissions should be similarly regarded as telephone exchange service. That result, Intrado believes, would further the pro-competitive policy reflected in the Federal Act.

Intrado relies on certain FCC decisions for the proposition that the "key component" of telephone exchange service is that it enables "intercommunication"

[6] The definitions appear at 47 U.S.C. §153(47).

among a "community of subscribers" within an exchange area. Intrado asserts that its proposed 911 service will perform this intercommunicating function by connecting end-users and Intrado's PSAP subscribers. Intercommunication does not require that a proposed service supplant a subscriber's existing local service in order to qualify as telephone exchange service, Intrado argues.

Moreover, Intrado stresses, this Commission has already determined that Intrado provides "telephone exchange service," in a previous arbitration involving predecessors of, respectively, Intrado and AT&T[7]. In that proceeding, the Commission held that the service contemplated by Intrado's successor "falls within the definition of telephone exchange service found in 47 USC §153(47)."[8]

Intrado also emphasizes that AT&T, in effect, characterizes its own 911 service as telephone exchange service in its tariffs. Intrado alleges that its 911 service tariff is substantially similar to AT&T's and should also be regarded as telephone exchange service.

2. AT&T

AT&T argues that Intrado's proposed service is not "telephone exchange service" within the meaning of the Federal Act. For that reason, AT&T asserts, Intrado is not entitled to either subsection 251(c)(2) interconnection or an arbitrated ICA with AT&T. Specifically, AT&T contends that Intrado's 911 service does not permit subscribers to originate an outbound telecommunications transmission, as Part B of the federal definition requires (a requirement AT&T would also read into Part A). The public agencies using Intrado's service will need to subscribe to the telephone exchange service of another provider to initiate an outbound or non-911 call. AT&T emphasizes that the Florida Public Service Commission dismissed Intrado's arbitration requests with AT&T's Florida affiliate[9] and with another ILEC[10] precisely because, that Commission found, Intrado's 911 service does not enable call origination.

Intrado's 911 service also falls outside the definition of telephone exchange service, AT&T charges, because it is not the intercommunicating service explicitly required by Part A (and, according to the FCC, implicitly required by Part B) of §153(47). Intercommunication means that an end-user can call the other end-users in the exchange area, and not merely a pre-designated PSAP, AT&T maintains.

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[7] In the Matter of the Petition of SCC Communications Corp. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with SBC Communications Inc., Dckt. 00-0769 (March 21, 2000) ("SCC Arbitration"). As previously noted, SCC did not conduct operations under the ICA resulting from that proceeding.

[8] *Id*., at 6.

[9] Petition by Intrado Communications, Inc., for Arbitration with BellSouth Telecommunications, Inc., d/b/a AT&T Florida, Fla. Pub. Serv. Comm'n. Dckt. 070736-TP, Final Order (Dec. 3, 2008).

[10] Petition by Intrado Communications, Inc., for Arbitration with Embarq Florida, Fla. Pub. Serv. Comm'n. Dckt. 070699-TP, Final Order (Dec. 3, 2008).

AT&T further avers that Intrado's planned service is not "within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area," as expressly required by Part A of the pertinent definition. Nor, AT&T insists, is Intrado's service covered by the "exchange service charge," as Part A also specifies.

As for this Commission's conclusions in the SCC Arbitration, AT&T argues that the telecommunications services involved in the present case are different and that our earlier analysis was inconsistent with certain FCC orders issued prior to or contemporaneous with that arbitration decision.

AT&T additionally suggests that this Commission has the discretion to decline to arbitrate the unresolved issues in this case, and that we can use that discretion in order to await the results of arbitration decisions elsewhere.

3. Staff

Staff maintains that Intrado is entitled to subsection 251(c) interconnection with AT&T, principally because the Commission previously reached that conclusion in the SCC Arbitration. As Staff sees it, "Intrado proposes to provide essentially the same service here as it proposed to provide in" that case. Staff IB at 10. Staff cautions, however, that the terms and conditions of Intrado's interconnection should closely conform to the requirements of subsection 251(c), despite Intrado's request, in certain instances, for non-traditional arrangements. In Staff's view, Intrado should not be permitted to claim the benefits of the Federal Act while simultaneously avoiding its requirements.

4. Analysis and Conclusions

As framed by the parties, the fundamental question in Issue 1 is whether Intrado's 911 service constitutes "telephone exchange service" under Part A or Part B in §153(47). The full statutory definition of "telephone exchange service" is as follows:

> (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

Given that §153(47) presents two alternative definitions conjoined by "or," a provider's service can constitute telephone exchange service under either alternative. The FCC has not commented on whether stand-alone 911 service like Intrado's is telephone exchange service. For purposes of comparison, the FCC has held that directory assistance call completion[11] and xDSL-based advanced services[12] are telephone exchange service, but paging service is not[13].

Although Intrado and AT&T dispute the meaning of several elements in the alternative definitions of telephone exchange service, two elements warrant particular emphasis – call origination and intercommunicating service. Call origination is significant because the Florida Commission rejected Intrado's claim that 911 service is telephone exchange service, on the ground that the service does not include call origination[14]. Intercommunicating service is essential because, as Intrado correctly observes, the FCC has called it the "key criterion for determining whether a service falls within the scope of the telephone exchange service definition."[15]

Intrado and AT&T have each commingled their discussion of call origination and intercommunicating service. Intrado addresses both elements in a single sub-heading in its Initial Brief, at 6. AT&T contends that call origination and termination are "part and parcel" of intercommunicating service. AT&T IB at 7, fn. 6. The Commission does not agree that call origination/termination and intercommunicating service are the same thing. When Congress added Part B to the §153(47) definition, it employed different language (origination/termination) rather than re-employing "intercommunicating

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[11] Provision of Directory Listing Information Under the Telecommunications Act of 1934, as Amended, 16 FCC Rcd. 2736 (2001) ("Directory Assistance Order").

[12] In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, 15 FCC Rcd. 385 (1999) ("Advanced Services Order").

[13] In the Matters of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd (1996).

[14] See citations at footnotes 9 and 10, *supra*. In the briefs filed in this proceeding, the parties disputed whether the Florida Commission is the only state commission to decide this issue during the current round of Intrado interconnection filings. Intrado contended that the Ohio Commission "specifically determined that Intrado's [911 service] is telephone exchange service." Intrado RB at 10, citing Application of Intrado Communications Inc. to Provide Competitive Local Exchange Services, P.U.C.O. Case No. 07-1199-TP-ACE, Finding and Order (Feb. 5, 2008) ("Ohio Certification Order"). AT&T rejoined that Intrado misrepresents the Ohio decision. AT&T RB at 21. We note that the Ohio proceeding was a certification proceeding, not an interconnection arbitration. The Ohio Commission concluded that end-users have "no relationship" with Intrado and that Intrado is not a CLEC. Ohio Certification Order, Finding 7. However, the Ohio Commission created a new carrier category for Intrado ("competitive emergency services telecommunications carrier") and stated that "Intrado is a telecommunications carrier *engaged in* the provision of telephone exchange service pursuant to Section 251 of the [Federal Act]". *Id*. (emphasis added). In later proceedings, parties debated whether "engaged in" meant only that Intrado's 911 service performed a function within *other carriers'* telephone exchange service. Nevertheless, in a subsequent interconnection arbitration, Petition of Intrado Communications, Inc. for Arbitration to Establish an Interconnection Agreement with Ohio Bell Telephone Company dba AT&T, P.U.C.O. Case No. 07-1280-TP-ARB, Arbitration Award (Mar. 4, 2009), the Ohio Commission expressly concluded (at p. 15) that Intrado's 911 service is telephone exchange service. (The Ohio ruling is discussed later in this Arbitration Decision). Thus, both Ohio and Florida have now directly addressed whether Intrado's 911 service is telephone exchange service, reaching opposite conclusions.

