

**Diamond Williams**

110071-TP

**From:** GURDIAN, MANNY (Legal) [mg2708@att.com]  
**Sent:** Monday, April 04, 2011 4:20 PM  
**To:** Filings@psc.state.fl.us  
**Subject:** Docket No.: 110071-TP  
**Attachments:** Untitled.pdf

A. Manuel A. Gurdian

BellSouth Telecommunications, Inc. d/b/a AT&T Florida

150 South Monroe Street

Suite 400

Tallahassee, Florida 32301

(305) 347-5561

[manuel.gurdian@att.com](mailto:manuel.gurdian@att.com)

B. Docket No.: 110071-TP: Emergency Complaint of Express Phone Service, Inc. against  
BellSouth Telecommunications, Inc. d/b/a AT&T Florida Regarding Interpretation of the Parties'  
Interconnection Agreement

C. BellSouth Telecommunications, Inc. d/b/a AT&T Florida  
on behalf of Manuel A. Gurdian

D. 74 pages total (includes letter, certificate of service, pleading and exhibits)

E. BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Response in Opposition to Express  
Phone's Complaint

<<Untitled.pdf>>

4/5/2011

DOCUMENT NUMBER-DATE

02251 APR -4 =

FPSC-COMMISSION CLERK



Manuel A. Gurdian  
General Attorney

AT&T Florida  
150 South Monroe Street  
Suite 400  
Tallahassee, FL 32301

T: (305) 347-5561  
F: (305) 577-4491  
manuel.gurdian@att.com

April 4, 2011

Ann Cole, Commission Clerk  
Office of the Commission Clerk  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

**Re: Docket No.: 110071-TP: Emergency Complaint of Express Phone Service, Inc. against BellSouth Telecommunications, Inc. d/b/a AT&T Florida Regarding Interpretation of the Parties' Interconnection Agreement**

Dear Ms. Cole:

Enclosed is BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Response in Opposition to Express Phone's Emergency Complaint, Request for Emergency Relief, Request to Hold Docket in Abeyance and Request for Mediation, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,



Manuel A. Gurdian

cc: All Parties of Record  
Jerry D. Hendrix  
Gregory R. Follensbee  
E. Earl Edenfield, Jr.

909733

**CERTIFICATE OF SERVICE**  
**Docket No. 110071-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via

Electronic Mail and First Class U.S. Mail this 4<sup>th</sup> day of April, 2011 to the following:

Theresa Tan  
Staff Counsel  
Florida Public Service  
Commission  
Division of Legal Services  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850  
[ltan@psc.state.fl.us](mailto:ltan@psc.state.fl.us)

Express Phone Service  
Mr. Tom Armstrong  
1803 West Fairfield Drive, Unit 1  
Pensacola, FL 32501-1040  
Tel. No.: (850) 291-6415  
Fax No.: (850) 308-1151  
[tom@dei.gccoxmail.com](mailto:tom@dei.gccoxmail.com)

Keefe Law Firm  
Vicki Gordon Kaufman  
118 North Gadsden Street  
Tallahassee, FL 32301  
Tel. No.: 850-681-3828  
Fax No.: 850-681-8788  
[vkaufman@kagmlaw.com](mailto:vkaufman@kagmlaw.com)

Mark Foster  
707 West Tenth Street  
Austin, Texas 78701  
Tel. No. (512) 708-8700  
Fax No. (512) 697-0058  
[mark@mfosterlaw.com](mailto:mark@mfosterlaw.com)

  
Manuel A. Gurdian

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Emergency Complaint of ) Docket No. 110071-TP  
Express Phone Service, Inc. )  
against BellSouth Telecommunications, )  
Inc. d/b/a AT&T Florida regarding )  
Interpretation of the Parties' )  
Interconnection Agreement ) Filed: April 4, 2011

**AT&T FLORIDA'S RESPONSE IN OPPOSITION TO EXPRESS PHONE'S  
EMERGENCY COMPLAINT, REQUEST FOR EMERGENCY RELIEF, REQUEST TO  
HOLD DOCKET IN ABEYANCE AND REQUEST FOR MEDIATION**

BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T Florida") respectfully submits its Response to the Emergency<sup>1</sup> Complaint, Request for Emergency Relief to Avoid Customer Disconnection, Request to Hold Docket in Abeyance and Request for Mediation ("Complaint")<sup>2</sup> filed by Express Phone Service, Inc. ("Express Phone"). As will be explained herein, Express Phone is not entitled to any relief whatsoever and its Complaint should be dismissed. Accordingly, the Florida Public Service Commission ("Commission") should issue an Order that: (i) dismisses Express Phone's Complaint; (ii) requires Express Phone to make immediate payment of all past due amounts on its Florida accounts; and (iii) does not prohibit AT&T Florida from exercising its contractual rights to discontinue providing service to Express Phone in Florida if Express Phone fails to timely pay such past due amounts.<sup>3</sup>

**I. INTRODUCTION**

<sup>1</sup> To the extent this arguably constitutes an "emergency," it is one of Express Phone's own making, as it is Express Phone that has violated the express provisions of its Resale Agreement ("Agreement") with AT&T Florida by its failure to fully and timely pay amounts due.

<sup>2</sup> On or about March 15, 2011, Express Phone filed similar requests in Alabama and Mississippi. See *In re: Emergency Complaint of Express Phone Service, Inc. against BellSouth Telecommunications, Inc. d/b/a AT&T Mississippi regarding interpretation of the Parties' Interconnection Agreement*, Docket No. 11-AD-097 and *In re: Complaint of Express Phone Service, Inc. against BellSouth Telecommunications, Inc. d/b/a AT&T Alabama regarding interpretation of the Parties' Interconnection Agreement*, Docket No. 31590. Express Phone owes AT&T more than \$2 million in past due charges for services provided in Alabama, Mississippi and Florida. See Complaint at ¶ 9.

<sup>3</sup> Express Phone was disconnected on March 30, 2011.

On November 2, 2006, AT&T Florida filed a request for approval of the Agreement with Express Phone.<sup>4</sup> By operation of law, on January 31, 2007, the Commission approved the Agreement between Express Phone and AT&T Florida.<sup>5</sup> In that Commission-approved and binding Agreement, Express Phone expressly agreed to “make payment to [AT&T Florida] for all services billed *including disputed amounts*,” and it agreed to make those payments “on or before the next bill date.”<sup>6</sup>

Express Phone has not honored its commitments under the Agreement. Instead, under the guise of various credit requests and billing “disputes,” Express Phone has substantially stopped paying its bills. On February 23, 2011, AT&T Florida sent Express Phone a letter<sup>7</sup> and attachments that, among other things: sets forth Express Phone’s substantial past due balance; quotes the operative language of the parties’ Agreement; notes that from May 2008 to December 2010, Express Phone paid AT&T Florida less than twenty-eight percent of the net amount owed (the billed amounts less credits AT&T Florida applied for promotions and other adjustments) for that same time period; and demands payment of all past due charges on or before March 14, 2011, or suffer suspension of order processing<sup>8</sup>, and payment on or before March 29, 2011 or Express Phone’s service will be disconnected.

In its Complaint, Express Phone acknowledges that the parties’ Agreement does “not allow for disputed amounts to be withheld from its monthly payments to AT&T...”<sup>9</sup>

---

<sup>4</sup> See Docket No. 060714-TP, *In re: Request for approval of resale agreement, between BellSouth Telecommunications, Inc. and Express Phone Service, Inc.*

<sup>5</sup> See Commission Staff Memorandum dated February 2, 2007 filed in Docket No. 060714-TP.

<sup>6</sup> See Agreement, Attachment 3, Billing, at §§1.4 and 1.4.1 (emphasis added). Exhibit “A” to this Response is a copy of Attachment 3 to the parties’ Agreement.

<sup>7</sup> Exhibit A to Express Phone’s Complaint is a copy of that letter and its attachments.

<sup>8</sup> On March 4, 2011, AT&T Florida extended the suspension of order processing deadline to March 18, 2011.

<sup>9</sup> Complaint at p. 6, ¶15

Consequently, Express Phone is admittedly in breach of the Agreement by having a past-due balance due to AT&T Florida in excess of \$1.2 million.<sup>10</sup>

Express Phone alleges that “is currently involved in numerous open billing disputes with AT&T” and that “AT&T actually *owes* Express Phone a total of \$2,516,260 for services provided in three states (Alabama, Florida and Mississippi)” (presumably in promotional credits that Express Phone has requested and AT&T Florida has denied). AT&T Florida denies this allegation, which is, in effect, an argument that AT&T Florida must pay Express Phone for having ordered services from AT&T Florida and resold those services to its end users. More importantly, Express Phone’s allegations do nothing to alter the fact that the plain language of the Agreement requires it to pay all amounts it is billed, *even if it disputes those amounts*.<sup>11</sup> Moreover, AT&T Florida questions whether Express Phone can pay its bills on a going-forward basis, much less its substantial past-due balance, and AT&T Florida is increasingly concerned that its stockholders will have to bear the burden of the substantial Express Phone uncollectibles. AT&T Florida, therefore, respectfully asks that the Commission deny the relief requested in Express Phone’s Complaint.

## II. ARGUMENT

### A. **The unambiguous language of the Agreement requires Express Phone to pay all amounts billed, including disputed charges.**

As Express Phone has correctly observed at paragraph 14 of the Complaint, the parties’ Commission-approved Agreement requires Express Phone to pay all amounts it is billed, even if it disputes those amounts:

---

<sup>10</sup> Complaint at p. 4, ¶9. In total, Express Phone owes AT&T more than \$2 million in Alabama, Mississippi and Florida. *Id.*

<sup>11</sup> In its Complaint, Express Phone makes no offer to pay any portion of the balance now. Instead, it asks the Commission to allow it to continue ordering services from AT&T Florida and continue violating its agreement by paying AT&T Florida nothing for those services indefinitely. To require AT&T Florida to wait indefinitely for Express Phone to pay its bills would require AT&T Florida’s stockholders, in essence, to continue subsidizing non-paying wholesale customers like Express Phone. In these trying economic times, that is simply too much to ask.

Payment of *all* charges will be the responsibility of Express Phone.<sup>12</sup>

Express Phone shall make payment to [AT&T Florida] for all services billed *including disputed amounts*.<sup>13</sup>

Payment for services provided by [AT&T Florida], *including disputed charges*, is due on or before the next bill date.<sup>14</sup>

The language quoted above is unambiguous, and the Commission-approved Agreement is a valid contract. The Commission, therefore, is required by law to enforce the Agreement as written because Florida law is clear that "an **unambiguous** agreement must be enforced in accordance with its terms." *Paddock v. Bay Concrete Indus., Inc.*, 154 So.2d 313 (Fla. 2d DCA 1963). *See also, Brooks v. Green*, 993 So. 2d 58 (Fla. 1<sup>st</sup> DCA 2008)("It is established law in this state that a contract must be applied as written, absent an ambiguity or some illegality."); *Medical Center Health Plan v. Brick*, 572 So. 2d 548, 551 (Fla. 1<sup>st</sup> DCA 1990)("A party is bound by, and a court is powerless to rewrite, the clear and unambiguous terms of a voluntary contract. *Nat'l Health Laboratories, Inc. v. Bailmar, Inc.*, 444 So.2d 1078, 1080 (Fla. 3d DCA 1984)."). Moreover, "[i]t is a fundamental rule of contract interpretation that a contract which is clear, complete, and unambiguous does not require judicial construction," *Jenkins v. Eckerd Corp.*, 913 So.2d 43 (Fla. 1<sup>st</sup> DCA 2005), and "[i]t is not the role of the courts to make an otherwise valid contract more reasonable from the standpoint of one contracting party." *Stack v. State Farm Mut. Auto Ins. Co.*, 507 So.2d 617, 619 (Fla. 3d DCA 1987).<sup>15</sup>

---

<sup>12</sup> Agreement, Attachment 3, p. 6, § 1.4.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at § 1.4.1.

<sup>15</sup> These principles apply even when contractual terms bind a party to a seemingly harsh or out of the ordinary bargain. *See Barakat v. Broward County Hous. Auth.*, 771 So.2d 1193, 1195 (Fla. 4<sup>th</sup> DCA 2000)("Contracts are to be construed in accordance with the plain meaning of the words contained therein....It is never the role of the trial court to rewrite a contract to make it more reasonable for one of the parties or to relieve a party from what turns out to be bad bargain....A fundamental tenet of contract law is that parties are free to contract, even when one side negotiates a harsh bargain."). *See also, Applica Inc. v. Newtech Electronics Indus., Inc.*, 980 So.2d 1194 (Fla. 3d DCA 2008)("where an agreement is unambiguous...we enforce the contract as written, no matter how disadvantageous the language might later prove to be.").

The parties' Agreement is not only a binding contract but also "the Congressionally prescribed vehicle for implementing the substantive rights and obligations set forth in the Act," *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 582 (6<sup>th</sup> Cir. 2003), and once a carrier enters "into an interconnection agreement in accordance with section 252, ... it is then regulated directly by the interconnection agreement." *Law Offices of Curtis V. Trinko LLP v. Bell Atl. Corp.*, 305 F.3d 89, 104 (2d Cir. 2002), *rev'd in part on other grounds sub nom; Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). *See also, Mich. Bell Tel. Co. v. MCImetro Access Trans. Servs., Inc.*, 323 F.3d 348, 359 (6<sup>th</sup> Cir. 2003) ("[O]nce an agreement is approved, these general duties [under the 1996 Act] do not control" and parties are "governed by the interconnection agreement" instead, and "the general duties of [the 1996 Act] no longer apply"). Moreover, "[t]he Act does not authorize a state commission to alter terms within an approved negotiated agreement or to nullify an approved negotiated agreement." *In re: Petition of Supra Telecommunications & Information Systems for generic proceeding to arbitrate rates, terms, and conditions of interconnection with BellSouth Telecommunications, Inc., or, in the alternative, petition for arbitration of interconnection agreement*, Docket No. 980155-TP; Order No. PSC-98-0466-FOF-TP (March 31, 1998).

Additionally, in a docket involving agreement language that is identical to what is quoted above, the Commission found "that AT&T is entitled under the plain terms of the ICA to prompt payment of all sums billed; and in the absence of such payment, is entitled to proceed with the actions outlined in the Notice of Commencement of Treatment" and "the plain language of these provisions is clear that while [the CLEC] can dispute amounts billed by AT&T, it must pay those amounts as billed within the time specified by the ICA". *In re: Complaint and petition for relief against LifeConnex Telecom, LLC f/k/a Swiftel, LLC by BellSouth Telecommunications, Inc.*



*d/b/a AT&T Florida*, Docket No. 100021-TP, Order No. PSC-10-0457-PCO-TP, p.6 (Issued July 16, 2010).<sup>16</sup>

The language quoted above from Sections 1.4 and 1.4.1 of the parties' Agreement is unambiguous, and the Commission-approved Agreement is a "valid contract." The Commission, therefore, should enforce the terms of the Agreement as written, as it already enforced an agreement with identical language in the LifeConnex matter, Docket No. 100021-TP. Express Phone has admitted that it breached the Agreement by its failure to pay all amounts due, including disputed amounts; thus, the Commission should deny Express Phone's Complaint in which Express Phone does nothing more than ask to be relieved of its contractual obligations.