[15] Advanced Services Order, para. 26.

service" in the new sub-part. Moreover, the FCC would not have needed to read an intercommunicating service requirement into Part B, as it did in the Advanced Services Order[16], if intercommunicating service already carried the same meaning as call origination/termination. In this Commission's view, intercommunication pertains to the accessibility of end-users to each other, while origination/termination pertains to an individual end-user's ability to initiate or receive a call[17]. Accordingly, these elements will be addressed separately here.

a) Call Origination

To analyze the call origination requirement in the context of emergency services, the Commission finds it helpful to describe 911 communications. The emergency response system is designed for urgent circumstances. Callers need only enter three universally recognized digits into a telecommunications path specifically created for those circumstances. To minimize the potential for error, failure or overload, the telecommunications path is not designed for calls in the opposite direction (from PSAPs to emergency sites). Indeed, in Illinois, 911 service is defined as "a terminating only service"[18] and outbound calls on 911 circuits are prohibited[19].

Intrado has appropriately included these facts and policies in its proposed 911 service[20]. Intrado thus acknowledges that its 911 service does not include the capability to originate a call (except via transfer by the PSAP of an inbound call placed by a 911 end-user). A PSAP that subscribes to Intrado's 911 service will need one or more additional telephone lines, not associated with 911 service, to originate calls[21]. The PSAP will not be able to return the call of a 911 end-user via Intrado's 911 service if a call is dropped. AT&T Ex. 1.0 at 21.

Nevertheless, Intrado maintains that its 911 service furnishes call origination within the meaning of the federal definition. As Intrado sees it, the call transfer mechanism (which Intrado also refers to as "hookflashing") is a form of call origination by the subscribing PSAP. As Intrado witness Spece-Lenss described in oral testimony:

> [T]he call process has two parts. You have the consumer, the citizen who is dialing 911. The PSAP receives the call and then the PSAP originates the transfer. So it's originating

[16] Advanced Services Order, para. 20.
[17] In the practical sense, of course, a telecommunications end-user must be able to originate or terminate communications with other accessible users. But for statutory construction, we are obliged to discern the intended meaning of each of the discrete terms chosen by the legislature.
[18] 83 Ill. Adm. Code 725.500(a).
[19] 83 Ill. Adm. Code 725.500(d).
[20] "Intrado has purposefully designed its 911 service to be unable to originate an outgoing call except in the instance of conferencing or call-transfer disconnect processes." AT&T Cross-Ex. 3 (Intrado response to AT&T Data Request 18).
[21] "Illinois public safety agencies subscribe to local exchange service for administrative purposes, such as to receive other emergency or non-emergency calls, including any which might be relayed by operators or terminated on PSTN-accessible local exchange telephone lines." Intrado IB at 21.

> the call through the hook flash, either the selective transfer feature or the 10-digit transfer feature and it's originating the call.

Tr. 110.

The Florida Commission rejected this argument and denied Intrado's request for subsection 251(c)(2) interconnection on that basis. The Florida Commission did not elaborate upon its conclusion, perhaps because it found it self-evident. The Ohio Commission held that Intrado's 911 service does include call origination[22]. Ohio's half-sentence rationale was confined to this: the federal definition of telephone exchange service does not "quantify" the term "originate"[23]. We will expand upon our sister commissions' limited discussion of this issue, and we will reach the same conclusion as the Florida Commission.

Simply, hookflashing is not call origination. It is a call transfer procedure that reroutes a call *originated by the person placing the inbound 911 call to the PSAP*. While Intrado is correct that call transfer is commonly used, Intrado IB at 14, that does not mean it is a call origination mechanism. That is particularly so in the 911 context in Illinois, in which call transfer, as defined by our regulations, is limited to rerouting of the originated call to an emergency services provider or another PSAP ("`Call Transfer' – a 9-1-1 service in which the PSAP telecommunicator receiving a call transfers that call to the appropriate public safety agency or another provider of emergency services"[24]). We believe that the reference to "that call" in our regulatory definition is significant, because it captures what in fact occurs during an emergency call transfer – the PSAP works collaboratively with an emergency responder or another PSAP to address the ongoing request for assistance. The Commission therefore disagrees with the viewpoint of Intrado's witness who "wouldn't consider it the same call when a PSAP [needs] to do a transfer." Tr. 112 (Spence-Lenss). Indeed, Intrado's own tariff characterizes call transfer as the "[t]he act of adding an additional party to an *existing call*."[25]

The call transfer capability in Intrado's planned service thus reflects the limited scope of transferability contemplated in the 911 architecture. Such transfers are confined to other PSAP's served by Intrado, although transfers to non-Intrado PSAPs and related public safety agencies are possible if certain infrastructure and

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[22] Petition of Intrado Communications, Inc. for Arbitration to Establish an Interconnection Agreement with Ohio Bell Telephone Company dba AT&T, P.U.C.O. Case No. 07-1280-TP-ARB, Arbitration Award (Mar. 4, 2009) at 16 ("Ohio Arbitration").

[23] This Commission does not perceive call origination as a *quantitative* matter. The appropriate inquiry is qualitative – *can* the customer originate a call using Intrado's 911 service? The quantity of calls or call recipients is not relevant to this component of the federal definition of telephone exchange service (although it is relevant to the "intercommunication" component of the definition, discussed later).

[24] 83 Ill. Adm. Code 725.105.

[25] AT&T Ex. 1.0, Sch. PHP-3, P.U.C.O. Tariff No. 1, Sec. 1, Orig. Page 1 (definition of "Call Transfer or Call Bridging") (emphasis added). Intrado describes its Illinois tariff, which was not offered for the record here, as "similar" to its Ohio tariff. Intrado IB at 20, fn. 85.

arrangements are in place with Intrado[26]. Moreover, PSAP-to-PSAP call transfer capability is not mandated by law, Staff Ex. 2 at 13, and Intrado (and AT&T) would only implement it (through interconnection of selective routers) upon customer request. Intrado Ex. 2 at 11. Thus, insofar as call transfer by an Intrado-served PSAP will be technically enabled, it will be appropriately limited to continuous handling of the caller-originated assistance request.

Although it is not entirely clear (given the parties' commingled analyses of call origination and intercommunication), Intrado apparently suggests an analogy between its 911 call transfer function and the DA services that the FCC found to be telephone exchange service in the Directory Assistance Order. If that is so, the Commission does not find the analogy apt. In the Directory Assistance Order, the FCC held that DA providers perform telephone exchange service when they furnish call completion service (that is, when they enable the party requesting number lookup to place a call to the requested number). Without call completion, "the competing directory assistance provider is not providing telephone exchange service within the meaning of section 3(47)."[27] In the Illinois 911 context, an Intrado-served PSAP (or any other PSAP) could not originate a new communication with a party of the 911 caller's choice for a purpose unrelated to the emergency at hand. The PSAP can only transfer the call, without terminating it, to a single authorized respondent[28], and may continue to participate in the call[29]. That is not like DA call completion, which originates a new call to the end-user's selected destination somewhere in the exchange area, without further involvement by the DA provider (who may provision number look-up and call completion without live human participation).

Nonetheless, this Commission did conclude, in the SCC Arbitration, that Intrado (as SCC) provided a service "by which a subscriber can originate and terminate an emergency or 9-1-1 call."[30] However, the 911-related services SCC proposed to provide in 2001 are not the same as Intrado's proposed 911 service here and they differ meaningfully with respect to call origination. SCC customers included ILECs, CLECs and wireless carriers, for whom it intended to deliver originated 911 traffic to AT&T's

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[26] Specifically, Intrado can transfer calls to "any Intrado served PSAP, to other non-Intrado served PSAPs if the non-Intrado served PSAP's service provider has deployed the selective router-to-selective router feature and is interconnected with Intrado's national network, and to any authorized agency that is directly interconnected to the nationwide Intrado 911/E911 network." AT&T Cross Ex. 4 (Intrado response to AT&T Data Request 20).

[27] Directory Assistance Order, para. 22.

[28] "A 9-1-1 system should be designed so that a call will never be transferred more than once." 83 Ill. Adm. Code 725.505(g).

[29] Indeed, the transferring PSAP *must* remain involved with the call until it is safe to disengage. "At such time as the telecommunicator verifies that the transfer has been completed *and the telecommunicator's services are no longer required*, the telecommunicator may manually release himself from the call." *Id*. (emphasis added). Intrado's Ohio 911 tariff is consistent with this requirement and it reflects the fact that call handling by a PSAP does not usually end at transfer. "The term `Call Bridging' is preferred because 9-1-1 call handlers rarely transfer calls without staying connected to ensure the call is effectively handled (no `blind' transfers)." AT&T Ex. 1.0, Sch. PHP-3, P.U.C.O. Tariff No. 1, Sec. 1, Orig. Page 1 (definition of "Call Transfer or Call Bridging").