**B. Express Phone's Alleged (and Improper) Request to Opt-In to a Different Interconnection Agreement Five Months Ago has no Bearing on the Outcome of Express Phone's Complaint.**

Express Phone alleges that in October 2010, AT&T Florida "refused" Express Phone's request to opt into the Image Access interconnection agreement<sup>17</sup> (which Express Phone asserts would allow Express Phone to withhold payment for disputed amounts until those disputes were ultimately resolved). Assuming (without admitting) these allegations are true, they are of no benefit to Express Phone because it clearly had no right to switch from one Agreement to another in mid-stream. The Parties' Agreement became effective in November 2006,<sup>18</sup> and it clearly states that "[t]he initial term of this Agreement shall be five (5) years, beginning on the Effective

---

<sup>16</sup> Commissions in Kentucky, North Carolina and Alabama have all reached similar conclusions regarding agreements with language that is identical to the above quoted Agreement provisions. See *In the Matter of BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Kentucky v. LifeConnex Telecom, LLC f/k/a Swiftel, LLC*, Case No. 2010-00026; *In the Matter of Disconnection of LifeConnex Telecom, Inc. f/k/a Swiftel, LLC by BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T North Carolina*, Docket No. P-55, Sub 1817; and *Petition of LifeConnex Telecom, LLC, f/k/a Swiftel, LLC Concerning Implementation of its Interconnection Agreement with BellSouth Telecommunications, Inc. d/b/a AT&T Alabama or AT&T Southeast and Motion for Temporary Emergency Relief to Prevent Suspension of Service*, Docket No. 31450.

<sup>17</sup> Complaint at ¶15.

<sup>18</sup> See Agreement, General Terms and Conditions ("GTC"), at p. 1 ("Effective Date" is thirty days after last signature executing the Agreement); at GTC, "Signature Page" (last signature is October 4, 2006). Exhibit "B" to this Response is a copy of the GTC of the Agreement.

Date . . . .”<sup>19</sup> During that five-year initial term, “Express Phone may request termination of this Agreement *only if it is no longer purchasing services pursuant to this Agreement,*”<sup>20</sup> which obviously is not the case. Additionally, “[n]o modification [or] amendment . . . shall be effective and binding upon the Parties unless it is made in writing and duly signed by the Parties,”<sup>21</sup> and Express Phone does not allege any such modification or amendment in its Complaint. Finally, the Agreement plainly states that negotiations for a new agreement shall commence “*no earlier than* two hundred seventy (270) days . . . prior to the expiration of the initial term of this Agreement . . . .”<sup>22</sup> Both AT&T Florida and Express Phone clearly are obligated to comply with the Agreement they negotiated and signed, and this Commission approved, until at least late 2011, and Express Phone has no right to unilaterally back out of those obligations by “opting into” a different agreement in the interim.<sup>23</sup>

In erroneously suggesting otherwise, Express Phone relies on Section 252(i) of the Telecommunications Act of 1996 (“the Act”).<sup>24</sup> It is well-settled that §252(i) does not allow Express Phone to opt into another Agreement any time it pleases. In *Global Naps, Inc. v. Verizon*, 396 F.3d 16 (1st Cir. 2005), for instance, a CLEC filed a petition for arbitration

---

<sup>19</sup> *Id.*, p. 3, §2.1.

<sup>20</sup> *Id.*, §2.3.1.

<sup>21</sup> *Id.*, p. 13, §12.2.

<sup>22</sup> *Id.*, p. 3, §2.2.

<sup>23</sup> There is no authority under the Act for Express Phone to adopt a new agreement or seek arbitration from this Commission when it has an approved Agreement, as an interconnection agreement, as indicated above, is “the Congressionally prescribed vehicle for implementing the substantive rights and obligations set forth in the Act,” (*Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 582 (6<sup>th</sup> Cir. 2003)), and once a carrier enters “into an interconnection agreement in accordance with section 252, . . . it is then regulated directly by the interconnection agreement.” *Law Offices of Curtis V. Trinko LLP v. Bell Atl. Corp.*, 305 F.3d 89, 104 (2d Cir. 2002), *rev’d in part on other grounds sub nom; Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). *See also, Mich. Bell Tel. Co. v. MCImetro Access Trans. Servs., Inc.*, 323 F.3d 348, 359 (6<sup>th</sup> Cir. 2003) (“[O]nce an agreement is approved, these general duties [under the 1996 Act] do not control” and parties are “governed by the interconnection agreement” instead, and “the general duties of [the 1996 Act] no longer apply”).

<sup>24</sup> While not mentioned in its Complaint, in a telephone conference with Staff held on March 17, 2011, Express Phone also relied on a provision in the Agreement for additional support of its position. However, this section merely incorporates the “adoption” provisions of 47 U.S.C. §252(i) of the federal Act, and does not expand the provisions of §252(i) in anyway. *See Agreement, GTC §11, p.13.*

pursuant to §252 and the state commission entered its order in that arbitration proceeding. Displeased with that order, the CLEC purported to opt into a preexisting interconnection agreement (with terms more to its liking) pursuant to §252(i). The state commission, however, ruled that once it had concluded the arbitration and issued its order, the CLEC was not free to “opt into” another agreement pursuant to §252(i) in lieu of accepting the arbitrated terms and incorporating them into its agreement. The First Circuit Court of Appeals affirmed that ruling, concluding that section 252(i) does not grant a CLEC like Express Phone an unconditional right to opt out of one agreement and into another.

Moreover, in *In re: Petition of Supra Telecommunications & Information Systems for generic proceeding to arbitrate rates, terms, and conditions of interconnection with BellSouth Telecommunications, Inc., or, in the alternative, petition for arbitration of interconnection agreement*, Docket No. 980155-TP; Order No. PSC-98-0466-FOF-TP (March 31, 1998), the Commission addressed a CLEC’s improper request for arbitration of a new interconnection agreement while the parties were operating under an existing agreement. The Commission stated that the Act does not authorize the Commission to conduct an arbitration on matters covered by an agreement and to alter terms within an approved negotiated agreement. Specifically, the Commission found “nothing in the Act authorizing a state commission to conduct an arbitration on matters covered by an agreement that has been approved pursuant to Section 252(e). The Act does not authorize a state commission to alter terms within an approved negotiated agreement or to nullify an approved negotiated agreement.” The Commission in granting the ILEC’s motion to dismiss the CLECs’ petition for arbitration held that the CLEC was “currently bound by a Commission-approved agreement addressing resale, unbundling, and interconnection. Nothing in the Act provides for a request for arbitration while the matters at issue are governed by an

approved agreement.”

More recently, the New York Commission logically extended the First Circuit’s ruling explained above to interconnection agreements that are negotiated instead of arbitrated.<sup>25</sup> Specifically, a CLEC executed an interconnection agreement with Verizon that did not expire until November 2007. Twenty months before that expiration date, the CLEC attempted to opt into a different interconnection agreement, claiming that “unilateral termination is authorized whenever a §252(i) option is exercised.”<sup>26</sup> The New York Commission disagreed, explaining that the First Circuit’s decision “not only refutes [the CLEC’s] contention that it has an unconditional right to opt-in to another agreement but also that §252(i) authorizes voiding a contract.”<sup>27</sup> It further held that “§252(i) does not confer an unconditional right to opt-in to an existing agreement or authorize unilateral termination of an existing interconnection agreement,” and it ruled that the CLEC “is not authorized to terminate its current . . . interconnection agreement with Verizon.”<sup>28</sup> Similarly, Express Phone was not (and is not) authorized to evade its contractual obligations by terminating its Commission-approved Agreement and opting into another one.

**C. AT&T Florida has not waived its right to demand payment of all amounts, including amounts Express Phone disputes.**

Express Phone alleges that “the dispute over the application of the promotional discounts has been going on between Express Phone and AT&T for several years.”<sup>29</sup> It then alleges that “the parties have engaged in a course of conduct in which Express Phone has disputed inappropriate charges and AT&T has done nothing to collect them” and by AT&T Florida now

---

<sup>25</sup> See Declaratory Ruling, *Petition of Pac-West Telecomm, Inc. for a Declaratory Ruling Respecting Its Rights to Interconnection with Verizon New York, Inc.*, Case No. 06-C-1042 (February 27, 2007). Exhibit “C” to this Response is a copy of this Ruling.

<sup>26</sup> *Id.* at p. 8.

<sup>27</sup> *Id.* at p. 10.

<sup>28</sup> *Id.* at p. 11-12.

<sup>29</sup> See Complaint at ¶ 20.

calling for payment it is thus acting “unfair and unreasonable”.<sup>30</sup> In essence, Express Phone argues that by not having demanded payment of all charges due in the past, AT&T Florida has waived its right to do so now.

Once again, Express Phone’s argument is refuted by the unambiguous language of the parties’ Commission-approved Agreement:

A failure or delay of either party to enforce any of the provisions hereof, to exercise any option which is herein provided, or to require performance of any of the provisions hereof shall in no way be construed to be a waiver of such provisions or options, and each Party, notwithstanding such failure, shall have the right thereafter to insist upon the performance of any and all of the provisions of this Agreement.<sup>31</sup>

Thus, even if AT&T Florida had not insisted that Express Phone pay all amounts (including disputed amounts) in the past, it clearly has the right “thereafter (i.e. now) to insist upon the performance of any and all provisions” of the Agreement. In *In re: Complaint and petition for relief against LifeConnex Telecom, LLC f/k/a Swiftel, LLC by BellSouth Telecommunications, Inc. d/b/a AT&T Florida*, Docket No. 100021-TP, Order No. PSC-10-0457-PCO-TP at p.7 (Issued July 16, 2010), the Commission agreed with AT&T Florida’s position in finding that the language in an identical provision from another agreement was “unambiguous, and clearly allows AT&T the right to fail to enforce provisions in the ICA on a flexible basis, without then being required to waive enforcement of those provisions in the future.”

AT&T Florida has exercised its lawful right to insist that Express Phone pay all amounts it has been billed, and if it does not do so, AT&T Florida has the right to suspend, disconnect, and terminate Express Phone’s service as allowed by the Agreement.<sup>32</sup>

---

<sup>30</sup> *Id.* (emphasis in original).

<sup>31</sup> Agreement, GTC, p, 15, §16.

<sup>32</sup> See Agreement, Attachment 3, pp. 7-9, §§1.5 to 1.5.5.

**D. Express Phone's security deposit does not in anyway release Express Phone from its obligation to make complete and timely payments of its bills**

Express Phone alleges in its Complaint that, in the event that its disputes are not ultimately found in Express Phone's favor, AT&T Florida has "a substantial security deposit of \$120,000 to protect its interests in Florida."<sup>33</sup> Once again, Express Phone's argument is refuted by clear and unambiguous language of the Agreement which provides that the deposit that Express Phone has with AT&T Florida "shall in *no way* release Express Phone from its obligation to make complete and timely payments of its bills."<sup>34</sup> Moreover, a deposit provides AT&T Florida some level of protection against Express Phone's inability to pay its bills for services it purchases from AT&T Florida *in the future*. A deposit is not intended to – and does not – provide AT&T Florida any protection against Express Phone's inability to pay more than \$1.2 million for services it has purchased in the past and for which it refused to pay in Florida.<sup>35</sup>

**E. Commission does not have the authority to issue an Injunction**

In order to hear and determine a complaint or petition, a court or agency must be vested not only with jurisdiction over the parties, but also with subject matter jurisdiction to grant the relief requested by the parties. *See Keena v. Keena*, 245 So. 2d 665, 666 (Fla. 1<sup>st</sup> DCA 1971). Subject matter jurisdiction arises only by virtue of law – it must be conferred by constitution or statute and cannot be created by waiver or acquiescence. *Jesse v. State*, 711 So. 2d 1179, 1180 (Fla. 2d DCA 1998). This Commission, therefore, must dismiss a complaint or deny a request for relief to the extent that it asks the Commission to address matters over which it has no jurisdiction or to the extent that it seeks relief that the Commission is not authorized to grant.

---

<sup>33</sup> See Complaint at ¶ 19.

<sup>34</sup> See Agreement, Attachment 3, p. 4, § 1.3.1 (emphasis supplied).

<sup>35</sup> Due to its recent experience with other reseller CLECs such as Express Phone, AT&T Florida has serious doubts that Express Phone will ever pay the amounts due AT&T Florida. *See Tennessee Telephone Service, LLC's Bankruptcy filing in the United States Bankruptcy Court for the Middle District of Tennessee, Case No. 10-08252 and EveryCall Communications, Inc.'s Bankruptcy filing in the United States Bankruptcy Court for the Middle District of Louisiana, Case No. 10-11504.*

*See, e.g., In re: Petition by AT&T Communications of the Southern States, Inc. TCG South Florida, and MediaOne Florida Telecommunications, Inc. for structural separation of BellSouth Telecommunications, Inc. into two distinct wholesale and retail corporate subsidiaries.* Docket No. 010345-TP, PSC-01-2178-FOF-TP (Nov. 6, 2001) (granting BellSouth's Motion to Dismiss AT&T's and FCCA's Petition for Structural Separation because "the Petitions fail to state a cause of action upon which relief can be granted. Namely, we have neither Federal nor State authority to grant the relief requested"); *In re: Complaint and petition of John Charles Heekin against Florida Power & Light Company*, Docket No. 981923-EI, Order No. PSC-99-1054-FOF-EI (May 24, 1999) (Commission dismissed a complaint because the complaint involved "a claim...outside this Commission's jurisdiction.").

The Commission, therefore, must determine whether the Legislature has granted it any authority to force AT&T Florida to continue to provide service to Express Phone for which AT&T Florida is not being paid. In making this determination, the Commission must keep in mind that the Legislature has never conferred upon the Commission any general authority to regulate public utilities, including telephone companies. *See City of Cape Coral v. GAC Util., Inc.*, 281 So. 2d 493, 496 (Fla. 1973). Instead, "[t]he Commission has only those powers granted by statute expressly or by necessary implication." *See Deltona Corp. v. Mayo*, 342 So. 2d 510, 512 n.4 (Fla. 1977); *accord East Central Regional Wastewater Facilities Oper. Bd. v. City of West Palm Beach*, 659 So.2d 402, 404 (Fla. 4th DCA 1995) (noting that an agency has "only such power as expressly or by necessary implication is granted by legislative enactment" and that "as a creature of statute," an agency "has no common law jurisdiction or inherent power . . .").

Moreover, any authority granted by necessary implication must be derived from fair implication and intendment incident to any express authority. *See Atlantic Coast Line R.R. Co.*

v. *State*, 74 So. 595, 601 (Fla. 1917); *State v. Louisville & N. R. Co.*, 49 So. 39 (Fla. 1909). Finally, “any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it.” *State v. Mayo*, 354 So. 2d 359, 361 (Fla. 1977).

The “emergency relief” Express Phone seeks is for the Commission to order AT&T Florida “to take no action to suspend or otherwise interfere with Express Phone’s services to its customers....”<sup>36</sup> That relief is an injunction, notwithstanding Express Phone’s obvious care in avoiding the term. *See First Nat’l Bank in St. Petersburg v. Ferris*, 156 So.2d 421 (Fla. 2d DCA 1963)(An injunction “commands that acts be done or undone.”). However, the Commission cannot grant the relief requested because it lacks the authority to issue injunctions.<sup>37</sup> *See In re: Complaint and Petition of Cynwyd Investments Against Tamiami Village Utility, Inc.*, Docket Nos. 920649-WS and 930642-WS, Order No. PSC-94-0210 at p. 9 (February 21, 1994) (“We agree that this Commission does not have subject matter jurisdiction to issue injunctions . . . .”); *see also Florida Power & Light Company v. Albert Litter Studios, Inc.*, 896 So.2d 891, 892 n.3 (Fla. 3d DCA 2005) (The Commission “concedes that it lacks the authority to issue injunctive relief.”); *In re: Petition to investigate, claim for damages, complaint and other statements against respondents Evercom Systems, Inc. d/b/a Correctional Billing Services and BellSouth Corporation by Bessie Russ*, Docket No. 060640-TP, Order No. PSC-07-0332-PAA-TP (Issued April 16, 2007) (“We find it appropriate to grant BellSouth’s Partial Motion to Dismiss. The Petition/Complaint shall be dismissed in part because we do not have judicial power required to... (b) issue injunctions”) and *In re: Petition for Commission to intervene, investigate and mediate dispute between DSL Internet Corporation d/b/a DSLi and BellSouth Telecommunications, Inc.*, Docket No. 080631-TP, Order No. PSC- 09-0515-PCO-TP (Issued

<sup>36</sup> See Complaint at p. 8, ¶22 and p.11.

<sup>37</sup> Pursuant to Section 364.015, Florida Statutes, the Commission may seek to enforce its orders in circuit court via a request for an injunction.



July 21, 2009) (“we find that this Commission does not have the authority to provide injunctive relief to [Petitioner]. Thus, assuming all of [Petitioner]’s allegations as true, we find that [Petitioner] has failed to state a cause of action for which injunctive relief can be granted. As such, we shall grant the AT&T Partial Motion to Dismiss and thereby dismiss the portion of the Petition in which [Petitioner] requests injunctive relief.”).

Because Express Phone seeks a remedy (an injunction) that the Commission has no authority to provide, Express Phone’s requested relief should be denied.<sup>38</sup>

**F. Even if the Commission had authority to issue injunctions (which it does not) Express Phone has not demonstrated, and cannot demonstrate, that it is entitled to the extraordinary injunctive relief it seeks.**

Even if the Commission had authority to issue injunctions (which it does not), Express Phone has not demonstrated, and cannot demonstrate, that it is entitled to the extraordinary injunctive relief it seeks. The test, which Express Phone cannot meet, consists of a showing of satisfaction of the following criteria: (1) the likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) substantial likelihood of success on the merits; and (4) considerations of public interest. *See Tom v. Russ*, 752 So.2d 1250 (Fla. 1<sup>st</sup> DCA 2000) citing *Spradley v. Old Harmony Baptist Church*, 721 So.2d 735, 737 (Fla. 1<sup>st</sup> DCA 1998). In order for an injunction to be entered a court must specify the reasons for entry and “clear, definite, and unequivocally sufficient factual findings must support each of the four conclusions necessary to justify entry of a preliminary injunction.” *Id.*

---

<sup>38</sup> At paragraph 6 of its Complaint, Express Phone also cites to Section 364.01, Florida Statutes to support its argument that the Commission is empowered to provide the relief requested. Section 364.01 is an expression of legislative intent and provides guidance to the Commission on how to view and interpret the exercise of substantive jurisdiction. This section is not a legislative grant of authority and does not convey to the Commission any independent authority to act. In particular, it provides no authority to act in this instance. *See Order No. PSC-10-0457-PCO-TP at 4-5* (“We do not find our authority under Section 364.01, F.S., is intended to provide emergency relief when one party seeks to be relieved of its obligations under a negotiated contract in the absence of extraordinary and compelling circumstances” and “we do not find that allowing AT&T to take action clearly contemplated by the ICA rises to the level of ‘anti-competitive’ activity or denies ‘fair competition’ sufficient to invoke our general authority under section 364.01, F.S.”)

In light of the plain language of the Agreement discussed above, Express Phone cannot prove that it has a right to refuse to pay its bills or that it has a substantial likelihood of success on the merits of that position – to the contrary, it admits that the Agreement does “not allow for disputed amounts to be withheld from its monthly payments to AT&T”.<sup>39</sup> Further, if Express Phone has the money to pay its bills as it committed to do in the Agreement, it will suffer no harm whatsoever – if its disputes are invalid, it merely will have paid amounts it was obligated to pay anyway (and there is no “harm” in that), and if its disputes are valid, there is nothing to suggest that AT&T Florida cannot provide it bill credits or payments in accordance with the Commission’s rulings in this Docket. In contrast, if Express Phone does not have the money to pay its bills (which apparently is the case), then the harm of requiring AT&T Florida to provide even more service for which it will not be paid clearly outweighs any purported “harm” to Express Phone. And while Express Phone claims that “irreparable harm” will result if its end users are disconnected<sup>40</sup>, that claim goes too far. While they may no longer receive service from Express Phone, there are a number of other carriers in Florida, including other prepay resellers, from whom Express Phone’s current end users can receive service.

**G. Even if Express Phone was a party to the Consolidated Dockets (and it is not), nothing in those dockets would relieve Express Phone of its contractual obligation to pay all amounts, including disputed charges.**

Express Phone’s Complaint includes a request that this docket be held in abeyance to await the outcome of proceedings in other states regarding the “appropriate application of promotional discounts in the wholesale market.”<sup>41</sup> Express Phone is not a participant in the

---

<sup>39</sup> See Complaint, p. 6, ¶ 15. Moreover, Express Phone acknowledges that the Agreement provides that “Express Phone shall make payment to BellSouth for all services billed including disputed amounts” and “Payment for services provided by BellSouth, including disputed charges, is due on or before the next bill date.” Complaint, p. 6, footnote 2.

<sup>40</sup> See Complaint, p. 9, ¶25.

<sup>41</sup> See Complaint at ¶¶ 27, 28.

Consolidated Dockets, has no rights under those proceedings, and these proceedings do not, in anyway, excuse Express Phone from compliance with the plain and unambiguous language of the Agreement.<sup>42</sup> The Joint Motion on Procedural Issues<sup>43</sup> filed by the parties to Docket Nos. 100021-TP and 100022-TP does not support any relief requested by Express Phone. In plain language that Express Phone does not address in its Complaint, the Joint Motion provides:

As stated below, any individual Party may also seek to pursue in its respective docket, either concurrent with or following the Consolidated Phase, any issue, claim, or counterclaim, including related discovery, that is not addressed in the Consolidated Phase.

Nothing in this Joint Motion is intended, or shall be construed, as a waiver of any Party's pending motions, claims, counterclaims or defenses or a Party's right to amend and supplement its claims, counterclaims, or other pleadings, or to pursue any issue, claim, or counterclaim that is not addressed in the Consolidated Phase in each Party's respective docket, either concurrent with our following the Consolidated Phase, or to seek such other relief as a change in circumstances may warrant.

Clearly, the Joint Motion does not prevent AT&T Florida from pursuing "any issue" or "claim" that is not addressed in the Consolidated Phase of Docket Nos. 100021-TP and 100022-TP. In addition, based upon the allegations contained in the Complaint, AT&T Florida is unable to determine whether Express Phone's promotional disputes are the same or different to the issues raised in Docket Nos. 100021-TP and 100022-TP as Express Phone's Complaint lacks specificity regarding the disputes at issue.<sup>44</sup>

---

<sup>42</sup> See LifeConnex Order in Docket No. 100021-TP at p. 5 ("We do not find the Order Holding Dockets In Abeyance bars this action, and language contained in the Joint Motions themselves supports AT&T's position that the Notice of Commencement of Treatment may proceed independently of the underlying dispute.").

<sup>43</sup> See LifeConnex Telecom, LLC, Image Access, Inc. and AT&T Florida's May 13, 2010 Joint Motion on Procedural Issues filed on May 13, 2010 in Docket Nos. 100021-TP and 100022-TP.

<sup>44</sup> Express Phone has raised one promotion which is not at issue in the other dockets. See Thomas Armstrong Affidavit attached to the Complaint as Exhibit "B" at footnote 2. Upon information and belief, AT&T Florida believes that Mr. Armstrong, when referring to a "long distance" promotion is referring to a promotion not offered by AT&T Florida but is a promotion offered by SBC Long Distance, LLC, BellSouth Long Distance, Inc. or SNET America, Inc., depending on the region.

The issues raised in Docket Nos. 1000021-TP and 100022-TP are how much, if any, credit the resellers who are parties to those proceedings are entitled to receive when they resell services that are the subject of certain promotional offers. Express Phone's Complaint in this Docket has nothing to do with the merits of those issues. Instead, the separate and distinct questions raised by Express Phone's Complaint are: who bears the risk of non-payment while billing disputes are being resolved and may Express Phone unilaterally cancel a contract it voluntarily entered before the term expires? Those questions clearly are not addressed in the Consolidated Phase of Docket Nos. 1000021-TP and 100022-TP. As explained above, however, Express Phone has no right to get out of its Commission-approved Agreement and that Agreement definitely addresses (and answers) the first question by requiring Express Phone to pay all amounts AT&T Florida bills, even if it disputes those amounts.

**H. The Commission cannot require Mediation between the parties in these circumstances**

Express Phone's Complaint includes a request that the parties mediate the issues raised in the Complaint. While the Commission has previously encouraged parties to "settle contested proceedings" it also has explicitly recognized that "mediation . . . is available on a strictly voluntary basis." Order No. PSC-03-0773-PCO-EQ, p. 5; *see also* Section 120.573, Florida Statutes and Rule 28-106.111. Because mediation can occur only when both parties consent, this Commission cannot enter an order at Express Phone's sole request that requires AT&T Florida to submit to such a process.

**III. CONCLUSION**

In conclusion, Express Phone has an existing Agreement with AT&T Florida which unambiguously requires Express Phone to pay all amounts in full, including disputed amounts.

Moreover, it cannot seek to adopt a different agreement for the reasons discussed herein.

Accordingly, Express Phone's Complaint should be dismissed.

#### **IV. RESPONSE TO SPECIFIC ALLEGATIONS**

1. Upon information and belief, AT&T Florida admits the allegations of paragraph 1 of the Complaint.

2. Upon information and belief, AT&T Florida admits the allegations of paragraph 2 of the Complaint.

3. Upon information and belief, AT&T Florida admits the allegations of paragraph 3 of the Complaint.

4. Upon information and belief, AT&T Florida admits the allegations of paragraph 4 of the Complaint

5. AT&T Florida admits the allegations of paragraph 5 of the Complaint. Further, AT&T Florida hereby notifies the parties that its legal representatives for the purposes of this proceeding are:

E. Earl Edenfield, Jr.  
Tracy W. Hatch  
Manuel A. Gurdian  
c/o Gregory R. Follensbee  
150 South Monroe Street  
Suite 400  
Tallahassee, Florida 32301  
(305) 347-5558

6. AT&T Florida admits that Express Phone's Complaint arises under its Agreement with AT&T Florida. AT&T Florida asserts that the provisions of the Agreement and federal and state law speak for themselves. AT&T Florida denies the remainder of the allegations of paragraph 6 of the Complaint.

7. AT&T Florida admits that the provisions of the Agreement, federal and state law, and its public filings in *Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273 (5<sup>th</sup> Cir. 2010) speak for themselves. AT&T Florida denies any allegations in paragraph 7 of the Complaint to the contrary.

8. AT&T Florida admits that the federal case law cited in paragraph 8 of the Complaint speaks for itself. AT&T Florida denies, however, the remaining allegations, if any, contained in paragraph 8 of the Complaint.

9. AT&T Florida admits that it exercised its right under the relevant Agreement to demand immediate payment of the stated balances due AT&T Florida (as well as under the relevant Resale Agreements in Alabama and Mississippi), and that it extended the payment date until March 18, 2001, in a voluntary and good faith effort to avoid further controversy. AT&T Florida further avers that Express Phones failed to remit the balances due by March 18, 2011 and that, in accordance with the terms of the relevant Agreement, it suspended Express Phone's ability to submit orders for new service on that date. AT&T Florida further avers that Express Phones failed to remit the balances due by March 29, 2011 and that, in accordance with the terms of the relevant Agreement, it disconnected Express Phone service on March 30, 2011. AT&T Florida admits that it reserves the right to terminate service to Express Phone under the relevant Agreement. AT&T Florida denies the remaining allegations of paragraph 9 of the Complaint.

10. AT&T Florida admits that, absent Express Phone's compliance with its duties and responsibilities contained in the relevant Agreement, the natural consequence could be that Express Phone may not be able to continue to do business in the manner in which it wishes. AT&T Florida affirmatively asserts that it is Express Phone that is responsible for any suspension or disconnection of service, as it is Express Phone that has failed to comply with the

express and unambiguous provisions of the Agreement by failing to make complete and timely payment for services rendered by AT&T Florida to Express Phone. AT&T Florida denies the remaining allegations of paragraph 10 of the Complaint.

11. Paragraph 11 of the Complaint contains legal argument to which AT&T Florida is not required to respond. AT&T Florida denies the remaining allegations, if any, of paragraph 11 of the Complaint.

12. AT&T Florida admits the allegations of paragraph 12 of the Complaint.

13. AT&T Florida admits that it and Express Phone have a dispute with regard to certain billing matters. AT&T Florida admits that the affidavit attached as Exhibit B to the Complaint says what it says, but AT&T Florida denies the allegations contained therein. AT&T Florida denies the remaining allegations of paragraph 13 of the Complaint.

14. AT&T Florida admits that Express Phone is unambiguously obligated under the Agreement to pay all amounts, *without regard to disputes about such billing*. See Section 1.4 of Attachment 3 the Resale Agreement (“Express Phone shall make payment to [AT&T Florida] for all services billed *including disputed amounts*” “on or before the next bill date”) (Agreement, Sections 1.4 and 1.4.1 (emphasis supplied)) (quoted at paragraph 14 of the Complaint). AT&T Florida denies the remaining allegations of paragraph 14 of the Complaint.

15. AT&T Florida denies the allegations contained in the first sentence of paragraph 15 of the Complaint. AT&T Florida admits that Express Phone improperly and unlawfully attempted to avoid the duties and obligations to which it agreed in the Agreement by requesting to “opt in” to an interconnection agreement entered into between AT&T Florida and another carrier. AT&T Florida admits that the provisions of the referenced carrier’s interconnection

agreement with AT&T Florida speak for themselves and is on file with the Commission. AT&T Florida denies the remaining allegations, if any, of paragraph 15 of the Complaint.

16. AT&T Florida admits that Express Phone improperly and unlawfully attempted to avoid the duties and obligations to which it agreed in the Agreement by requesting to “opt in” to an interconnection agreement entered into between AT&T Florida and another carrier. AT&T Florida admits that the federal statute cited in paragraph 16 of the Complaint speaks for itself. The remainder of paragraph 16 of the Complaint contains legal argument to which AT&T Florida is not required to respond, and AT&T denies the remaining allegations, if any, of paragraph 16 of the Complaint.

17. AT&T Florida admits the allegations of paragraph 17 of the Complaint.

18. AT&T Florida denies the allegations of paragraph 18 of the Complaint.

19. AT&T Florida admits that it holds a security deposit pursuant to the terms of the Agreement, but it denies that such fact is relevant to the instant dispute. AT&T denies the remaining allegations, if any, of paragraph 19 of the Complaint.

20. AT&T Florida admits that it has certain disagreements with Express Phone, but AT&T Florida denies the remainder of the allegations contained in paragraph 20 of the Complaint.

21. AT&T Florida avers that Express Phones’ ability to submit orders for new service was suspended on March 18, 2011 due to Express Phone’s failure to comply with the express provisions of the Agreement. AT&T Florida denies the remaining allegations, if any, contained in Paragraph 21 of the Complaint and denies that Express Phone is entitled to the relief requested in paragraph 21 of the Complaint, or to any relief whatsoever.



22. AT&T Florida affirmatively asserts that it has acted properly in enforcing the clear and unambiguous terms of the parties' Agreement and that it is Express Phone, not AT&T Florida, that has placed Express Phone and its customers in the position of having their service disconnected for Express Phone's failure to timely pay its bills in full. AT&T Florida denies that Express Phone is entitled to the relief requested in paragraph 22 of the Complaint, or to any relief whatsoever.

23. AT&T Florida admits the provisions of the Agreement speak for themselves and no further response is required of AT&T Florida.

24. AT&T Florida admits that the parties have been unable to resolve the dispute that is subject of the Complaint. AT&T Florida denies that Express Phone is entitled to the relief requested in paragraph 24 of the Complaint, or to any relief whatsoever. AT&T Florida denies the remaining allegations, if any, of paragraph 24 of the Complaint.

25. AT&T Florida affirmatively asserts that it has acted properly in enforcing the clear and unambiguous terms of the parties' Agreement and that it is Express Phone, not AT&T Florida, that has placed Express Phone and its customers in the position of having their service disconnected for Express Phone failure to timely pay its bills in full. AT&T Florida denies the allegations of paragraph 25 of the Complaint and further denies that Express Phone is entitled to the relief requested in paragraph 25 of the Complaint, or to any relief whatsoever.