[30] SCC Arbitration at 6.

(then, Ameritech's) selective routing tandems, for transmission to an appropriate PSAP[31]. SCC did not intend to serve PSAPs, the terminators of 911 traffic. AT&T Ex. 1.0 at 20 (Pellerin). In the present case, Intrado's service will begin at the selective router and proceed to the PSAP. Intrado does not intend to "aggregate originating 911 calls from other carriers for delivery to [AT&T's] selective routers," AT&T Ex. 1.0, Sch. PHP-9, and it does not intend to "provide non-wire line telephone exchange service to customers in Illinois." *Id*. Thus, Intrado will not enable 911 call origination for any party[32], much less for its subscriber PSAPs (the relevant entity for purposes of Part B of the federal definition of telephone exchange service). Accordingly, the Commission will not repeat here our conclusion in the SCC Arbitration that Intrado originates telecommunications service.

In sum, the Commission finds that Intrado's 911 service does not enable a subscriber to initiate telecommunications service within the meaning of Part B of the federal definition of telephone exchange service.

b) Intercommunicating Service (or "Intercommunication")

As previously noted, while intercommunicating service is not an explicit element of Part B of the statutory definition of telephone exchange service, the FCC regards it as part of the requisite comparability among services under Parts A and B[33]. This Commission defers to the FCC's interpretation of the Federal Act. Therefore, Intrado's 911 service must provide intercommunicating service in order to constitute telephone exchange service under either part of the federal definition.

Despite their opposing views of Intrado's 911 service with respect to intercommunication, both Intrado and AT&T cite the same text in the Advanced Services Order: "a service satisfies the 'intercommunication' requirement of section 3(47)(A) as long as it provides customers with the capability of intercommunicating with other subscribers."[34] The parties also each rely on the same language in both the

[31] SCC Arbitration at 5. The Commission notes that its discussion of the SCC proceeding is based solely on the final Arbitration Decision there. Neither the Commission nor the parties can utilize other matter from that docket for decision-making purposes in this case, unless it has been admitted as record evidence here. One mechanism for admitting such matter is administrative notice, pursuant to 83 Ill. Adm. Code 640(2) & (3). Administrative notice was not utilized in this case, and matter filed in Docket 00-0769 did not enter the record here by other means. Consequently, Intrado's citation to its filing in Docket 00-0769 (which we understand to have been made in good faith), appearing in Intrado's RB at 11, fn. 52 (and any similar citation by any participant here), cannot be considered.

[32] We note that Intrado is not authorized to provide dial tone in Illinois. In its certification proceeding in this state (as SCC), Intrado expressly stated that it would not supply dial tone, SCC Communications Corp., Application for a Certificate of Authority to Provide Telecommunications Services in Illinois, Dckt. 00-0606, Order at 2 (Dec. 20, 2000) and Amendatory Order, (Jan. 31, 2001) (together, "SCC Certification Order"), and we included that fact in formal findings (Findings 6 & &) in that case.

[33] "Because we find that the term 'comparable' means that the services retain the key characteristics and qualities of the telephone exchange service definition under subparagraph (A), we reject the argument that subparagraph (B) eliminates the requirement that telephone exchange service permit 'intercommunication' among subscribers within a local exchange area." Advanced Services Order, para. 30.

[34] Advanced Services Order, para. 23; cited at Intrado IB at 13 and AT&T IB at 6.

Advanced Services Order and the Directory Assistance Order that intercommunicating service "refers to a service that permits a community of interconnected customers to make calls to one another."[35]

The parties interpret the quoted terms differently, however. AT&T asserts that virtually *all* customers in an exchange area must be able to intercommunicate with virtually *all other* customers in the exchange area via the requesting carrier's service. AT&T IB at 6-7. Intrado argues that the interconnected community need only consist of the intended subscriber (a PSAP) and its potential "customers" (persons needing emergency services) with the exchange area. The issue thus framed by the parties is whether intercommunicating service must inter-link (like a traditional CLEC) all potential subscribers or just the providers and potential users of a niche service (in this case, 911 service).

While the FCC has not precisely defined the scope of intercommunication that a provider must offer to meet the definition of telephone exchange service, the inferences reasonably drawn from the cited FCC decisions do not favor Intrado. In the Directory Assistance Order, on which Intrado places considerable reliance, the FCC concluded that certain DA providers furnish the requisite intercommunication for telephone exchange service[36]. But, as discussed above, the key attribute of such DA service, the FCC found, is not the basic number look-up function. Rather, it is the call completion service (to the caller's requested telephone number) that certain DA providers offer[37]. Call completion enables the end-user to reach telecommunications customers beyond the DA service provider.

Thus, nothing in the Directory Assistance Order suggests that performing traditional number look-up service, or establishing a part of the telecommunications pathway for performing that service, constitutes the requisite intercommunication for telephone exchange service. Intercommunication between callers and DA number retrieval systems (or live personnel) is not enough. The caller must be able to communicate, via the DA provider's service, with other interconnected telecommunications customers. Is Intrado's 911 service, then, sufficiently like the call completion service the FCC characterized as an intercommunicating service?

As discussed above, Intrado's planned service permits the personnel of its PSAP customer to receive an inbound emergency call and transfer it, when necessary, to another PSAP. The transferring PSAP remains involved in the call, at least initially, via the conference function. Such transfers are limited to other PSAP's served by Intrado

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[35] Advanced Services Order, para. 23; Directory Assistance Order, para. 17; cited at Intrado IB at 13 and AT&T IB at 6.

[36] The Commission notes that the Directory Assistance Order did not address interconnection under subsection 251(c)(2) of the Federal Act. Rather, the FCC considered whether DA providers furnish telephone exchange service for the purpose of determining their eligibility for nondiscriminatory access to ILEC DA databases under subsection 251(b)(3).

[37] Moreover, not all call completion falls within the statutory definition. Call completion has to occur through the DA's own facilities or via resale, with a separate charge to the caller. Directory Assistance Order, para. 22.

(and to non-Intrado PSAPs and related agencies under certain circumstances previously described). Such transfers remain within the designated 911 network (Intrado's or - with connected selective routers - another 911 telecommunications provider's), in order to retain ALI and properly provide the emergency response that the caller seeks. Tr. 74 (Hicks).

The Commission therefore finds that Intrado's call transfer capability is not sufficiently like the call completion service that met the intercommunication test in the Directory Assistance Order. In the DA context, after the caller obtains information from the DA provider, s/he can elect to communicate with a large and diverse number of other telecommunications customers connected to the PSTN in the exchange area (at least those customers with published numbers), for purposes entirely different than the purpose of the initial call to the DA provider (*i.e.*, to obtain a telephone number). In contrast, Intrado's 911 service permits no more than a transfer to another PSAP for further (and joint) handling of the original purpose of the call. Thus, the "community of interconnected customers" made accessible to the DA caller is dramatically different than the single transferee made accessible through Intrado's 911 service[38].

In the Advanced Services Order, on which Intrado also relies, the FCC held that telecommunications accomplished through xDSL-based advanced services provide intercommunication (and constitute telephone exchange service)[39]. The FCC rejected an ILEC's suggestion that the relevant xDSL-based service was analogous to private line service[40], which is not telephone exchange service. Although an xDSL subscriber must initially designate an internet service provider or other third-party for receipt of high speed data transmissions, the FCC emphasized that the subscriber, "with relative ease," can "rearrange the service to communicate with any other subscriber on [the packet switched] network."[41] The FCC also stressed that the customer can perform that rearrangement without disconnecting service or requesting an additional line. In contrast, a private line subscriber would have to order an additional line to communicate with additional telecommunications customers.

A comparison between xDSL-based advanced services and Intrado's 911 service can be performed from the perspective of the end-user or the PSAP subscriber. For the end-user, 911 service enables communication only with a predetermined PSAP served by Intrado. At most, the PSAP can, in turn, transfer the call to another PSAP (also served by Intrado, unless there are connected selective routers). Transfer is not at the end-user's behest, and the end-user, by design, cannot communicate with any other person or entity via 911 dialing. From the PSAP's perspective, call transfer is the only

[38] Curiously, after repeatedly comparing 911 callers to DA callers, for the purpose of showing that its 911 service provides intercommunication, Intrado IB at 13-16, Intrado asserts on exceptions that "[a]nalysis of Intrado's 911 service should *not* be from the perspective of the 911 caller." Intrado BOE at 4 (emphasis added).
[39] Advanced Services Order, para. 24.
[40] Private line service is "a service whereby facilities for communications between two or more designated points are set aside for the exclusive use or availability of a particular customer and authorized users during stated periods of time." 47 CFR §21.2.
[41] Advanced Services Order, para's. 24 & 25.

enabled and permissible outbound telecommunications option under Intrado's service. Any other outbound call, including a call-back to the end-user, requires an additional administrative line over the PSTN. Indeed, the PSAP cannot communicate *with anyone* via 911 service except as a call recipient. Thus, the PSAP and 911 caller cannot "make calls to one another," as the Advanced Services Order requires for intercommunication[42].

The Commission finds it significant that the FCC did not reject the ILEC argument in the Advanced Services Order that "services offered over a predesignated transmission path do not constitute telephone exchange service."[43] Rather, it found the cases cited in support of that argument "readily distinguishable," because the services involved in those cases were offered via private lines. While AT&T implies that Intrado's 911 service is equivalent to private line service, AT&T RB at 7, the Commission need not and does not reach that conclusion. For our purposes here, we simply determine that Intrado's 911 service is not sufficiently similar to xDSL-based advanced services to sustain a finding, based on the Advanced Services Order, that Intrado's 911 service provides intercommunication. The services involved in the Advanced Services Order afforded the end-user subscriber substantially greater access to, and control over, communication with other subscribers and end-users than does Intrado's 911 service, which enables communication solely between end-users and a designated PSAP (with possible call transfer to another PSAP).

That said, the Commission is mindful of Intrado's recommendation to interpret these FCC decisions broadly, with a predilection toward fostering competitive entry. That is a constructive request, and the Commission has endeavored to ascertain the meaning of each relevant decision as a whole. Intrado is correct that the FCC has construed the Federal Act in a manner that accommodates technological advancement and advanced product offerings. The FCC has not, however, relaxed the intercommunication requirement.

In the Advanced Services Order, for example, the FCC determined that, "in this era of converging technologies," it would not limit the federal definition to voice service[44] and it would construe the law to include packet switching (along with the traditional circuit switching). But the FCC did not modify the scope of the "community of interconnected customers"[45] necessary for telephone exchange service. To the contrary, it reiterated that it had "long interpreted the traditional telephone exchange definition to refer to 'the provision of individual two-way voice communication by means of a central switching complex to interconnect *all subscribers* within a geographic area.'"[46] And the FCC twice expressly stated in the Advanced Services Order that xDSL-based service permitted interconnection because a customer could reconfigure

[42] *Id*., para. 23.
[43] *Id*., para 25.
[44] *Id*. at 21.
[45] *Id*. at 23.
[46] Advanced Services Order, para. 20, (emphasis added), citing, among other cases, its post-1996 decision in Application of Bell South for Provision of In-Region, InterLATA Services in Louisiana, 13 FCC Rcd. 20599, 20621 (1998) ("Bell South Order").

the service "to communicate with *any other customer*" located on the packet-switched network.[47]

The Directory Assistance Order relies upon the Advanced Services Order without explicitly or implicitly altering the treatment of intercommunication contained in the latter decision. When the FCC says, in the Directory Assistance Order, that the call completion feature of some DA services allows "an interconnected community of customers to make calls to one another,"[48] it is plainly referring to call recipients other than the DA service itself (the functional equivalent of the PSAP in this analysis).

Consequently, the Commission does not agree with Intrado that "911 callers, PSAPs and first responders," Intrado IB at 14, constitute an interconnected community within the meaning of the FCC orders discussed here. We need not adopt AT&T's concept of the interconnected community - virtually *all* telephone subscribers in an exchange area (an effectively impossible standard for any carrier today) - to conclude that the interconnected community, for purposes of defining telephone exchange service, encompasses a more varied inter-customer communication than an inbound-only hub-and-spoke arrangement in which all calls must end with the hub PSAP (or another PSAP via call transfer).

This is not a question, as Intrado suggests (Intrado RB at 6), of whether intercommunication is limited to voice communication or whether non-traditional services or technologies can provide interconnection. The FCC decisions discussed here have already answered those questions. The real issue posed by the intercommunication requirement is whether telecommunications customers have access to a multiplicity of other customers of their own choosing within the exchange area. The x-DSL service in the Advanced Services Order and the call completion service in the Directory Assistance Order supply such access, while Intrado's 911 service does not.

The Florida Commission did not directly address intercommunication, since it rejected Intrado's petition for lack of call origination. The Ohio Commission found that intercommunication via Intrado's 911 service is "minimal" but nonetheless sufficient for telephone exchange service, because the Federal Act does not "quantify" intercommunication[49]. The FCC, however, *has* analyzed intercommunication quantitatively, in the sense of requiring inter-access among multiple customers through the telecommunications provider's system, not mere one-way communication to a single end-point. Again, in both the Advanced Services Order and the Directory Assistance Order, the FCC describes the intercommunication necessary for telephone exchange service as enabling "a community of interconnected customers to make calls to one another." [50] Thus, as the FCC has viewed it to date (and Intrado has premised its case in large measure on the FCC' construction of the Federal Act), intercommunication involves cross-communication among a multiplicity of end-points.

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[47] *Id*., para. 24 & para. 25, fn. 61 (emphasis added).
[48] Directory Assistance Order, para. 17.
[49] Ohio Arbitration, *supra*, at 15.
[50] Advanced Services Order, para. 23; Directory Assistance Order, para. 21.

Accordingly – and as we did with regard to call origination - the Commission will diverge from the result we reached with respect to intercommunication in the SCC Arbitration. In that docket, we said that "SCC transports a portion of an Emergency 9-1-1 call" and found that sufficient for intercommunication. SCC Arbitration at 6. There are important differences between that case and this one. Intrado has altered its array of services, the Directory Assistance Order was not analyzed in our 2001 Order and, as AT&T observes, our 2001 Order can be fairly read to have assigned to AT&T's predecessor the burden of proof and persuasion regarding intercommunication. AT&T IB at 14. Nonetheless, the Commission did say in the SCC Arbitration that transport of 911 calls constituted intercommunication and we expressly acknowledge that we are revising our position here. Transport of 911 calls from an ILEC's 911 tandem to a terminating PSAP, by itself, is not intercommunication under the Federal Act, as interpreted by the FCC. Unlike the call completion service in the Directory Assistance Order, terminating 911 transport does not interconnect a community. It delivers a single-purpose communication to a pre-designated termination point.

c) Service Within a Telephone Exchange or Connected Exchange System of the Character Ordinarily Furnished by a Single Exchange

Part A of the federal definition of telephone exchange service also requires "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge." With regard to the first clause in this quotation, the FCC said that "`exchange service' generally refers to service within local calling areas which is covered by an exchange service charge, as distinct from 'toll service' between exchanges for which there is a separate additional charge."[51] In more common parlance, service within a telephone exchange is "local" calling.

The second clause in the quoted text refers to a group of exchanges that are treated like a single exchange, for reasons of public policy or local custom (often denominated as "extended [or expanded] area service"). In such circumstances, calls that traverse exchange boundaries within the connected group of exchanges are still "local."

The FCC also said that, "[t]he concept of an exchange area is based on geography and regulation, not equipment. An exchange might have one or several central offices."[52] Consequently, the FCC differentiates between local (telephone exchange) service and toll (exchange access) service by "looking to the end points of the communication,"[53] to determine whether they are in the same geographic unit.

[51] Advanced Services Order, para. 17, fn. 42.
[52] Bell South Order, 13 FCC Rcd. 20623, fn. 68.
[53] Advanced Services Order, para. 16.