26. AT&T Florida denies that Express Phone is entitled to the relief requested in paragraph 26 of the Complaint, or to any relief whatsoever.

27. AT&T Florida admits that the filings in Docket Nos. 100021-TP and 100022-TP speak for themselves and AT&T Florida denies any allegations in paragraph 27 of the Complaint to the contrary.

28. AT&T Florida admits that there are currently proceedings going on in Alabama, Louisiana, North Carolina and South Carolina and that the filings in those proceedings speak for themselves, and AT&T Florida denies any allegations in paragraph 28 of the Complaint to the contrary. AT&T Florida denies that Express Phone is entitled to the relief requested in paragraph 28 of the Complaint, or to any relief whatsoever.

29. AT&T Florida admits that it and Express Phone have a dispute with regard to certain billing matters. AT&T Florida denies that Express Phone is entitled to the relief requested in paragraph 29 of the Complaint, or to any relief whatsoever.

30. Denied.

31. AT&T Florida admits that the Commission's prior orders speak for themselves and AT&T Florida denies any allegations in paragraph 31 of the Complaint to the contrary. AT&T Florida denies that Express Phone is entitled to the relief requested in paragraph 31 of the Complaint, or to any relief whatsoever.

32. AT&T Florida denies that Express Phone is entitled to the relief requested in the "WHEREFORE" clause of the Complaint, or to any relief whatsoever.

33. Any and all allegations in the Complaint that are not expressly admitted herein are denied.

#### **V. AFFIRMATIVE DEFENSES**

34. The Complaint fails to state a cause of action for which relief can be granted.

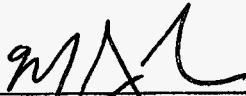
35. The Complaint should be dismissed for failure to comply with a condition precedent in that Express Phone did not notify AT&T Florida in writing upon the discovery of a billing dispute as required by the parties Resale Agreement(s).

36. Express Phone's claims are barred by the doctrines of laches, estoppel, and waiver.

37. Express Phone's claims are barred by the statute of limitations.

WHEREFORE, having fully answered, AT&T Florida respectfully requests that this Complaint be dismissed.

Respectfully submitted this 4<sup>th</sup> day of April, 2011.

  
\_\_\_\_\_  
E. Earl Edenfield, Jr.  
Tracy W. Hatch  
Manuel A. Gurdian  
AT&T Florida  
c/o Gregory R. Follensbee  
150 South Monroe Street  
Suite 400  
Tallahassee, FL 32301  
Tel. No. (305) 347-5558  
Fax. No. (305) 577-4491  
[ke2722@att.com](mailto:ke2722@att.com)  
[th9467@att.com](mailto:th9467@att.com)  
[mg2708@att.com](mailto:mg2708@att.com)

ATTORNEYS FOR BELLSOUTH  
TELECOMMUNICATIONS, INC., d/b/a  
AT&T FLORIDA

908874

## **Exhibit A**

---

**Attachment 3**  
**Page 1**

**Attachment 3**  
**Billing**

Version: 4Q05 Resale Standalone Agreement  
03/15/06

**TABLE OF CONTENTS**

**1. Payment and Billing Arrangements..... 3**  
**2. Billing Disputes..... 9**  
**Rates.....Exhibit A**

**BILLING**

**1. Payment and Billing Arrangements**

The terms and conditions set forth in this Attachment shall apply to all services ordered and provisioned pursuant to this Agreement.

- 1.1 BellSouth will bill through the Carrier Access Billing System (CABS), Integrated Billing System (IBS) and/or the Customer Records Information Systems (CRIS) depending on the particular service(s) provided to Express Phone under this Agreement. BellSouth will format all bills in CABS Billing Output Specification (CBOS) Standard or CLUB/EDI format, depending on the type of service provided. For those services where standards have not yet been developed, BellSouth's billing format may change in accordance with applicable industry standards.
- 1.1.1 For any service(s) BellSouth receives from Express Phone, Express Phone shall bill BellSouth in CBOS format.
- 1.1.2 Any switched access charges associated with interexchange carrier access to the resold local exchange lines will be billed by, and due to BellSouth.
- 1.1.3 BellSouth will render bills each month on established bill days for each of Express Phone's accounts. If either Party requests multiple billing media or additional copies of the bills, the billing Party will provide these at the rates set forth in BellSouth's FCC No. 1 Tariff, Section 13.3.6.3, except for resold services which shall be at the rates set forth in BellSouth's Non-Regulated Services Pricing List N6.
- 1.1.4 BellSouth will bill Express Phone in advance for all services to be provided during the ensuing billing period except charges associated with service usage and nonrecurring charges, which will be billed in arrears.
- 1.1.4.1 For resold services, charges for services will be calculated on an individual customer account level, including, if applicable, any charge for usage or usage allowances. BellSouth will also bill Express Phone, and Express Phone will be responsible for and remit to BellSouth, all charges applicable to said services including but not limited to 911 and E911 charges, EUCL charges, federal subscriber line charges, telecommunications relay charges, and franchise fees, unless otherwise ordered by a Commission.
- 1.1.5 BellSouth will not perform billing and collection services for Express Phone as a result of the execution of this Agreement.
- 1.2 **Establishing Accounts and Subsequent State Certifications.** After submitting a credit profile and deposit, if required, and after receiving certification as a local exchange carrier from the appropriate Commission, Express Phone will provide

the appropriate BellSouth Local Contract Manager responsible for new CLEC activation, the necessary documentation to enable BellSouth to establish accounts for resold services. Such documentation shall include the Application for Master Account, if applicable, proof of authority to provide Telecommunications Services, the appropriate OCN for each state as assigned by the NECA, CIC, if applicable, ACNA, if applicable, BellSouth's blanket form LOA, Misdirected Number form, and a tax exemption certificate, if applicable. Notwithstanding anything to the contrary in this Agreement, Express Phone may not order services under a new account and/or subsequent state certification, established in accordance with this Section until thirty (30) days after all information specified in this Section is received from Express Phone.

- 1.2.1 Company Identifiers. If Express Phone needs to change, add to, eliminate or convert its OCN(s), ACNAs and other identifying codes (collectively "Company Identifiers") under which it operates when Express Phone has already been conducting business utilizing those Company Identifiers, Express Phone shall follow the Mergers and Acquisitions Process as described on BellSouth's Interconnection Web site, AND SHALL PAY ALL CHARGES AS A RESULT OF SUCH CHANGES.
- 1.2.2 Tax Exemption. It is the responsibility of Express Phone to provide BellSouth with a properly completed tax exemption certificate at intervals required by the appropriate taxing authorities. A tax exemption certificate must be supplied for each individual Express Phone entity purchasing Services under this Agreement. Upon BellSouth's receipt of a properly completed tax exemption certificate, subsequent billings to Express Phone will not include those taxes or fees from which Express Phone is exempt. Prior to receipt of a properly completed exemption certificate, BellSouth shall bill, and Express Phone shall pay all applicable taxes and fees. In the event that Express Phone believes that it is entitled to an exemption from and refund of taxes with respect to the amount billed prior to BellSouth's receipt of a properly completed exemption certificate, BellSouth shall assign to Express Phone its rights to claim a refund of such taxes. If applicable law prohibits the assignment of tax refund rights or requires the claim for refund of such taxes to be filed by BellSouth, BellSouth shall, after receiving a written request from Express Phone and at Express Phone's sole expense, pursue such refund claim on behalf of Express Phone, provided that Express Phone promptly reimburses BellSouth for any costs and expenses incurred by BellSouth in pursuing such refund claim, and provided further that BellSouth shall have the right to deduct any such outstanding costs and expenses from the amount of any refund obtained prior to remitting such refund to Express Phone. Express Phone shall be solely responsible for the computation, tracking, reporting and payment of all taxes and fees associated with the services provided by Express Phone to its customers.
- 1.3 Deposit Policy. Prior to the inauguration of service or, thereafter, upon BellSouth's request, Express Phone shall complete the BellSouth Credit Profile



(BellSouth form) and provide information to BellSouth regarding Express Phone's credit and financial condition. Based on BellSouth's analysis of the BellSouth Credit Profile and other relevant information regarding Express Phone's credit and financial condition, BellSouth reserves the right to require Express Phone to provide BellSouth with a suitable form of security deposit for Express Phone's account(s). If, in BellSouth's sole discretion, circumstances so warrant and/or Express Phone's gross monthly billing has increased, BellSouth reserves the right to request additional security (or to require a security deposit if none was previously requested) and/or file a Uniform Commercial Code (UCC-1) security interest in Express Phone's "accounts receivables and proceeds".

- 1.3.1 Security deposit shall take the form of cash, an Irrevocable Letter of Credit (BellSouth form), Surety Bond (BellSouth form) or, in BellSouth's sole discretion, some other form of security proposed by Express Phone. Any such security deposit shall in no way release Express Phone from its obligation to make complete and timely payments of its bill(s). If BellSouth requires Express Phone to provide a security deposit, Express Phone shall provide such security deposit prior to the inauguration of service or within fifteen (15) days of BellSouth's request, as applicable. Deposit request notices will be sent to Express Phone via certified mail or overnight delivery. Such notice period will start the day after the deposit request notice is rendered by certified mail or overnight delivery. Interest on a cash security deposit shall accrue and be applied or refunded in accordance with the terms in BellSouth's GSST.
- 1.3.2 Security deposits collected under this Section shall not exceed two (2) months' estimated billing. Estimated billings are calculated based upon the monthly average of the previous six (6) months current billings, if Express Phone has received service from BellSouth during such period at a level comparable to that anticipated to occur over the next six (6) months. If either Express Phone or BellSouth has reason to believe that the level of service to be received during the next six (6) months will be materially higher or lower than received in the previous six (6) months, Express Phone and BellSouth shall agree on a level of estimated billings based on all relevant information.
- 1.3.3 In the event Express Phone fails to provide BellSouth with a suitable form of security deposit or additional security deposit as required herein, defaults on its account(s), or otherwise fails to make any payment or payments required under this Agreement in the manner and within the time required, service to Express Phone may be Suspended, Discontinued or Terminated in accordance with the terms of Section 1.5 below. Upon Termination of services, BellSouth shall apply any security deposit to Express Phone's final bill for its account(s).
- 1.3.3.1 At least seven (7) days prior to the expiration of any letter of credit provided by Express Phone as security under this Agreement, Express Phone shall renew such letter of credit or provide BellSouth with evidence that Express Phone has obtained a suitable replacement for the letter of credit. If Express Phone fails to

comply with the foregoing, BellSouth shall thereafter be authorized to draw down the full amount of such letter of credit and utilize the cash proceeds as security for Express Phone account(s). If Express Phone provides a security deposit or additional security deposit in the form of a surety bond as required herein, Express Phone shall renew the surety bond or provide BellSouth with evidence that Express Phone has obtained a suitable replacement for the surety bond at least seven (7) days prior to the cancellation date of the surety bond. If Express Phone fails to comply with the foregoing, BellSouth shall thereafter be authorized to take action on the surety bond and utilize the cash proceeds as security for Express Phone's account(s). If the credit rating of any bonding company that has provided Express Phone with a surety bond provided as security hereunder has fallen below B, BellSouth will provide written notice to Express Phone that Express Phone must provide a replacement bond or other suitable security within fifteen (15) days of BellSouth's written notice. If Express Phone fails to comply with the foregoing, BellSouth shall thereafter be authorized to take action on the surety bond and utilize the cash proceeds as security for Express Phone's account(s). Notwithstanding anything contained in this Agreement to the contrary, BellSouth shall be authorized to draw down the full amount of any letter of credit or take action on any surety bond provided by Express Phone as security hereunder if Express Phone defaults on its account(s) or otherwise fails to make any payment or payments required under this Agreement in the manner and within the time, as required herein.

- 1.4 **Payment Responsibility.** Payment of all charges will be the responsibility of Express Phone. Express Phone shall pay invoices by utilizing wire transfer services or automatic clearing house services. Express Phone shall make payment to BellSouth for all services billed including disputed amounts. BellSouth will not become involved in billing disputes that may arise between Express Phone and Express Phone's customer.
- 1.4.1 **Payment Due.** Payment for services provided by BellSouth, including disputed charges, is due on or before the next bill date. Information required to apply payments must accompany the payment. The information must notify BellSouth of Billing Account Numbers (BAN) paid; invoices paid and the amount to be applied to each BAN and invoice (Remittance Information). Payment is considered to have been made when the payment and Remittance Information are received by BellSouth. If the Remittance Information is not received with payment, BellSouth will be unable to apply amounts paid to Express Phone's accounts. In such event, BellSouth shall hold such funds until the Remittance Information is received. If BellSouth does not receive the Remittance Information by the payment due date for any account(s), late payment charges shall apply.
- 1.4.1.1 **Due Dates.** If the payment due date falls on a Sunday or on a holiday that is observed on a Monday, the payment due date shall be the first non-holiday day following such Sunday or holiday. If the payment due date falls on a Saturday or on a holiday which is observed on Tuesday, Wednesday, Thursday, or Friday, the

payment due date shall be the last non-holiday day preceding such Saturday or holiday. If payment is not received by the payment due date, a late payment charge, as set forth in Section 1.4.1.2, below, shall apply.

- 1.4.1.2 **Late Payment.** If any portion of the payment is not received by BellSouth on or before the payment due date as set forth above, or if any portion of the payment is received by BellSouth in funds that are not immediately available to BellSouth, then a late payment and/or interest charge shall be due to BellSouth. The late payment and/or interest charge shall apply to the portion of the payment not received and shall be assessed as set forth in Section A2 of BellSouth's GSST, Section B2 of the Private Line Service Tariff or Section E2 of the BellSouth intrastate Access Services Tariff, or pursuant to the applicable state law as determined by BellSouth. In addition to any applicable late payment and/or interest charges, Express Phone may be charged a fee for all returned checks at the rate set forth in Section A2 of BellSouth's GSST or pursuant to the applicable state law.
- 1.5 **Discontinuing Service to Express Phone.** The procedures for discontinuing service to Express Phone are as follows:
- 1.5.1 In order of severity, Suspend/Suspension, Discontinue/Discontinuance and Terminate/Termination are defined as follows for the purposes of this Attachment:
- 1.5.1.1 Suspend/Suspension is the temporary restriction of the billed Party's access to the ordering systems and/or access to the billed Party's ability to initiate PIC-related changes. In addition, during Suspension, pending orders may not be completed and orders for new service or changes to existing services may not be accepted.
- 1.5.1.2 Discontinue/Discontinuance is the denial of service by the billing Party to the billed Party that will result in the disruption and discontinuation of service to the billed Party's customers. Additionally, at the time of Discontinuance, BellSouth will remove any Local Service Freezes in place on the billed Party's customers.
- 1.5.1.3 Terminate/Termination is the disconnection of service by the billing Party to the billed Party.
- 1.5.2 BellSouth reserves the right to Suspend, Discontinue or Terminate service in the event of prohibited, unlawful or improper use of BellSouth facilities or service, abuse of BellSouth facilities, or any other violation or noncompliance by Express Phone of the rules and regulations of BellSouth's tariffs.
- 1.5.3 **Suspension.** If payment of amounts due as described herein is not received by the bill date in the month after the original bill date, or fifteen (15) days from the date of a deposit request in the case of security deposits, BellSouth will provide written notice to Express Phone that services will be Suspended if payment of such amounts, and all other amounts that become past due before Suspension, is not received by wire transfer, automatic clearing house or cashier's check in the

manner set forth in Section 1.4.1 above, or in the case of a security deposit request, in the manner set forth in Section 1.3.1 above: (1) within fifteen (15) days following such notice for CRIS billed services; and (2) within seven (7) days following such notice for security deposit requests.