Thus, to constitute telephone exchange service, a service must enable calling from one point within the geographic exchange area to another point in that area.

Applying the foregoing principles to the xDSL service in the Advanced Services Order, the FCC determined that some xDSL traffic terminated locally (and was, therefore, telephone exchange service) and some did not (and was, therefore, classifiable as exchange access). Importantly, however, the fact that xDSL-based communications could fall into either category did not mean that ILECs were excused from the obligations imposed on them by subsection 251(c), including interconnection. Rather, *insofar as xDSL was terminated locally*, the FCC expressly found that the duties associated with local exchange service were applicable[54]. The FCC reiterated this principle in the Directory Assistance Order. The "ability [to provide exchange access] does not cancel or otherwise nullify the telephone exchange service that the DA provider has the ability to provide."[55]

Thus, even assuming for the sake of argument that Intrado's proposed 911 service would handle some calls that terminated beyond the local exchange area, the service would still constitute local exchange service (if it satisfied the other elements of the federal definition), *to the extent that* the service enabled local calling. There is no question that Intrado's 911 service will facilitate 911 calls that originate and terminate within the same exchange area. Indeed, 911 service is essentially local, since its core purpose is to link the caller to the responders that can most quickly and readily provide assistance. Thus, Intrado satisfies the "geographic" element in the federal definition of local exchange service, and it does not matter, in this context, that it might also facilitate 911 calling to PSAPs outside the local exchange area[56].

d) Exchange Service Charge

The federal definition of telephone exchange service additionally requires that the service within the pertinent exchange area be covered by the "exchange service charge." This requirement is difficult to apply, because the FCC has not been entirely clear about its purpose or its contours. For example, in the Advanced Services Order, the FCC stated that the exchange service charge "comes into play only for the purposes of distinguishing whether or not a service is a local (telephone exchange) service, by

[54] For clarity: in the Advanced Services Order, the principal proponent of the argument that xDSL is not telephone exchange service was an ILEC that provided xDSL. The ILEC did not want such service classified as either telephone exchange service or exchange service, so that the unbundling requirements of subsection 251(c)(3) would be inapplicable. Thus, the Advanced Services Order was not addressing the nature of a CLEC's competitive services and it was not about interconnection (except insofar as interconnection would be an additional ILEC obligation if xDSL constituted either telephone exchange service or exchange access).

[55] Directory Assistance Order, para. 19, fn. 54.

[56] In fact, Intrado would be entitled to interconnection under subsection 251(C)(2)(A) if it provided *both* telephone exchange service and exchange access. However, it expressly denies that it will offer exchange access, Tr. 109 (Spence-Lenss), and, as we hold above, it does not satisfy other elements of the federal definition of telephone exchange service.

virtue of being part of a 'connected system of exchanges,' and not a `toll' service."[57] To that extent, the FCC seems to conflate the exchange service charge component of the federal definition with the telephone exchange boundary component discussed in the preceding section of this Decision.

The FCC also said in the Advanced Services Order that the name or title of a service in a carrier's bills does not determine whether it is an exchange service charge. "[I]n a competitive environment, where there are multiple local service providers and multiple services, there will be no single 'exchange service charge.'"[58] The FCC adopted this approach to preclude ILECs from distorting the nature of a charge by simply calling it something other than an exchange service charge[59]. However, the FCC also noted that it was describing a service that "otherwise satisfies the telephone exchange service definition."[60] Thus, while billing nomenclature does not determine the nature of the service, the functionality of the service does. Charges associated with a service that is equivalent to the service a subscriber receives for a traditional exchange service charge satisfy the federal definition.

Applying the foregoing principles in the Advanced Services Order, the FCC concluded that an x-DSL charge constituted an exchange service charge, because "an end-user obtains the ability to communicate within the equivalent of an exchange area as a result of entering into a service and payment agreement with a provider of a telephone exchange service."[61] In the Directory Assistance Order, the FCC, relying expressly on the principles articulated in the Advanced Services Order, found that the per-call charge paid by an end-user for DA call completion was also an exchange service charge, primarily because call completion was "unquestionably local in nature."[62]

In the present case, Intrado's potential customers would be PSAPs, not end-users. Are the rates that an Intrado-served PSAP would pay for 911 service analogous to an end-user's exchange service charge? Because Intrado's 911 service does not "otherwise satisf[y] the telephone exchange service definition" (because it does not enable call origination or intercommunication), it is not analogous. However, if Intrado's 911 service did satisfy the other elements of the federal definition, the Commission, mindful of the FCC's particularly flexible treatment of the exchange service charge in the Advanced Services Order and the Directory Assistance Order, would likely take a different view of Intrado's 911 charge. That is, if a service that enables only inbound calls from points throughout an exchange area to a single termination point were deemed to provide call origination and intercommunication, we would likely hold that the associated rate constitutes an exchange service charge.

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[57] Advanced Services Order, para. 27. (The FCC reiterated this principle in the Directory Assistance Order, at para. 19.)
[58] *Id*., para. 28.
[59] Again, as mentioned in an earlier footnote, the Advanced Services Order involved an ILEC's services, not a competitor's.
[60] Advanced Services Order, para. 28.
[61] *Id*., para. 27. (The FCC also repeated this principle in the Directory Assistance Order, at para. 19.)
[62] Directory Assistance Order, para. 19.

The Commission notes that our assessment of this element of the federal definition is largely abstract, since Intrado's recurring 911 service charges are only described summarily in the tariff in evidence here[63]. Consequently, irrespective of our conceptual view of what constitutes an exchange service charge within the meaning of the federal definition and the cited FCC cases, the Commission could not, on the present record, definitively determine that Intrado's proposed 911 rates include a charge that is, in fact, an exchange service charge.

e) Comparison to AT&T'S 911 Service

In addition to its argument that its own proposed 911 service falls within the federal definition of telephone exchange service, Intrado emphasizes that AT&T's 911 service is much like Intrado's and is referred to in AT&T's tariffs as a "telephone exchange communication service." Intrado IB at 20. This is further proof, Intrado says, that its own service is telephone exchange service.

The Commission does not agree that the text in AT&T's tariff is significant or that it permits the inference Intrado makes. The tariff language and the federal definition, while similar, are differently worded and there is no apparent reason to assume that AT&T was trying to track the federal definition. Since "telephone exchange communication service" is not a statutory term in either Illinois or federal law, we accept AT&T's explanation that it is merely a functional description of the service[64].

A more substantial concern is whether AT&T's comparable 911 service enables either call origination or intercommunication. The tariff suggests it does not. Although it is a detailed document, the tariff (and the service it contemplates) can be fairly summarized (like Intrado's comparable 911 service) by one of its "Terms and Conditions" - "911 Service is furnished to the customer only for the purpose of *receiving* reports of emergencies from the public."[65]

Also, whether AT&T provides telephone exchange service is not dependent upon the nature of its 911 service. AT&T is an ILEC, and it unquestionably supplies telephone exchange service, apart from its 911 offerings. If, however, AT&T (like Intrado) proposed to provide *only* the 911 service described in its tariff, the Commission

[63] AT&T Ex. 1, Sch. PHP-3, P.U.C.O., Tariff No. 1, Sec. 5, Orig. Page 11 ("Intelligent Emergency Network Rates and Charges"). In Intrado's Ohio tariff (which Intrado describes as similar to its Illinois tariff), the precise elements that comprise recurring services such as 911 Routing Service and ALI Management Services are not delineated. Moreover, these services are priced on an individual case basis. Also, the Commission cannot determine whether these services involve usage-sensitive pricing, but such pricing can properly be included within an exchange service charge. Bell South Order, 13 FCC Rcd at 20623.

[64] "[The AT&T tariff] refers to 'telephone exchange communication service' because it is a communication service that is offered in an exchange." AT&T RB at 14.