- 1.5.3.1 The Suspension notice shall also provide that all past due charges for CRIS billed services, and all other amounts that become past due for such services before Discontinuance, must be paid within thirty (30) days from the date of the Suspension notice to avoid Discontinuance of CRIS billed services.
- 1.5.4 Discontinuance. If payment of amounts due as described herein is not received by the bill date in the month after the original bill date, BellSouth will provide written notice that BellSouth may Discontinue the provision of existing services to Express Phone if payment of such amounts, and all other amounts that become past due before Discontinuance, including requested security deposits, is not received by wire transfer, automatic clearing house or cashier's check in the manner set forth in Section 1.4.1 above or in the case of a deposit in accordance with Section 1.3.1 above, within thirty (30) days following such written notice; provided, however, that BellSouth may provide written notice that such existing services may be Discontinued within fifteen (15) days following such notice, subject to the criteria described in Section 1.5.4.1 below.
- 1.5.4.1 BellSouth may take the action to Discontinue the provision of existing service upon fifteen (15) days from the day after BellSouth provides written notice of such Discontinuance if (a) such notice is sent by certified mail or overnight delivery; (b) Express Phone has not paid all amounts due pursuant to a subject bill(s), or has not provided adequate security pursuant to a deposit request; and (c) either:
- (1) BellSouth has sent the subject bill(s) to Express Phone within seven (7) business days of the bill date(s), verifiable by records maintained by BellSouth:
    - i. in paper or CDROM form via the United States Postal Service (USPS),  
or
    - ii. in magnetic tape form via overnight delivery, or
    - iii. via electronic transmission; or
  - (2) BellSouth has sent the subject bill(s) to Express Phone, using one of the media described in (1) above, more than thirty (30) days before notice to Discontinue service has been rendered.
- 1.5.4.2 In the case of Discontinuance of services, all billed charges, as well as applicable disconnect charges, shall become due.
- 1.5.4.3 Express Phone is solely responsible for notifying the customer of the Discontinuance of service. If, within seven (7) days after Express Phone's services have been Discontinued, Express Phone pays, by wire transfer, automatic clearing

house or cashier's check, all past due charges, including late payment charges, outstanding security deposit request amounts if applicable and any applicable restoral charges as set forth in Section A4 of BellSouth's GSST, then BellSouth will reestablish service for Express Phone.

1.5.5 **Termination.** If within seven (7) days after Express Phone's service has been Discontinued and Express Phone has failed to pay all past due charges as described above, then Express Phone's service will be Terminated.

**2. Billing Disputes**

2.1 Express Phone shall electronically submit all billing disputes to BellSouth using the form specified by BellSouth. In the event of a billing dispute, the Parties will endeavor to resolve the dispute within sixty (60) days of the notification date. Within five (5) business days of BellSouth's denial, or partial denial, of the billing dispute, if Express Phone is not satisfied with BellSouth's resolution of the billing dispute or if no response to the billing dispute has been received by Express Phone by such sixtieth (60<sup>th</sup>) day, Express Phone must pursue the escalation process as outlined in the Billing Dispute Escalation Matrix, set forth on BellSouth's Interconnection Services Web site, or the billing dispute shall be considered denied and closed. If, after escalation, the Parties are unable to reach resolution, then the aggrieved Party, if it elects to pursue the dispute shall pursue dispute resolution in accordance with General Terms and Conditions.

2.2 For purposes of this Section 2, a billing dispute means a reported dispute submitted pursuant to Section 2.1 above of a specific amount of money actually billed by BellSouth within twelve (12) months of the submission of such dispute. Express Phone agrees not to submit billing disputes for amounts billed more than twelve (12) months prior to submission of a billing dispute filed for amounts billed. The billing dispute must be clearly explained by Express Phone and supported by written documentation, which clearly shows the basis for disputing charges. The determination as to whether the billing dispute is clearly explained or clearly shows the basis for disputing charges shall be within BellSouth's sole reasonable discretion. Disputes that are not clearly explained or those that do not provide complete information may be rejected by BellSouth. Claims by Express Phone for damages of any kind will not be considered a billing dispute for purposes of this Section. If BellSouth resolves the billing dispute, in whole or in part, in favor of Express Phone, any credits and interest due to Express Phone as a result thereof shall be applied to Express Phone's account by BellSouth upon resolution of the billing dispute.

## **Exhibit B**

---

## **BELLSOUTH / CLEC Agreement**

**Customer Name: Express Phone Service, Inc.**

Express Phone Services, Inc. 2006 Resale	2
Table of Contents	3
General Terms and Conditions	5
Signature Page	24
Att 1 - Resale	25
Att 1 - Resale Discounts & Rates	45
Att 2 - Ordering	54
Att 3 - Billing	62
Att 4 - Performance Measurements	71
Att 5 - Disaster Recovery Plan	73
Att 6 - BFR and NBR Process	82

Note: This page is not part of the actual signed contract/amendment, but is present for record keeping purposes only.

---

**Resale Agreement**

**Between**

**BellSouth Telecommunications, Inc.**

**And**

**Express Phone Service, Inc.**



---

## **TABLE OF CONTENTS**

### **General Terms and Conditions**

- Definitions
- 1. CLEC Certification
- 2. Term of the Agreement
- 3. Parity
- 4. Court Ordered Requests for Call Detail Records and Other Subscriber Information
- 5. Liability and Indemnification
- 6. Intellectual Property Rights and Indemnification
- 7. Proprietary and Confidential Information
- 8. Resolution of Disputes
- 9. Taxes
- 10. Force Majeure
- 11. Adoption of Agreements
- 12. Modification of Agreement
- 13. Legal Rights
- 14. Indivisibility
- 15. Severability
- 16. Non-Waivers
- 17. Governing Law
- 18. Assignments and Transfers
- 19. Notices
- 20. Rule of Construction
- 21. Headings of No Force or Effect
- 22. Multiple Counterparts
- 23. Filing of Agreement
- 24. Compliance with Law
- 25. Necessary Approvals
- 26. Good Faith Performance
- 27. Rates
- 28. Rate True-Up
- 29. Survival
- 30. Entire Agreement

---

**TABLE OF CONTENTS (cont'd)**

**Attachment 1 - Resale**

**Attachment 2 - Pre-Ordering, Ordering, Provisioning and Maintenance and Repair**

**Attachment 3 - Billing**

**Attachment 4 - Performance Measurements**

**Attachment 5 - BellSouth Disaster Recovery Plan**

**Attachment 6 - Bona Fide Request and New Business Request Process**

**AGREEMENT  
GENERAL TERMS AND CONDITIONS**

**THIS AGREEMENT** is made by and between BellSouth Telecommunications, Inc., (BellSouth), a Georgia corporation, and Express Phone Service, Inc. (Express Phone), a Florida corporation, and shall be effective on the Effective Date, as defined herein. This Agreement may refer to either BellSouth or Express Phone or both as a "Party" or "Parties."

**WITNESSETH**

**WHEREAS**, BellSouth is a local exchange telecommunications company authorized to provide Telecommunications Services (as defined below) in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee; and

**WHEREAS**, Express Phone is or seeks to become a CLEC authorized to provide telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee; and

**WHEREAS**, pursuant to Sections 251 and 252 of the Act; Express Phone wishes to purchase certain services from BellSouth; and

**NOW THEREFORE**, in consideration of the mutual agreements contained herein, BellSouth and Express Phone agree as follows:

**Definitions**

**Affiliate** is defined as a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or equivalent thereof) of more than ten percent (10%).

**Commission** is defined as the appropriate regulatory agency in each state of BellSouth's nine-state region (Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee).

**Competitive Local Exchange Carrier (CLEC)** means a telephone company certificated by the Commission to provide local exchange service within BellSouth's franchised area.

**Effective Date** is defined as the date that the Agreement is effective for purposes of rates, terms and conditions and shall be thirty (30) days after the date of the last signature executing the Agreement. Future amendments for rate changes will also be effective thirty (30) days after the date of the last signature executing the amendment.

**FCC** means the Federal Communications Commission.

**Telecommunications** means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

**Telecommunications Service** means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

**Telecommunications Act of 1996 (Act)** means Public Law 104-104 of the United States Congress effective February 8, 1996. The Act amended the Communications Act of 1934 (47 U.S.C. Section 1 et. seq.).

**1. CLEC Certification**

1.1 Express Phone agrees to provide BellSouth in writing Express Phone's CLEC certification from the Commission for all states covered by this Agreement except Kentucky prior to BellSouth filing this Agreement with the appropriate Commission for approval. Additionally, Express Phone shall provide to BellSouth an effective certification to do business issued by the secretary of state or equivalent authority in each state covered by this Agreement.

1.2 To the extent Express Phone is not certified as a CLEC in each state covered by this Agreement as of the execution hereof, Express Phone may not purchase services hereunder in that state. Express Phone will notify BellSouth in writing and provide CLEC certification from the Commission when it becomes certified to operate in, as well as an effective certification to do business issued by the secretary of state or equivalent authority for, any other state covered by this Agreement. Upon receipt thereof, BellSouth will file this Agreement in that state, and Express Phone may purchase services pursuant to this Agreement in that state, subject to establishing appropriate accounts in the additional state as described in Attachment 3.

1.3 Should Express Phone's certification in any state be rescinded or otherwise terminated, BellSouth may, at its election, suspend or terminate this Agreement immediately and all monies owed on all outstanding invoices for services provided in that state shall become due, or BellSouth may refuse to provide services hereunder in that state until certification is reinstated in that state, provided such notification is made prior to expiration of the term of this Agreement. Express Phone shall provide an effective certification to do business issued by the secretary of state or equivalent authority in each state covered by this Agreement.

**2. Term of the Agreement**

- 2.1 The initial term of this Agreement shall be five (5) years, beginning on the Effective Date and shall apply to the BellSouth territory in the state(s) of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee. Notwithstanding any prior agreement of the Parties, the rates, terms and conditions of this Agreement shall not be applied retroactively prior to the Effective Date.
- 2.2 The Parties agree that by no earlier than two hundred seventy (270) days and no later than one hundred and eighty (180) days prior to the expiration of the initial term of this Agreement, they shall commence negotiations for a new agreement to be effective beginning on the expiration date of this Agreement (Subsequent Agreement). If as of the expiration of the initial term of this Agreement, a Subsequent Agreement has not been executed by the Parties, then except as set forth in Sections 2.3.1 and 2.3.2 below, this Agreement shall continue on a month-to-month basis while a Subsequent Agreement is being negotiated. The Parties' rights and obligations with respect to this Agreement after expiration of the initial term shall be as set forth in Section 2.3 below.
- 2.3 If, within one hundred and thirty-five (135) days of commencing the negotiation referred to in Section 2.2 above, the Parties are unable to negotiate new terms, conditions and prices for a Subsequent Agreement, either Party may petition the Commission to establish appropriate rates, terms and conditions for the Subsequent Agreement pursuant to 47 U.S.C. § 252.
- 2.3.1 Express Phone may request termination of this Agreement only if it is no longer purchasing services pursuant to this Agreement. Except as set forth in Section 2.3.2 below, notwithstanding the foregoing, in the event that as of the date of expiration of the initial term of this Agreement and conversion of this Agreement to a month-to-month term, the Parties have not entered into a Subsequent Agreement and no arbitration proceeding has been filed in accordance with Section 2.3 above, then BellSouth may terminate this Agreement upon sixty (60) days notice to Express Phone. In the event that BellSouth terminates this Agreement as provided above, BellSouth shall continue to offer services to Express Phone pursuant to the rates, terms and conditions set forth in BellSouth's then current standard interconnection agreement. In the event that BellSouth's standard interconnection agreement becomes effective between the Parties, the Parties may continue to negotiate a Subsequent Agreement.
- 2.3.2 Notwithstanding Section 2.2 above, in the event that as of the expiration of the initial term of this Agreement the Parties have not entered into a Subsequent Agreement and no arbitration proceeding has been filed in accordance with Section 2.3 above and BellSouth is not providing any services under this Agreement as of the date of expiration of the initial term of this Agreement, then this Agreement shall not continue on a month-to-month basis but shall be deemed terminated as of the expiration date hereof.

- 2.4 If, at any time during the term of this Agreement, BellSouth is unable to contact Express Phone pursuant to the Notices provision hereof or any other contact information provided by Express Phone under this Agreement, and there are no active services being provisioned under this Agreement, then BellSouth may, at its discretion, terminate this Agreement, without any liability whatsoever, upon sending of notification to Express Phone pursuant to the Notices section hereof.
- 2.5 In addition to as otherwise set forth in this Agreement, BellSouth reserves the right to suspend access to ordering systems, refuse to process additional or pending applications for service, or terminate service in the event of prohibited, unlawful or improper use of BellSouth's facilities or service, abuse of BellSouth's facilities or any other material breach of this Agreement, and all monies owed on all outstanding invoices shall become due. In such event, Express Phone is solely responsible for notifying its customers of any discontinuance of service.
3. **Parity**  
When Express Phone purchases, Telecommunications Services from BellSouth pursuant to Attachment 1 of this Agreement for the purposes of resale to customers, such services shall be equal in quality, subject to the same conditions, and provided within the same provisioning time intervals that BellSouth provides to its Affiliates, subsidiaries and customers.
- 4 **Court Ordered Requests for Call Detail Records and Other Subscriber Information**
- 4.1 Subpoenas Directed to BellSouth. Where BellSouth provides resold services for Express Phone, or, if applicable under this Agreement, switching, BellSouth shall respond to subpoenas and court ordered requests delivered directly to BellSouth for the purpose of providing call detail records when the targeted telephone numbers belong to Express Phone customers. Billing for such requests will be generated by BellSouth and directed to the law enforcement agency initiating the request. BellSouth shall maintain such information for Express Phone customers for the same length of time it maintains such information for its own customers.
- 4.2 Subpoenas Directed to Express Phone. Where BellSouth is providing resold services to Express Phone, or, if applicable under this Agreement, switching, then Express Phone agrees that in those cases where Express Phone receives subpoenas or court ordered requests regarding targeted telephone numbers belonging to Express Phone customers, and where Express Phone does not have the requested information, Express Phone will advise the law enforcement agency initiating the request to redirect the subpoena or court ordered request to BellSouth for handling in accordance with Section 4.1 above.
- 4.3 In all other instances, where either Party receives a request for information involving the other Party's customer, the Party receiving the request will advise the law enforcement agency initiating the request to redirect such request to the other Party.

**5 Liability and Indemnification**

- 5.1 **Express Phone Liability.** In the event that Express Phone consists of two (2) or more separate entities as set forth in this Agreement and/or any Amendments hereto, or any third party places orders under this Agreement using Express Phone's company codes or identifiers, all such entities shall be jointly and severally liable for the obligations of Express Phone under this Agreement.
- 5.2 **Liability for Acts or Omissions of Third Parties.** BellSouth shall not be liable to Express Phone for any act or omission of another entity providing any services to Express Phone.
- 5.3 Except for any indemnification obligations of the Parties hereunder, each Party's liability to the other for any loss, cost, claim, injury, liability or expense, including reasonable attorneys' fees relating to or arising out of any cause whatsoever, whether based in contract, negligence or other tort, strict liability or otherwise, relating to the performance of this Agreement, shall not exceed a credit for the actual cost of the services or functions not performed or improperly performed. Any amounts paid to Express Phone pursuant to Attachment 4 hereof shall be credited against any damages otherwise payable to Express Phone pursuant to this Agreement.
- 5.3.1 **Limitations in Tariffs.** A Party may, in its sole discretion, provide in its tariffs and contracts with its customers and third parties that relate to any service, product or function provided or contemplated under this Agreement, that to the maximum extent permitted by Applicable Law, such Party shall not be liable to the customer or third party for (i) any loss relating to or arising out of this Agreement, whether in contract, tort or otherwise, that exceeds the amount such Party would have charged that applicable person for the service, product or function that gave rise to such loss and (ii) consequential damages. To the extent that a Party elects not to place in its tariffs or contracts such limitations of liability, and the other Party incurs a loss as a result thereof, such Party shall, except to the extent caused by the other Party's gross negligence or willful misconduct, indemnify and reimburse the other Party for that portion of the loss that would have been limited had the first Party included in its tariffs and contracts the limitations of liability that such other Party included in its own tariffs at the time of such loss.
- 5.3.2 Neither BellSouth nor Express Phone shall be liable for damages to the other Party's terminal location, equipment or customer premises resulting from the furnishing of a service, including, but not limited to, the installation and removal of equipment or associated wiring, except to the extent caused by a Party's negligence or willful misconduct or by a Party's failure to ground properly a local loop after disconnection.
- 5.3.3 Under no circumstance shall a Party be responsible or liable for indirect, incidental, or consequential damages, including, but not limited to, economic loss or lost business or profits, damages arising from the use or performance of equipment or

software, or the loss of use of software or equipment, or accessories attached thereto, delay, error, or loss of data. In connection with this limitation of liability, each Party recognizes that the other Party may, from time to time, provide advice, make recommendations, or supply other analyses related to the services or facilities described in this Agreement, and, while each Party shall use diligent efforts in this regard, the Parties acknowledge and agree that this limitation of liability shall apply to provision of such advice, recommendations, and analyses.

5.3.4 To the extent any specific provision of this Agreement purports to impose liability, or limitation of liability, on either Party different from or in conflict with the liability or limitation of liability set forth in this Section, then with respect to any facts or circumstances covered by such specific provisions, the liability or limitation of liability contained in such specific provision shall apply.

5.4 Indemnification for Certain Claims. Except to the extent caused by the indemnified Party's gross negligence or willful misconduct, the Party providing services hereunder, its Affiliates and its parent company, shall be indemnified, defended and held harmless by the Party receiving services hereunder against any claim, loss or damage arising from the receiving Party's use of the services provided under this Agreement pertaining to (1) claims for libel, slander or invasion of privacy arising from the content of the receiving Party's own communications, or (2) any claim, loss or damage claimed by the customer of the Party receiving services arising from such company's use or reliance on the providing Party's services, actions, duties, or obligations arising out of this Agreement.

5.5 Disclaimer. EXCEPT AS SPECIFICALLY PROVIDED TO THE CONTRARY IN THIS AGREEMENT, NEITHER PARTY MAKES ANY REPRESENTATIONS OR WARRANTIES TO THE OTHER PARTY CONCERNING THE SPECIFIC QUALITY OF ANY SERVICES, OR FACILITIES PROVIDED UNDER THIS AGREEMENT. THE PARTIES DISCLAIM, WITHOUT LIMITATION, ANY WARRANTY OR GUARANTEE OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ARISING FROM COURSE OF PERFORMANCE, COURSE OF DEALING, OR FROM USAGES OF TRADE.

## 6 Intellectual Property Rights and Indemnification

6.1 No License. Except as expressly set forth in Section 6.2 below, no patent, copyright, trademark or other proprietary right is licensed, granted or otherwise transferred by this Agreement. The Parties are strictly prohibited from any use, including but not limited to, in the selling, marketing, promoting or advertising of telecommunications services, of any name, service mark, logo or trademark (collectively, the "Marks") of the other Party. The Marks include those Marks owned directly by a Party or its Affiliate(s) and those Marks that a Party has a legal and valid license to use. The Parties acknowledge that they are separate and distinct and that each provides a separate and distinct service and agree that neither



Party may, expressly or impliedly, state, advertise or market that it is or offers the same service as the other Party or engage in any other activity that may result in a likelihood of confusion between its own service and the service of the other Party.

- 6.2 Ownership of Intellectual Property. Any intellectual property that originates from or is developed by a Party shall remain the exclusive property of that Party. Except for a limited, non-assignable, non-exclusive, non-transferable license to use patents or copyrights to the extent necessary for the Parties to use any facilities or equipment (including software) or to receive any service solely as provided under this Agreement, no license in patent, copyright, trademark or trade secret, or other proprietary or intellectual property right, now or hereafter owned, controlled or licensable by a Party, is granted to the other Party. Neither shall it be implied nor arise by estoppel. Any trademark, copyright or other proprietary notices appearing in association with the use of any facilities or equipment (including software) shall remain on the documentation, material, product, service, equipment or software. It is the responsibility of each Party to ensure at no additional cost to the other Party that it has obtained any necessary licenses in relation to intellectual property of third Parties used in its network that may be required to enable the other Party to use any facilities or equipment (including software), to receive any service, or to perform its respective obligations under this Agreement.
- 6.3 Intellectual Property Remedies
- 6.3.1 Indemnification. The Party providing a service pursuant to this Agreement will defend the Party receiving such service or data provided as a result of such service against claims of infringement arising solely from the use by the receiving Party of such service in the manner contemplated under this Agreement and will indemnify the receiving Party for any damages awarded based solely on such claims in accordance with Section 5 above.
- 6.3.2 Claim of Infringement
- 6.3.2.1 In the event that use of any facilities or equipment (including software), becomes, or in the reasonable judgment of the Party who owns the affected network is likely to become, the subject of a claim, action, suit, or proceeding based on intellectual property infringement, then said Party, promptly and at its sole expense and sole option, but subject to the limitations of liability set forth below, shall:
- 6.3.2.2 modify or replace the applicable facilities or equipment (including software) while maintaining form and function, or
- 6.3.2.3 obtain a license sufficient to allow such use to continue.
- 6.3.2.4 In the event Sections 6.3.2.2 or 6.3.2.3 above are commercially unreasonable, then said Party may terminate, upon reasonable notice, this contract with respect to use of, or services provided through use of, the affected facilities or equipment

(including software), but solely to the extent required to avoid the infringement claim.

- 6.3.3 **Exception to Obligations.** Neither Party's obligations under this Section shall apply to the extent the infringement is caused by: (i) modification of the facilities or equipment (including software) by the indemnitee; (ii) use by the indemnitee of the facilities or equipment (including software) in combination with equipment or facilities (including software) not provided or authorized by the indemnitor, provided the facilities or equipment (including software) would not be infringing if used alone; (iii) conformance to specifications of the indemnitee which would necessarily result in infringement; or (iv) continued use by the indemnitee of the affected facilities or equipment (including software) after being placed on notice to discontinue use as set forth herein.
- 6.3.4 **Exclusive Remedy.** The foregoing shall constitute the Parties' sole and exclusive remedies and obligations with respect to a third party claim of intellectual property infringement arising out of the conduct of business under this Agreement.
- 6.3.5 **Dispute Resolution.** Any claim arising under Sections 6.1 and 6.2 above shall be excluded from the dispute resolution procedures set forth in Section 8 below and shall be brought in a court of competent jurisdiction.

## 7 Proprietary and Confidential Information

- 7.1 **Proprietary and Confidential Information.** It may be necessary for BellSouth and Express Phone, each as the "Discloser," to provide to the other Party, as "Recipient," certain proprietary and confidential information (including trade secret information) including but not limited to technical, financial, marketing, staffing and business plans and information, strategic information, proposals, request for proposals, specifications, drawings, maps, prices, costs, costing methodologies, procedures, processes, business systems, software programs, techniques, customer account data, call detail records and like information (collectively the "Information"). All such Information conveyed in writing or other tangible form shall be clearly marked with a confidential or proprietary legend. Information conveyed orally by the Discloser to Recipient shall be designated as proprietary and confidential at the time of such oral conveyance, shall be reduced to writing by the Discloser within forty-five (45) days thereafter, and shall be clearly marked with a confidential or proprietary legend.
- 7.2 **Use and Protection of Information.** Recipient agrees to protect such Information of the Discloser provided to Recipient from whatever source from distribution, disclosure or dissemination to anyone except employees of Recipient with a need to know such Information solely in conjunction with Recipient's analysis of the Information and for no other purpose except as authorized herein or as otherwise authorized in writing by the Discloser. Recipient will not make any copies of the Information inspected by it.

7.3 **Exceptions**

7.3.1 Recipient will not have an obligation to protect any portion of the Information which:

7.3.2 (a) is made publicly available by the Discloser or lawfully by a nonparty to this Agreement; (b) is lawfully obtained by Recipient from any source other than Discloser; (c) is previously known to Recipient without an obligation to keep it confidential; or (d) is released from the terms of this Agreement by Discloser upon written notice to Recipient.

7.4 Recipient agrees to use the Information solely for the purposes of negotiations pursuant to 47 U.S.C. § 251 or in performing its obligations under this Agreement and for no other entity or purpose, except as may be otherwise agreed to in writing by the Parties. Nothing herein shall prohibit Recipient from providing information requested by the FCC or a state regulatory agency with jurisdiction over this matter, or to support a request for arbitration or an allegation of failure to negotiate in good faith.

7.5 Recipient agrees not to publish or use the Information for any advertising, sales or marketing promotions, press releases, or publicity matters that refer either directly or indirectly to the Information or to the Discloser or any of its affiliated companies.

7.6 The disclosure of Information neither grants nor implies any license to the Recipient under any trademark, patent, copyright, application or other intellectual property right that is now or may hereafter be owned by the Discloser.

7.7 **Survival of Confidentiality Obligations.** The Parties' rights and obligations under this Section 7 shall survive and continue in effect until two (2) years after the expiration or termination date of this Agreement with regard to all Information exchanged during the term of this Agreement. Thereafter, the Parties' rights and obligations hereunder survive and continue in effect with respect to any Information that is a trade secret under applicable law.

8 **Resolution of Disputes**

Except as otherwise stated in this Agreement, if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the aggrieved Party, if it elects to pursue resolution of the dispute, shall petition the Commission for a resolution of the dispute. However, each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement.

9 **Taxes**

9.1 **Definition.** For purposes of this Section, the terms "taxes" and "fees" shall include but not be limited to federal, state or local sales, use, excise, gross receipts or

other taxes or tax-like fees of whatever nature and however designated (including tariff surcharges and any fees, charges or other payments, contractual or otherwise, for the use of public streets or rights of way, whether designated as franchise fees or otherwise) imposed, or sought to be imposed, on or with respect to the services furnished hereunder or measured by the charges or payments therefore, excluding any taxes levied on income.

- 9.2 **Taxes and Fees Imposed Directly On Either Providing Party or Purchasing Party**
- 9.2.1 Taxes and fees imposed on the providing Party, which are not permitted or required to be passed on by the providing Party to its customer, shall be borne and paid by the providing Party.
- 9.2.2 Taxes and fees imposed on the purchasing Party, which are not required to be collected and/or remitted by the providing Party, shall be borne and paid by the purchasing Party.
- 9.3 **Taxes and Fees Imposed on Purchasing Party But Collected And Remitted By Providing Party**
- 9.3.1 Taxes and fees imposed on the purchasing Party shall be borne by the purchasing Party, even if the obligation to collect and/or remit such taxes or fees is placed on the providing Party.
- 9.3.2 To the extent permitted by applicable law, any such taxes and/or fees shall be shown on applicable billing documents between the Parties. Notwithstanding the foregoing, the purchasing Party shall remain liable for any such taxes and fees regardless of whether they are actually billed by the providing Party at the time that the respective service is billed.
- 9.3.3 If the purchasing Party determines that in its opinion any such taxes or fees are not applicable, the providing Party shall not bill such taxes or fees to the purchasing Party if the purchasing Party provides written certification, reasonably satisfactory to the providing Party, stating that it is exempt or otherwise not subject to the tax or fee, setting forth the basis therefor, and satisfying any other requirements under applicable law. If any authority seeks to collect any such tax or fee that the purchasing Party has determined and certified not to be applicable, or any such tax or fee that was not billed by the providing Party, the purchasing Party may contest the same in good faith, at its own expense. In any such contest, the purchasing Party shall promptly furnish the providing Party with copies of all filings in any proceeding, protest, or legal challenge, all rulings issued in connection therewith, and all correspondence between the purchasing Party and the taxing authority.
- 9.3.4 In the event that all or any portion of an amount sought to be collected must be paid in order to contest the imposition of any such tax or fee, or to avoid the existence of a lien on the assets of the providing Party during the pendency of such contest, the purchasing Party shall be responsible for such payment and shall be

entitled to the benefit of any refund or recovery. The purchasing Party shall have the right to contest, at its own expense, any such tax or fee that it believes is not applicable or was paid by it in error. If requested in writing by the purchasing Party, the providing Party shall facilitate such contest either by assigning to the purchasing Party its right to claim a refund of such tax or fee, if such an assignment is permitted under applicable law, or, if an assignment is not permitted, by filing and pursuing a claim for refund on behalf of the purchasing Party but at the purchasing Party's expense.

- 9.3.5 If it is ultimately determined that any additional amount of such a tax or fee is due to the imposing authority, the purchasing Party shall pay such additional amount, including any interest and penalties thereon.
- 9.3.6 Notwithstanding any provision to the contrary, the purchasing Party shall protect, indemnify and hold harmless (and defend at the purchasing Party's expense) the providing Party from and against any such tax or fee, interest or penalties thereon, or other charges or payable expenses (including reasonable attorney fees) with respect thereto, which are incurred by the providing Party in connection with any claim for or contest of any such tax or fee.
- 9.3.7 Each Party shall notify the other Party in writing of any assessment, proposed assessment or other claim for any additional amount of such a tax or fee by a taxing authority; provided, however, that the failure of a Party to provide notice shall not relieve the other Party of any obligations hereunder.
- 9.4 **Taxes and Fees Imposed on Providing Party But Passed On To Purchasing Party**
- 9.4.1 Taxes and fees imposed on the providing Party, which are permitted or required to be passed on by the providing Party to its customer, shall be borne by the purchasing Party.
- 9.4.2 To the extent permitted by applicable law, any such taxes and/or fees shall be shown on applicable billing documents between the Parties. Notwithstanding the foregoing, the purchasing Party shall remain liable for any such taxes and fees regardless of whether they are actually billed by the providing Party at the time that the respective service is billed.
- 9.4.3 If the purchasing Party disagrees with the providing Party's determination as to the application of or basis for any such tax or fee, the Parties shall consult with respect to the imposition and billing of such tax or fee. Notwithstanding the foregoing, the providing Party shall retain ultimate responsibility for determining whether and to what extent any such taxes or fees are applicable, and the purchasing Party shall abide by such determination and pay such taxes or fees to the providing Party. The providing Party shall further retain ultimate responsibility for determining whether and how to contest the imposition of such taxes and fees; provided, however, that any such contest undertaken at the request of the purchasing Party shall be at the purchasing Party's expense.

- 9.4.4 In the event that all or any portion of an amount sought to be collected must be paid in order to contest the imposition of any such tax or fee, or to avoid the existence of a lien on the assets of the providing Party during the pendency of such contest, the purchasing Party shall be responsible for such payment and shall be entitled to the benefit of any refund or recovery. The purchasing Party shall have the right to contest, at its own expense, any such tax or fee that it believes is not applicable or was paid by it in error. If requested in writing by the purchasing Party, the providing Party shall facilitate such contest either by assigning to the purchasing Party its right to claim a refund of such tax or fee, if such an assignment is permitted under applicable law, or, if an assignment is not permitted, by filing and pursuing a claim for refund on behalf of the purchasing Party but at the purchasing Party's expense.
- 9.4.5 If it is ultimately determined that any additional amount of such a tax or fee is due to the imposing authority, the purchasing Party shall pay such additional amount, including any interest and penalties thereon.
- 9.4.6 Notwithstanding any provision to the contrary, the purchasing Party shall protect, indemnify and hold harmless (and defend at the purchasing Party's expense) the providing Party from and against any such tax or fee, interest or penalties thereon, or other charges or payable expenses (including reasonable attorneys' fees) with respect thereto, which are incurred by the providing Party in connection with any claim for or contest of any such tax or fee.
- 9.4.7 Each Party shall notify the other Party in writing of any assessment, proposed assessment or other claim for any additional amount of such a tax or fee by a taxing authority; provided, however, that the failure of a Party to provide notice shall not relieve the other Party of any obligations hereunder.
- 9.5 Additional Provisions Applicable to All Taxes and Fees
- 9.5.1 In any contest of a tax or fee by one Party, the other Party shall cooperate fully by providing records, testimony and such additional information or assistance as may reasonably be necessary to pursue the contest. Further, the other Party shall be reimbursed for any reasonable and necessary out-of-pocket copying and travel expenses incurred in assisting in such contest.
- 9.5.2 Notwithstanding any provision of this Agreement to the contrary, any administrative, judicial, or other proceeding concerning the application or amount of a tax or fee shall be maintained in accordance with the provisions of this Section and any applicable federal, state or local law governing the resolution of such disputed tax or fee; and under no circumstances shall either Party have the right to bring a dispute related to the application or amount of tax or fee before a regulatory authority.