[65] Intrado Ex. 4 (Spence-Lenss), Attach. 3 (AT&T tariff, Ill. C.C. No. 20, Part 8, Sec. 3, 1st Revised Sheet No. 10, Sec. C ("Terms and Conditions"), sub. 2 (emphasis added).

would likely reach the same conclusion it reaches today concerning Intrado's 911 service[66].

f) The Pro-Competitive Policy in Applicable Law

More generally (as we noted earlier), Intrado has called upon this Commission to consider its arbitration Petition in light of the pro-competitive policies and intentions embedded in both federal and Illinois law. Additionally, Intrado stresses the critical importance of reliable 911 service, emphasizing the technological innovations Intrado's 911 service ostensibly includes. The Commission agrees with Intrado's view of applicable telecommunications and public safety policies, and we have no reason to doubt the quality of Intrado's 911 services (or, for that matter, the quality of AT&T's 911 services). The Commission is therefore receptive to statutory interpretation that advances the law's intentions and enhances public safety.

Nevertheless, the Commission is neither willing nor authorized to expand the specific provisions of the law beyond their apparent meaning. The Congress did not say that *any* market entrant is entitled to interconnection under subsection 251(c)(2). Rather, it described the entrants entitled to such interconnection with particularity. Irrespective of this Commission's interest in expanding competition, we cannot exceed the limits established by the Congress.

The Commission observes that Intrado chose its business model with full knowledge of the Federal Act. Its efforts to obtain interconnection under the Federal Act for that business model have not been entirely successful, at least thus far. It may occur that Intrado will modify its business plan to obtain interconnection more readily. It may also occur that the FCC, whether in its own right or through its Wireline Bureau, will construe the Federal Act differently than we do here. In either case, this Commission would certainly consider another interconnection request with those new circumstances in mind. Today's result is limited to the record in this particular case and the current state of the law, including the absence of an FCC ruling regarding the status of stand-alone 911 service as "telephone exchange service."

g) Commission Discretion to Arbitrate

As an alternative to its preferred outcome (rejection of Intrado's request for interconnection under subsection 251(c)(2)), AT&T contends that the Commission has discretion under the Federal Act to decline to entertain Intrado's interconnection Petition. AT&T IB at 14. Intrado disagrees. Intrado RB at 13, fn. 62. AT&T does not cite authority expressly conferring discretion on the state commissions. Instead, AT&T apparently relies on what it believes to be the absence of compulsory language in subsection 252(b) of the Federal Act (even though the title of that subsection is "Agreements Arrived at Through Compulsory Arbitration"). However, AT&T overlooks subsection 252(b)(4)(C), which provides that "[t]he State commission *shall* resolve each

[66] Indeed, AT&T states (albeit for purposes of this litigation) that its 911 service is not a telephone exchange service. AT&T RB at 15.

issue set forth in the petition and the response…and *shall* conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section." (Emphasis added). "Shall" is a compulsory term in a statute. It precludes discretion with regard to what "shall" be done. Unless there is precedent from the FCC or a superior court that interprets the Federal Act differently on this point (and AT&T has not cited any), the Commission cannot decline to consider Intrado's Petition.

That said, the Commission recognizes that the State Corporation Commission of Virginia "deferred" Intrado's comparable interconnection petitions in that state to the FCC[67]. The Virginia Commission concluded that the FCC was "the more appropriate agency" to determine the threshold issue of Intrado's right to interconnection under Section 251[68]. That commission cited a Virginia statute that apparently provides discretion to defer arbitration issues. It is not clear how a state statute trumps the mandatory federal provision quoted above, but, in any event, the Virginia Commission dismissed the petitions there (an action that arguably constitutes the resolution of issues contemplated by subsection 252(b)(4)(C)). After dismissal, Intrado successfully petitioned the FCC, under subsection 252(e)(5) of the Federal Act, to assume preemptive jurisdiction of Intrado's Virginia interconnection petitions, on the ground that the state commission had "fail[ed] to carry out its [arbitration] responsibility," as subsection 252(e)(5) stipulates. The FCC's Wireline Competition Bureau issued orders preempting the Virginia Commission[69].

We will not defer this proceeding to the FCC. As stated above, this Commission does not possess the authority to refrain from resolving the issues framed by the parties. Intrado's Virginia arbitrations were preempted by the FCC pursuant to Intrado's petitions under subsection 252(e)(5), and we assume that deferral by us would be similarly regarded as a failure to arbitrate. Moreover, we believe that, like the Florida Commission, we have correctly interpreted and applied the Federal Act by concluding that Intrado's proposed 911 service is not telephone exchange service within the meaning of the federal definition. And since the Virginia Commission's deferral has already caused that threshold issue to be presented to the FCC, deferral by this Commission would add nothing to the process of discerning the Federal Act's meaning. The FCC's Wireline Competition Bureau will issue a decision and it will resonate among

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[67] *E.g.*, Petition of Intrado Comm. of Virginia Inc. for Arbitration to Establish an Interconnection Agreement with Central Telephone Co. of Virginia d/b/a Embarq and United Telephone-Southeast, Inc. d/b/a Embarq, under Sec. 252(b) of the Telecommunications Act of 1996, Order of Dismissal, Feb. 14, 2008.

[68] *Id.*, at 2. Although the Virginia Commission focused on the threshold issue of Intrado's interconnection rights, it deferred to the FCC all of the issues presented by the arbitrating parties.

[69] The procedural history of the FCC's preemption of Intrado's Virginia petitions is summarized in the Wireline Competition Bureau's December 9, 2008 Order that consolidates Petition of Intrado Comm. of Virginia Inc. Pursuant to Sec. 252(e) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Arbitration of an Interconnection Agreement with Central Telephone Co. of Virginia and United Telephone-Southeast, Inc., FCC WC Dckt. 08-33, and Petition of Intrado Comm. of Virginia Inc. Pursuant to Sec. 252(e) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Arbitration of an Interconnection Agreement with Verizon South Inc. and Verizon Virginia Inc., FCC WC Dckt. 08-185.

the state Commissions (including this one)[70]. Furthermore, by issuing a final arbitration decision, we enable Intrado to seek review in the federal District Courts under subsection 252(e)(6), thereby obtaining additional federal guidance on the meaning of the Federal Act.

h) Summary – "Telephone Exchange Service"

Intrado's 911 service is not telephone exchange service within the meaning of the federal definition in §153(47). It does not enable its PSAP customers to originate calls, as required by Part B of that definition. It does not facilitate intercommunication, whether by its PSAP customers or by the end-users initiating emergency calls, as required by Parts A and B of that definition. It does provide service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area (even if it also provides service beyond an exchange area). It appears to furnish service under an exchange service charge (although the precise nature of its recurring charges cannot confirmed by the evidentiary record). Based on the foregoing conclusions, the Commission resolves this issue as AT&T recommends, concluding that AT&T has no duty to interconnect with Intrado under subsection 251(c)(2) of the Federal Act.

i) Subsection 251(a) of the Federal Act

The ALJ's Proposed Arbitration Decision ("PAD") in this case contained the same summary and conclusions regarding subsection 251(c)(2) that appear in the immediately preceding subsection of this final Arbitration Decision. In its Exceptions to the PAD, Intrado argued that even if the Commission rules out arbitration under 251(c), it should nonetheless resolve the other arbitration issues in this case under the rubric of subsection 251(a)[71]. Intrado BOE at 6-10. Intrado correctly emphasizes that subsection 251(a) of the Federal Act requires all carriers to interconnect. Intrado also accurately recounts our prior decisions obligating ILECs to both negotiate[72] and arbitrate[73] under 251(a) to accomplish such interconnection with a telecommunications carrier. Intrado stresses that subsection 251(a) - unlike subsection 251(c) - does not oblige the carrier requesting interconnection to provide telephone exchange service.

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[70] When the FCC preempts a state arbitration under subsection 252(e)(5), it "assume[s] the responsibility of the State Commission…and act[s] for the State Commission," not in its own right. Moreover, decisions are rendered by the FCC's Wireline Competition Bureau, rather than by the FCC Commissioners. Nevertheless, the Bureau's decisions are accorded considerable persuasive weight and frequent citation by the state commissions. Thus, with a successful outcome before the Bureau, Intrado would presumably re-petition for interconnection in states that had rejected its original request.

[71] Staff correctly points out that Intrado failed to comply with the requirement in 83 Ill. Adm. Code 761.430(b) that exceptions to a PAD must be accompanied by proposed replacement language. Staff RBOE at 1. Nonetheless, because Intrado's request for application of subsection 251(a) raises important legal and policy issues, the Commission will address it despite the procedural deficiency.

[72] Cambridge Telephone Co. et al.,Petition for Declaratory Relief and/or Suspension or Modification Relating to Certain Duties Under Sections 251(b) and (c) of the Federal Telecommunications Act, Dckt. 05-0259, Order, July 13, 2005 ("Cambridge Telephone").

[73] Sprint Communications LP, Petition for Consolidated Arbitration with Certain Illinois ILECs Pursuant to Section 252 of the Telecommunications Act of 1996, Dckt. 05-0402, Order, Nov. 8, 2005.

Intrado recites our own observation that subsection 251(a) "contains no restrictions on who may interconnect with whom."[74] Based on these points, as well as on the subsection 251(a) negotiations and arbitrations required by other state commissions[75], Intrado urges this Commission to exercise the authority conferred by subsection 251(a) to address the specific interconnection disputes in the other issues presented here.

The Commission cannot do what Intrado requests. Whether or not Intrado can request negotiation and arbitration under 251(a), and whether or not the Commission has the authority to conduct such arbitration, Intrado has not properly invoked that authority here. Under subsection 252(b)(4)(A) of the Federal Act, the "[s]tate commission *shall limit* its consideration…to the issues set forth in the petition and in the response."[76] Issue 1 in this proceeding does not address subsection 251(a). Rather, it expressly asks whether Intrado has an interconnection right *under subsection 251(c)*. And that is, in fact, the question addressed by the parties. "Specifically, Intrado asks the Commission to find [that]…*Section 251(c) provides the appropriate framework for interconnection arrangements* between competitors like Intrado and ILECs like AT&T." Intrado IB at 6 (emphasis added). "This case involves a petition for Section 252(b) arbitration between a requesting carrier and an ILEC regarding a request for interconnection *under Section 251(c)(2)*. AT&T IB at 1 (emphasis added).

Consequently, both Staff and AT&T oppose Intrado's recommendation to arbitrate issues under 251(a). "There are…no open issues under Section 251(a) properly before the Commission to resolve. The Commission should therefore decline Intrado's eleventh-hour invitation to arbitrate Section 251(a) issues for which Intrado declined to seek arbitration." Staff RBOE at 2-3. "Because there was no request to arbitrate any issue regarding Section 251(a) and no request for interconnection under Section 251(a), there is no 'open issue' regarding Section 251(a) and thus nothing that the Commission could lawfully decide." AT&T RBOE at 8.

Indeed, Intrado has strenuously opposed any agreement other than a subsection 251(c) agreement throughout this proceeding. "AT&T's proposal that Intrado can operate pursuant to a non-section 251(c) agreement with AT&T should likewise be rejected." Intrado RB at 14. The entire thrust of Intrado's presentation in this case is that it proposes to compete with AT&T for PSAP customers and that "ILEC-to-competitor relationships are governed by Section 251(c)." *Id*. at 27. Intrado could have, as an alternative basis for interconnection, framed an arbitration concerning its rights under subsection 251(a). It was certainly aware of prior state commission precedent with respect to subsection 251(a) arbitration[77]. Instead, Intrado placed its entire bet on

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[74] Cambridge Telephone, at 13.

[75] *See*, cases cited in Intrado's BOE at 8, fn. 34 (from the public utility commissions in California, Indiana, Iowa, New York, North Dakota and Washington).

[76] 47 U.S.C. 252(b)(4)(A) (emphasis added).

[77] Footnote 14 to this Arbitration Decision discusses *Intrado's own experience* regarding subsection 251(a) before the Ohio Commission. Footnote 66, above, concerns several state commission arbitration decisions discussing subsection 251(a), all cited in Intrado's BOE. Footnote 64 identifies an arbitration conducted by *this Commission* under subsection 251(a), which Intrado also cites in its BOE. We note

the success of a request under subsection 251(c). Consequently, no issue regarding 251(a) arbitration was presented to satisfy the requirements of subsection 252(b)(4)(A) - and, as a matter of fair process, neither AT&T nor Staff were apprised of the need to address such an issue[78].

Furthermore, the difference between the rights and duties of parties to subsection 251(a) arbitration, as contrasted with subsection 251(c) arbitration, are hardly trivial. Subsection 251(c) affords a requesting carrier certain rights that are more advantageous than the rights afforded by subsection 251(a). For example, subsection 251(c)(2)(B) of the Federal Act requires an ILEC to allow interconnection "at any feasible point within" the ILEC's network. This enables a competitor to choose the feasible interconnection point most favorable to its interests. Subsection 251(a), by its terms, does not impose the same duty on an ILEC[79]. Thus, certain disputes under 251(a) would be governed by different regulations, precedents and principles than those applicable to 251(c) disputes.

In the instant case, the parties in fact framed and argued their issues entirely under subsection 251(c). This is particularly so with respect to two of the most significant issues in this arbitration (as measured by the attention they have received in the parties' testimonies and briefs) – issues 7 and 10[80]. For Issue 7 (which pertains to selective E911 call routing when multiple PSAPs are served by a single AT&T end office), Intrado specifically relies on principles embedded in 251(c), particularly technical feasibility and the "equal in quality" requirement in subsection 251(c)(2)(C). Intrado IB at 41-49. AT&T's response is similarly grounded in 251(c). AT&T RB at 28-34. Likewise, Intrado's federal law arguments for Issue 10 (which concerns whether AT&T is required to establish points of interconnection on Intrado's network) are completely based on subsection 251(c)[81], as is AT&T's reply[82]. Consequently, these specific issues are neither presented for resolution, nor argued in fact, under subsection 251(a).

Additionally, the Commission observes that Intrado does not acknowledge that its belated attempt to transform this proceeding into a subsection 251(a) arbitration contradicts Intrado's fundamental position in this and other states. Intrado expressly declared that it "cannot provide 911/E911 services in Illinois today…without interconnection to the PSTN *pursuant to 251(c)*." Intrado IB at 23 (footnote omitted)

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that the requesting carrier in that case expressly sought arbitration under 251(a); it was not an eleventh-hour or "fallback" request after recommended denial of 251(c) arbitration.

[78] Like Intrado, AT&T was also aware that subsection 251(a) might have been introduced in this arbitration, and AT&T relied – fairly - on its understanding that disputes under that subsection had not been presented to the Commission ("Neither Intrado nor AT&T has sought interconnection under Section 251(a) or arbitration of any issue related to Section 251 (a)," AT&T RB at 39, fn. 29).

[79] Subsection 251(a) contemplates direct or indirect interconnection. The precise contours of the subsection 251(a) interconnection requirement - as distinct from the subsection 251(c) interconnection requirement - were addressed (among other issues) in Docket 05-0402, cited above, at 23-29.

[80] The resolution of these issues would also affect the outcome of certain other issues (*e.g.*, Issue 8).

[81] *E.g.*, "[Intrado's preferred interconnection configuration] is the standard of interconnection to be applied *pursuant to Section 251(c)(2)(C)* under a request for interconnection to provide competitive 911 services to PSAPS." Intrado IB at 60 (emphasis added); and more generally, Intrado IB at 53-65.

[82] AT&T RB at 38-41.

(emphasis added). It would have been instructive for Intrado to explain why it now believes it can furnish competitive 911 service under the less generous terms and conditions available for subsection 251(a) interconnection. Similarly, Intrado could have constructively discussed why it now believes that subsection 251(a) interconnection is lawful for Intrado's proposed services. Intrado, which describes itself as AT&T's competitor[83], told the Ohio Commission (in *opposition to* that commission's *sua sponte* application of subsection 251(a)) "that Section 251(c), not Section 251(a), governs all ILEC-competitor interconnections."[84] The absence of such explanation hardly compels this Commission to resort to subsection 251(a), particularly when specific disputed issues and Intrado's arbitration request in general are specifically predicated on subsection 251(c).

AT&T presents an additional and significant argument against subsection 251(a) arbitration – that the Federal Act does not authorize the state commissions to arbitrate disputes arising under that subsection. "[I]ssues purportedly arising under Section 251(a), which does not involve ILECs in particular or any of the special obligations imposed on ILECs…are not subject to compulsory arbitration under Section 252(b)." AT&T RBOE at 12. In fact, AT&T contends, the Federal Act (as least in subsection 251(c)(1)) does not even require an ILEC to *negotiate* with respect to the interconnection obligations imposed on carriers by subsection 251(a). *Id*. "[H]ence the only issues that can be subject to compulsory arbitration under Section 252(b), are those involving obligations on an ILEC under Sections 251(b) and (c)." *Id*. (relying in large measure on a U.S. District Court case in Texas)[85].