**10 Force Majeure**

In the event performance of this Agreement, or any obligation hereunder, is either directly or indirectly prevented, restricted, or interfered with by reason of fire, flood, earthquake or like acts of God, wars, revolution, civil commotion, explosion, acts of public enemy, embargo, acts of the government in its sovereign capacity, labor difficulties, including without limitation, strikes, slowdowns, picketing, or boycotts, unavailability of equipment from vendor, changes requested by Express Phone, or any other circumstances beyond the reasonable control and without the fault or negligence of the Party affected, the Party affected shall be excused from such performance on a day-to-day basis to the extent of such prevention, restriction, or interference (and the other Party shall likewise be excused from performance of its obligations on a day-to-day basis until the delay, restriction or interference has ceased); provided, however, that the Party so affected shall use diligent efforts to avoid or remove such causes of non-performance and both Parties shall proceed whenever such causes are removed or cease. The Party affected shall provide notice of the Force Majeure event within a reasonable period of time following such an event.

**11 Adoption of Agreements**

Pursuant to 47 U.S.C. § 252(i) and 47 C.F.R. § 51.809, BellSouth shall make available to Express Phone any entire resale agreement filed and approved pursuant to 47 U.S.C. § 252. The adopted agreement shall apply to the same states as the agreement that was adopted, and the term of the adopted agreement shall expire on the same date as set forth in the agreement that was adopted.

**12 Modification of Agreement**

12.1 If Express Phone changes its name or makes changes to its company structure or identity due to a merger, acquisition, transfer or any other reason, it is the responsibility of Express Phone to notify BellSouth of said change, request that an amendment to this Agreement, if necessary, be executed to reflect said change and notify the Commission of such modification of company structure in accordance with the state rules governing such modification in company structure if applicable. Additionally, Express Phone shall provide BellSouth with any necessary supporting documentation, which may include, but is not limited to, a credit application, Application for Master Account, proof of authority to provide telecommunications services, the appropriate Operating Company Number (OCN) for each state as assigned by National Exchange Carrier Association (NECA), Carrier Identification Code (CIC), Access Customer Name and Abbreviation (ACNA), BellSouth's blanket form letter of authority (LOA), Misdirected Number form and a tax exemption certificate.

12.2 No modification, amendment, supplement to, or waiver of the Agreement or any of its provisions shall be effective and binding upon the Parties unless it is made in writing and duly signed by the Parties.

12.3 In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of Express

Phone or BellSouth to perform any material terms of this Agreement, Express Phone or BellSouth may, on thirty (30) days' written notice, require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within forty-five (45) days after such notice, and either Party elects to pursue resolution of such amendment such Party shall pursue the dispute resolution process set forth in Section 8 above.

**13 Legal Rights**

Execution of this Agreement by either Party does not confirm or imply that the executing Party agrees with any decision(s) issued pursuant to the Telecommunications Act of 1996 and the consequences of those decisions on specific language in this Agreement. Neither Party waives its rights to appeal or otherwise challenge any such decision(s) and each Party reserves all of its rights to pursue any and all legal and/or equitable remedies, including appeals of any such decision(s).

**14 Indivisibility**

Subject to Section 15 below, the Parties intend that this Agreement be indivisible and nonseverable, and each of the Parties acknowledges that it has assented to all of the covenants and promises in this Agreement as a single whole and that all of such covenants and promises, taken as a whole, constitute the essence of the contract. The Parties further acknowledge that this Agreement is intended to constitute a single transaction and that the obligations of the Parties under this Agreement are interdependent.

**15 Severability**

If any provision of this Agreement, or part thereof, shall be held invalid or unenforceable in any respect, the remainder of the Agreement or provision shall not be affected thereby, provided that the Parties shall negotiate in good faith to reformulate such invalid provision, or part thereof, or related provision, to reflect as closely as possible the original intent of the parties, consistent with applicable law, and to effectuate such portions thereof as may be valid without defeating the intent of such provision. In the event the Parties are unable to mutually negotiate such replacement language, either Party may elect to pursue the dispute resolution process set forth in Section 8 above.

**16 Non-Waivers**

A failure or delay of either Party to enforce any of the provisions hereof, to exercise any option which is herein provided, or to require performance of any of the provisions hereof shall in no way be construed to be a waiver of such provisions or options, and each Party, notwithstanding such failure, shall have the right thereafter to insist upon the performance of any and all of the provisions of this Agreement.

**17 Governing Law**



Where applicable, this Agreement shall be governed by and construed in accordance with federal and state substantive telecommunications law, including rules and regulations of the FCC and appropriate Commission. In all other respects, this Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Georgia without regard to its conflict of laws principles.

**18 Assignments and Transfers**

18.1 Any assignment by either Party to any entity of any right, obligation or duty, or of any other interest hereunder, in whole or in part, without the prior written consent of the other Party shall be void. The assignee must provide evidence of a Commission approved certification to provide Telecommunications Service in each state that Express Phone is entitled to provide Telecommunications Service. After BellSouth's consent, the Parties shall amend this Agreement to reflect such assignments and shall work cooperatively to implement any changes required due to such assignment. All obligations and duties of any Party under this Agreement shall be binding on all successors in interest and assigns of such Party. No assignment or delegation hereof shall relieve the assignor of its obligations under this Agreement in the event that the assignee fails to perform such obligations. Notwithstanding anything to the contrary in this Section, Express Phone shall not be permitted to assign this Agreement in whole or in part to any entity unless either (1) Express Phone pays all bills, past due and current, under this Agreement, or (2) Express Phone's assignee expressly assumes liability for payment of such bills.

18.2 In the event that Express Phone desires to transfer any services hereunder to another provider of Telecommunications Service, or Express Phone desires to assume hereunder any services provisioned by BellSouth to another provider of Telecommunications Service, such transfer of services shall be subject to separately negotiated rates, terms and conditions.

**19 Notices**

19.1 Every notice, consent or approval of a legal nature, required or permitted by this Agreement shall be in writing and shall be delivered either by hand, by overnight courier or by US mail postage prepaid, or email if an email address is listed below, addressed to:

**BellSouth Telecommunications, Inc.**

BellSouth Local Contract Manager  
600 North 19<sup>th</sup> Street, 10<sup>th</sup> floor  
Birmingham, AL 35203

and

ICS Attorney  
Suite 4300  
675 West Peachtree Street  
Atlanta, GA 30375

**Express Phone Service, Inc.**

Thomas M. Armstrong  
1020 N 9<sup>th</sup> Avenue  
Pensacola, FL 32501  
tom@dei.gccoxmail.com

or at such other address as the intended recipient previously shall have designated by written notice to the other Party.

19.2 Unless otherwise provided in this Agreement, notice by mail shall be effective on the date it is officially recorded as delivered by return receipt or equivalent, and in the absence of such record of delivery, it shall be presumed to have been delivered the fifth day, or next business day after the fifth day, after it was deposited in the mails.

19.3 Notwithstanding the above, BellSouth will post to BellSouth's Interconnection Web site changes to business processes and policies and shall post to BellSouth's Interconnection Web site or submit through applicable electronic systems, other service and business related notices not requiring an amendment to this Agreement.

**20 Rule of Construction**

No rule of construction requiring interpretation against the drafting Party hereof shall apply in the interpretation of this Agreement.

**21 Headings of No Force or Effect**

The headings of Articles and Sections of this Agreement are for convenience of reference only, and shall in no way define, modify or restrict the meaning or interpretation of the terms or provisions of this Agreement.

**22 Multiple Counterparts**

This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which shall together constitute but one and the same document.

**23 Filing of Agreement**

This Agreement, and any amendments hereto, shall be filed with the appropriate state regulatory agency pursuant to the requirements of Section 252 of the Act, or as otherwise required by the state and the Parties shall share equally in any applicable fees. Notwithstanding the foregoing, this Agreement shall not be submitted for approval by the appropriate state regulatory agency unless and until

such time as Express Phone is duly certified as a local exchange carrier in such state, except as otherwise required by a Commission.

**24 Compliance with Law**

The Parties have negotiated their respective rights and obligations pursuant to substantive Federal and State Telecommunications law and this Agreement is intended to memorialize the Parties' mutual agreement with respect to each Party's rights and obligations under the Act and applicable FCC and Commission orders, rules and regulations. Nothing contained herein, nor any reference to applicable rules and orders, is intended to expand on the Parties' rights and obligations as set forth herein. To the extent the provisions of this Agreement differ from the provisions of any Federal or State Telecommunications statute, rule or order in effect as of the execution of this Agreement, this Agreement shall control. Each Party shall comply at its own expense with all other laws of general applicability.

**25 Necessary Approvals**

Each Party shall be responsible for obtaining and keeping in effect all approvals from, and rights granted by, governmental authorities, building and property owners, other carriers, and any other persons that may be required in connection with the performance of its obligations under this Agreement. Each Party shall reasonably cooperate with the other Party in obtaining and maintaining any required approvals and rights for which such Party is responsible.

**26 Good Faith Performance**

Each Party shall act in good faith in its performance under this Agreement and, in each case in which a Party's consent or agreement is required or requested hereunder, such Party shall not unreasonably withhold or delay such consent or agreement.

**27. Rates**

**27.1** Express Phone shall pay the charges set forth in this Agreement. In the event that BellSouth is unable to bill the applicable rate or no rate is established or included in this Agreement for any services provided pursuant to this Agreement, BellSouth reserves the right to back bill Express Phone for such rate or for the difference between the rate actually billed and the rate that should have been billed pursuant to this Agreement; provided, however, that subject to Express Phone's agreement to the limitation regarding billing disputes as described in Section 2.2 of Attachment 3 hereof, BellSouth shall not back bill any amounts for services rendered more than twelve (12) months prior to the date that the charges or additional charges for such services are actually billed. Notwithstanding the foregoing, both Parties recognize that situations may exist which could necessitate back billing beyond twelve (12) months. These exceptions are:

- Charges connected with jointly provided services whereby meet point billing guidelines require either Party to rely on records provided by a third party and such records have not been provided in a timely manner;

- Charges incorrectly billed due to erroneous information supplied by the non-billing Party.
  - Charges for which a regulatory body has granted the billing Party the authority to back bill beyond twelve (12) months.
- 27.2 To the extent a rate element is omitted or no rate is established, BellSouth has the right not to provision such service until the Agreement is amended to include such rate.
- 27.3 To the extent Express Phone requests services not included in this Agreement, such services shall be provisioned pursuant to the rates, terms and conditions set forth in the applicable tariffs or a separately negotiated Agreement, unless the Parties agree to amend this Agreement to include such service prospectively.
- 28 Rate True-Up**
- 28.1 This section applies to rates that are expressly subject to true-up.
- 28.2 The rates shall be trued-up, either up or down, based on final prices determined either by further agreement between the Parties, or by a final and effective order of the Commission. The Parties shall implement the true-up by comparing the actual volumes and demand for each item, together with the rates for each item, with the final prices determined for each item. Each Party shall keep its own records upon which the true-up can be based, and any final payment from one Party to the other shall be in an amount agreed upon by the Parties based on such records. In the event of any discrepancy between the records or disagreement between the Parties regarding the amount of such true-up, the dispute shall be subject to the dispute resolution process set forth in this Agreement.
- 28.3 A final and effective order of the Commission that forms the basis of a true-up shall be based upon cost studies submitted by either or both Parties to the Commission and shall be binding upon BellSouth and Express Phone specifically or upon all carriers generally, such as a generic cost proceeding.
- 29 Survival**
- The Parties' obligations under this Agreement which by their nature are intended to continue beyond the termination or expiration of this Agreement shall survive the termination or expiration of this Agreement.
- 30 Entire Agreement**
- 30.1 This Agreement means the General Terms and Conditions, the Attachments hereto and all documents identified therein, as such may be amended from time to time and which are incorporated herein by reference, all of which, when taken together, are intended to constitute one indivisible agreement. This Agreement sets forth the entire understanding and supersedes prior agreements between the Parties relating to the subject matter contained in this Agreement and merges all prior discussions

between them. Any orders placed under prior agreements between the Parties shall be governed by the terms of this Agreement and Express Phone acknowledges and agrees that any and all amounts and obligations owed for services provisioned or orders placed under prior agreements between the Parties, related to the subject matter hereof, shall, as of the Effective Date, be due and owing under this Agreement and be governed by the terms and conditions of this Agreement as if such services or orders were provisioned or placed under this Agreement. Neither Party shall be bound by any definition, condition, provision, representation, warranty, covenant or promise other than as expressly stated in this Agreement or as is contemporaneously or subsequently set forth in writing and executed by a duly authorized officer or representative of the Party to be bound thereby.

- 30.2 Any reference throughout this Agreement to a tariff, industry guideline, BellSouth's technical guideline or reference, BellSouth business rule, guide or other such document containing processes or specifications applicable to the services provided pursuant to this Agreement, shall be construed to refer to only those provisions thereof that are applicable to these services, and shall include any successor or replacement versions thereof, all as they are amended from time to time and all of which are incorporated herein by reference, and may be found at BellSouth's Interconnection Web site at: [www.interconnection.bellsouth.com](http://www.interconnection.bellsouth.com). References to state tariffs throughout this Agreement shall be to the tariff for the state in which the services were provisioned; provided, however, that in any state where certain BellSouth services or tariff provisions have been or become deregulated or detariffed, any reference in this Agreement to a detariffed or deregulated service or provision of such tariff shall be deemed to refer to the service description, price list or other agreement pursuant to which BellSouth provides such services as a result of detariffing or deregulation.

Resale Agreement  
General Terms and Conditions  
Signature Page

IN WITNESS WHEREOF, the Parties have executed this Agreement the day and year written below.

**BellSouth Telecommunications, Inc.**

**Express Phone Service, Inc.**

By: Kristen E. Shore

By: Thomas M. Armstrong

Name: Kristen E. Shore

Name: THOMAS M. ARMSTRONG

Title: Director

Title: PRESIDENT

Date: 8/23/06

Date: 8/23/06

## Exhibit C

STATE OF NEW YORK  
DEPARTMENT OF PUBLIC SERVICE

At a session of the Public Service  
Commission held in the City of  
Albany on February 27, 2007

COMMISSIONERS PRESENT:

Patricia L. Acampora, Chairwoman  
Maureen F. Harris  
Robert E. Curry, Jr.  
Cheryl A. Buley

CASE 06-C-1042 – Petition of Pac-West Telecomm, Inc. for a Declaratory Ruling  
Respecting Its Rights to Interconnection with Verizon New York  
Inc.

DECLARATORY RULING REGARDING PAC-WEST TELECOMM, INC.'S  
INTERCONNECTION RIGHTS WITH VERIZON NEW YORK INC.