Despite AT&T's arguments, the Commission will not render an opinion on the nature or scope of subsection 251(a) arbitration here. Doing so would contradict our determination that 251(a) arbitration is not part of this proceeding, having never been requested by either party for any issue in the Petition or Response. The fact that 251(a) arbitration was *first* discussed in briefs on exceptions does not merely support that determination; it also demonstrates that this critical threshold issue has not received the thorough analysis it would have undergone had it been framed as a disputed issue at the outset of the case (as it should have been to qualify for arbitration under the Federal Act).

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[83] "Intrado will be a direct competitor of AT&T in Illinois." Intrado Ex. 4 at 5.

[84] Petition of Intrado Communications, Inc. for Arbitration to Establish an Interconnection Agreement with Cincinnati Bell Telephone Company, P.U.C.O. Case No. 08-537-TP-ARB, Entry on Rehearing (Jan. 14, 2009) at 3 (para. 5). The Commission notes that AT&T's RBOE in this case was accompanied by a document that Intrado filed in the cited Ohio proceeding, along with another document from a similar proceeding. Those documents were not offered as evidence in this proceeding, and administrative notice was not requested. Accordingly, they were not considered by the Commission in this docket. Our discussion of events in the cited Ohio proceeding is based solely on the Ohio Commission's orders.

[85] Sprint Communications Co. v. Public Utility Commission of Texas, 2006 WL 4872346 (W.D. Tex. 2006). AT&T also disagrees with Intrado's view of the meaning of several state commission decisions (cited in Intrado's BOE at 8, fn. 34) relating to arbitration under subsection 251(a). AT&T RBOE at 15, fn. 11. Additionally, AT&T cites two commission decisions rebuffing subsection 251(a) arbitration (Colorado and West Virginia). *Id*. at 17-18.

Thus, nothing in this Arbitration Decision is intended to preclude Intrado from requesting interconnection under subsection 251(a), from requesting negotiation of issues associated with such interconnection (or issues pertaining to any other matters governed by 251(a)), or from requesting arbitration before this Commission. Should Intrado seek such arbitration, the Commission would perform its duty to resolve issues properly framed in accordance with Section 252, including the threshold issue of whether interconnection disputes under subsection 251(a) can or must be arbitrated by a state commission pursuant to the Federal Act. Without intending to prejudge that threshold issue in any respect, the Commission notes (as mentioned above) that we have previously arbitrated interconnection issues under the rubric of subsection 251(a)[86].

Issues 2-5, 7-12, 15, 17-18, 22-29, 33-36

The Commission resolved Issue 1, above, with the finding that AT&T has no duty to interconnect with Intrado pursuant to subsection 251(c)(2) of the Federal Act, because Intrado's proposed 911 service is not "telephone exchange service" within the meaning of the federal definition at 47 USC §153(47). Accordingly, no mandatory ICA will emanate from this arbitration. It necessarily follows that the ICA terms proposed by the parties in connection with the other issues in this proceeding cannot be approved. Therefore, in order to implement subsection 252(c)(1) of the Federal Act, which mandates that our resolution of open issues "meet the requirements of Section 251," the Commission resolves each of the other issues in this arbitration with the finding that no proposed ICA language is consistent with the requirements of Section 251, since no ICA is required under subsection 251(c)(2). All disputes regarding proposed ICA terms have been rendered moot and superfluous by our resolution of Issue 1.

V. STAFF'S REQUEST FOR A GENERIC PROCEEDING

Staff requests a Commission directive to prepare a report and draft order initiating a generic proceeding for issues relating to competitive 911 service. Staff asserts that this arbitration "raises issues that implicate the rights and interests of numerous entities" outside the case. Staff IB at 36. Presumably, Staff is principally referring to the PSAPs/ETSBs that manage and fund the 911 system, and the incumbent 911 telecommunications providers whose systems might require modification as competitive providers emerge. Staff's testimony suggests some of the issues that might be constructively addressed in a generic proceeding (such as modification of existing ETSB system planning), and posits further that 83 Ill. Adm. Code 725 might need to be revised to accommodate competitive entry for 911 service. Staff Ex. 3 (Schroll).

Staff's interest in a comprehensive approach to 911 competitive entry is patently sensible. In view of Intrado's revised contention that interconnection agreements between competitive 911 providers and ILECs can be formed under subsection 251(a),

[86] Sprint Communications LP, Petition for Consolidated Arbitration with Certain Illinois ILECs Pursuant to Section 252 of the Telecommunications Act of 1996, Dckt. 05-0402, Order, Nov. 8, 2005.

and in view of AT&T's asserted willingness to accomplish interconnection through a commercial agreement (which AT&T apparently does not regard as a 251(a) agreement), additional competitive 911 providers might well seek to serve Illinois ETSBs. Given that likelihood, we concur with the Florida Commission that "there may be potential unintended consequences that affect more than just the current parties [to arbitration,"[87] and that "all potentially affected parties should be consulted and afforded an opportunity to weigh in."[88] Furthermore, as Staff correctly notes, we are charged by the terms of the Emergency Telephone Safety Act[89] with establishing technical and operational standards to govern the provision of 911 service, competitive or otherwise, within this state. Accordingly, we will approve Staff's recommendation for an appropriate 911 proceeding[90].

VI. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record and being fully advised in the premises, is of the opinion and finds that:

(1) Intrado has petitioned this Commission for arbitration under subsection 252(b) of the Federal Act, for the purpose of executing an Interconnection Agreement with AT&T;

(2) the Commission has jurisdiction of the parties hereto and the subject matter hereof;

(3) the recitals of fact and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact;

(4) Intrado's proposed 911 service is not telephone exchange service within the meaning of §153(47) of the Federal Act; therefore, AT&T has no duty under subsection 251(c)(2) of the Federal Act to interconnect with Intrado and Issue 1 herein should be resolved accordingly;

(5) based on Finding (4), above, no interconnection agreement should be required under subsection 251(c)(2), and all other issues presented in this proceeding (Issues 2-5, 7-12, 15, 17-18, 22-29, 33-36), which pertain to the terms and conditions to be included in such an agreement, should be resolved by declaring them superfluous and moot.

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[87] Petition by Intrado Communications, Inc., for Arbitration with BellSouth Telecommunications, Inc., d/b/a AT&T Florida, Fla. Pub. Serv. Comm'n. Dckt. 070736-TP, Final Order (Dec. 3, 2008), at 8.
[88] *Id*. at 9.
[89] 50 ILCS 750.
[90] AT&T suggests that industry workshops might constructively *precede* a docketed proceeding. AT&T RBOE at 21. The Commission believes that would needlessly slow the process Staff envisions, particularly when workshops can be conducted *within* a docketed proceeding.

(6) the Commission has authority under the Emergency Telephone Systems Act to determine the technical and operational standards for 911 systems, including interconnection, and should open a generic proceeding with the intent of promulgating regulations regarding the provision of competitive 911 services; Staff should be directed to prepare an appropriate report and draft Order initiating such a proceeding.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that Issue 1 in this arbitration shall be resolved by determining that Intrado's proposed 911 service is not telephone exchange service within the meaning of §153(47) of the Federal Act and that, therefore, AT&T has no duty under subsection 251(c)(2) of the Federal Act to interconnect with Intrado.

IT IS FURTHER ORDERED that Issues 2-5, 7-12, 15, 17-18, 22-29, 33-36 shall be resolved by determining that no interconnection agreement between Intrado and AT&T is required under subsection 251(c)(2), and that, therefore, those issues are superfluous and moot.

IT IS FURTHER ORDERED that the Staff of the Commission shall prepare a report concerning issues pertinent to the provision of competitive 911 service, and shall prepare and present to the Commission a draft order initiating a generic proceeding concerning those issues.

Entered this 17th day of March, 2009.

BY ORDER OF THE COMMISSION