(Issued and Effective March 5, 2007)

BY THE COMMISSION:

BACKGROUND

In a Petition for a Declaratory Ruling (Petition) filed on August 28, 2006,  
Pac-West Telecomm, Inc.<sup>1</sup> (Pac-West) requested that the Commission rule Pac-West  
may:

1) terminate its existing template interconnection agreement with Verizon New York  
Inc. (Verizon) and 2) adopt the Verizon/Cablevision Lightpath Interconnection  
Agreement or 3) interconnect pursuant to a generally available Verizon tariff.<sup>2</sup>

On September 21, 2005, Pac-West requested that Verizon permit opt-in to  
the following interconnection agreements: Cablevision Lightpath (Cablevision) (New

<sup>1</sup> Pac-West is authorized by the Commission to operate in New York State as a  
facilities-based provider and reseller of telecommunications services. Case 06-C-  
0196, *Joint Petition for Approval of Transfer of Certificate of Public Convenience  
and Necessity Held by PWT of New York, Inc. to Pac-West Telecomm, Inc.* (issued  
April 13, 2006).

<sup>2</sup> Verizon submitted a Response to the Petition on September 18, 2006 and Pac-West  
replied October 16, 2006.



CASE 06-C-1042

York), TelNet (Michigan), US LEC (Maryland), Broadwing (Texas), and AT&T (Verizon East and Verizon West). Verizon responded on September 22 that the US LEC, Cablevision, and Broadwing agreements were not available for adoption in the states specified and requested that Pac-West make another opt-in selection for those states. In addition, Verizon asked Pac-West "if...[it] would like to negotiate your own agreements in those states."<sup>3</sup> On October 25, 2005, Pac-West informed Verizon that it would opt-in to Verizon's template agreement in New York.<sup>4</sup> On November 22, 2005, Pac-West executed Verizon's template interconnection agreement, which provides for the agreement to continue for a 2-year term and not expire until November 21, 2007.<sup>5</sup> After the 2-year term, either Verizon or Pac-West can terminate the agreement upon notice.<sup>6</sup>

Subsequently, Pac-West informed Verizon on March 17, 2006, that it wanted to opt-in to the Cablevision agreement.<sup>7</sup> Verizon responded on March 29, 2006 that the Pac-West/Verizon template agreement "governs the relationship between the parties...[and] does not

---

<sup>3</sup> Exhibit B, Verizon Response.

<sup>4</sup> Exhibit C, Verizon Response.

<sup>5</sup> The Pac-West/Verizon Interconnection Agreement was deemed approved by the Commission on March 7, 2005.

<sup>6</sup> 2.1 This Agreement shall be effective as of the Effective Date and, unless cancelled or terminated earlier in accordance with the terms hereof, shall continue in effect until November 21, 2007 (the "Initial Term"). Thereafter, this Agreement shall continue in force and effect unless and until cancelled or terminated as provided in this Agreement.

2.2 Either [Pac-West] or Verizon may terminate this Agreement effective upon the expiration of the Initial Term or effective upon any date after expiration of the Initial Term by providing written notice of termination at least ninety (90) days in advance of the date of termination.

<sup>7</sup> Exhibit D, Verizon Response.

CASE 06-C-1042

provide for early termination.”<sup>8</sup> In addition, Verizon restated its position that the Cablevision agreement was not available for adoption. Pac-West replied on April 13, 2006 that §252(i) entitled it to terminate its existing agreement and adopt any other available agreement and maintained that the Cablevision agreement was available. As an alternative, Pac-West proposed an amendment to the template agreement that would incorporate terms regarding reciprocal compensation for virtual foreign exchange (VFX) traffic and optional extended local calling area traffic.<sup>9</sup> On May 30, 2006, Verizon informed Pac-West that it had no right to terminate its template interconnection agreement and also declined to amend the agreement as proposed by Pac-West.

#### PARTIES’ POSITIONS

Pac-West maintains that it has the right under §252(i) to opt-in to another interconnection agreement or take telecommunications services pursuant to a Verizon tariff, “[n]otwithstanding the fact that Pac-West signed the Verizon template agreement.”<sup>10</sup> Pac-West argues that because termination of an existing interconnection agreement is not included as one of the §252(i) restrictions set forth in 47 CFR §51.809, nothing in federal law expressly prohibits Pac-West’s intended course of action. Pac-West cites *Global NAPs, Inc. v. Verizon New England, Inc.*<sup>11</sup> as “the...one judicially crafted exception to the right of a CLEC to opt-in to an available interconnection agreement” but states the decision is inapplicable because Pac-West and Verizon did not engage in §252(b) arbitration. Pac-West also references a provision in the template agreement that it maintains evinces intent by the parties to allow termination of the agreement in order to exercise a 252(i) option:

---

<sup>8</sup> Exhibit E, Verizon Response.

<sup>9</sup> Exhibit F, Verizon Response.

<sup>10</sup> Petition at 6.

<sup>11</sup> 396 F.3d 16 (1<sup>st</sup> Cir. 2005).

46. Section 252(i) Obligations

To the extent required by applicable law, each party shall comply with Section 252(i) of the Act. To the extent that the exercise by [Pac-West] of any of its rights it may have under Section 252(i) results in the rearrangement of services by Verizon, [Pac-West] shall be solely liable for all costs associated therewith, as well as for any termination charges associated with the termination of existing Verizon services.

Pac-West contends that termination charges would not have been discussed in the template agreement had the parties not contemplated a right to take services pursuant to another agreement or tariff. In addition, Pac-West maintains that the “most favored nation” clause in the FCC’s 1996 *Local Competition Order*,<sup>12</sup> confers the right to opt-in to any interconnection agreement without requiring that the requesting carrier finish out the term of an existing agreement. Pac-West cites a 10<sup>th</sup> Circuit case, *US West v. Sprint*,<sup>13</sup> as emphasizing a CLEC’s right pursuant to §252(i) “to effectively amend its own interconnection agreement by taking advantage of more favorable provisions contained in other CLEC interconnection agreements.” Based on the premise that it is permitted to adopt another interconnection agreement during the term of its template agreement, Pac-West states that its choices for adoption are the Cablevision agreement as well as Verizon interconnection tariffs.

Verizon responds that the template agreement does not expire until November 22, 2007 and cannot be unilaterally terminated before that date. Moreover, Verizon asserts that allowing Pac-West to terminate a binding interconnection agreement in order to opt-in to a replacement agreement, would undermine the §252 statutory scheme of interconnection. If Pac-West were to prevail, Verizon contends that any CLEC dissatisfied with an existing interconnection agreement could replace it by opting-in to

---

<sup>12</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, 11 FCC Rcd 15499 para. 1316 (1996) (*Local Competition Order*).

<sup>13</sup> *US West Communications, Inc. v. Sprint Communications Company, LP*, 275 F.3d 1241 (10<sup>th</sup> Cir. 2002) (US West).

another agreement, bypassing state commission §252 determinations, and rendering the good faith negotiation requirements of §252 a nullity.

Verizon maintains that the *Global NAPs* decision directly applies to Pac-West's proposal to terminate its template agreement and opt-in to a replacement agreement, despite Pac-West's assertion to the contrary. Verizon states the conclusion reached by the Court in *Global NAPs* that state commission §252 decisions were binding on parties to an arbitration and could not be voided by opting-in to a replacement agreement, arose from the context of a Massachusetts Department of Transportation and Energy (DTE) matter in which the DTE rejected an argument similar to Pac-West's in this proceeding, i.e., that a Verizon/Global NAPs interconnection agreement provision referencing §252(i) authorized voiding an arbitrated agreement by opting-in to an existing interconnection agreement.<sup>14</sup> The Massachusetts DTE rejected that argument as a basis for authorizing the unilateral termination of an existing contract.<sup>15</sup>

---

<sup>14</sup> The referenced provisions in the GNAPs/ Verizon agreement, which are almost identical to those in the template agreement cited by Pac-West for the same proposition, stated:

“[t]o the extent required by Applicable Law, each Party shall comply with Section 252(i) of the Act....” Section 46.1

“To the extent that the exercise by GNAPs of any rights it may have under Section 252(i)...results in the rearrangement of Services by Verizon, GNAPs shall be solely liable for all costs associated therewith, as well as for any termination charges associated with the termination of existing Verizon Services.” Section 46.2

<sup>15</sup> *Petition of Global NAPs, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Interconnection Agreement with Verizon New England, Inc. d/b/a Verizon Massachusetts, f/k/a/ New England Telephone & Telegraph Co. d/b/a Bell Atlantic-Massachusetts*, Commonwealth of Massachusetts Department of Telecommunications and Energy, D.T.E. 02-45, Order on Verizon New England, Inc. d/b/a Verizon Massachusetts' Motion for Approval of Final Arbitration Agreement or, in the Alternative, for Clarification (February 19, 2003) at 11-12.

In response to Pac-West's interpretation that the "most favored nation" clause in the FCC's 1996 *Local Competition Order*,<sup>16</sup> confers the right to opt-in to any interconnection agreement without requiring that the requesting carrier finish out the term of an existing agreement, Verizon states that while at one time the *Local Competition Order* pick-and-choose rule allowed a CLEC to amend an interconnection agreement by adopting individual terms from another interconnection agreement, this approach was superseded in the FCC's *All-or-Nothing Order*.<sup>17</sup> Verizon further asserts that termination of an existing agreement and replacement with another interconnection agreement is not even addressed, let alone conferred as a right, by the *All-or-Nothing Order*. In addition, Verizon maintains that the *US West* 10<sup>th</sup> Circuit decision cited by Pac-West as confirmation of a CLEC's §252(i) right to take advantage of more favorable provisions contained in other CLEC interconnection agreements, simply clarified that under the pick-and-choose rule, a CLEC could amend an existing interconnection agreement with additional provisions. Verizon characterizes Pac-West's argument that it is entitled to terminate its current interconnection agreement by adopting another with more favorable terms as tantamount to assertion of unconditional 252(i) rights, despite regulatory and judicial interpretations that 252(i) does not confer unrestricted rights.

Further, Verizon maintains that there is no support for Pac-West's allegations of discriminatory and anti-competitive behavior: Pac-West freely chose to adopt the template agreement rather than pursue a Commission ruling regarding its right to opt-in to a specific agreement and Pac-West did not attempt to negotiate changes in the template agreement. Finally, Verizon states that the Cablevision agreement is not available for adoption.

In reply, Pac-West maintains that the template agreement is subordinate to its §252(i) rights to adopt an available interconnection agreement and that because there

---

<sup>16</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, 11 FCC Rcd 15499 para. 1316 (1996) (*Local Competition Order*).

<sup>17</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-358, Second Report and Order, FCC 04-164 (rel. July 13, 2004) (*All-or-Nothing Order*).

was no binding arbitration order issued in this matter, the *Global NAPs* decision is inapplicable. In addition, Pac-West maintains that *US West* allows amendment of its existing interconnection agreement by opting-in to other CLEC agreements. Pac-West responds to Verizon's argument that the FCC's 2004 *All-or-Nothing Order*,<sup>18</sup> supplanted the prior pick-and-choose process of amending an existing agreement by incorporating individual terms from interconnection agreement by stating that the only change made by the *All-or-Nothing Order* was eliminating adoption of individual provisions. Pac-West also argues Verizon's characterization of Pac-West as freely executing the template agreement is inaccurate based on Pac-West's decision that it had no other choice if it wanted to avoid delay and expense in entering the New York market.

#### DISCUSSION AND CONCLUSION

Pac-West has an executed interconnection agreement with Verizon which does not expire until November 21, 2007.<sup>19</sup> Pac-West began the process that led to this agreement by deciding to forego negotiation or arbitration and instead requesting §252(i) opt-in to a specific agreement, the Cablevision interconnection agreement. Verizon is required pursuant to §252(i) "to make available any interconnection, service, or network element provided under an agreement...to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." However, an ILEC's §252(i) obligation is limited by regulation<sup>20</sup> and the ILEC may challenge an opt-in request.

Verizon did challenge Pac-West's request by stating that the Cablevision agreement was not available in New York and Verizon, therefore, requested that Pac-West make another opt-in selection. Rather than seeking a determination regarding the

---

<sup>18</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-358, Second Report and Order, FCC 04-164 (rel. July 13, 2004) (*All-or-Nothing Order*).

<sup>19</sup> After November 21, 2007, either party may give written notice that it wishes not to continue the agreement .

<sup>20</sup> 47 CFR §51.809.

appropriateness of Verizon's challenge, Pac-West decided to opt-in to a different interconnection agreement, Verizon's template agreement. Ten days after the Pac-West/Verizon agreement was approved by the Commission, and well before the 2-year term expired, Pac-West notified Verizon that it wanted to opt-in to the Cablevision agreement. Verizon informed Pac-West that their template agreement now governed the parties' relationship, did not provide for early termination, and in any event, the Cablevision agreement was not available for adoption. Subsequent discussions between Pac-West and Verizon did not result in a change of position by either party.

Pac-West claims that despite the clearly expressed termination provisions in the template agreement, unilateral termination is authorized whenever a §252(i) option is exercised. As support for that contention, Pac-West maintains that applicable law, as interpreted by the FCC and courts, authorizes termination as a consequence of exercising a paramount opt-in right. Verizon argues that current law does not supersede contractual obligations.

Section 252 provides three methods for a CLEC and an ILEC to reach the interconnection agreement in which ILEC telecommunication services are provided: negotiation (§252[a]); arbitration (§252[b]); and adoption (§252[i]). At issue is the §252(i) adoption process.

In August 1996, the FCC first interpreted §252(i) and decided that a pick-and-choose rule allowing a CLEC to adopt individual provisions from any state commission approved interconnection agreement to which the ILEC was a party would prevent discrimination.<sup>21</sup> After concluding §252(i) supported an interpretation allowing access to individual provisions in an interconnection agreement, the FCC determined that because §252(i) conferred a statutory right, "most favored nation" clauses in interconnection agreements were not required to enable a requesting carrier to avail itself of terms and conditions subsequently negotiated by another carrier.<sup>22</sup> The FCC then

---

<sup>21</sup> In re Implementation of the Local Competition Provisions in the Telecommunication Act of 1996, *First Report and Order*, 11 FCC Rcd 15499 (1996)(Local Competition Order).

<sup>22</sup> *I.d.* ¶1316.

went on to restrict use of the pick-and-choose rule as to cost, technical feasibility, and time.<sup>23</sup> In practice, CLECs were able to bypass the negotiation or arbitration process and adopt an existing interconnection agreement *in toto* or, because individual provisions were available for selection, amend an existing agreement.

In 2003, the FCC decided to revisit the pick-and-choose rule.<sup>24</sup> On July 13, 2004, the FCC adopted an all-or-nothing rule which required a CLEC to adopt an existing interconnection agreement in its entirety.<sup>25</sup> The FCC concluded that the pick-and-choose rule had not promoted negotiated interconnection agreements and ILECs seldom made significant concessions in negotiations in order to guard against opt-in by CLECs who could obtain the same bargained for concessions without making any trade-offs.<sup>26</sup> Both the *All-or-Nothing Order* and pick-and-choose rule portions of the *Local Competition Order* are silent regarding a CLEC's right to terminate an existing and approved interconnection agreement pursuant to a §252(i) adoption.

However, recent judicial interpretations of §252(i) have discussed the limits of adoption. In *Global NAPs*, the Court considered whether the Massachusetts Department of Telecommunications and Energy (DTE) violated §252(i) by precluding Global NAPs, a CLEC, from nullifying its arbitrated interconnection agreement with Verizon in order to opt-in to an existing Verizon/Sprint agreement. Global NAPs argued, as does Pac-West, that the effect of §252(i) overrides any existing obligation. The Court rejected this argument, stating that “§252(i) says nothing of the sort. Rather, it is written in terms of an obligation on the part of ILECs to make agreements available to potential

---

<sup>23</sup> 47 CFR §51.809.

<sup>24</sup> In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 (2003).

<sup>25</sup> In re Review of the Section 252 Unbundling Obligations of Incumbent Local Exchange Carriers, *Second Report and Order*, 19 F.C.C.R. 13494 (2004) (All-or-Nothing Rule).

<sup>26</sup> *All-or-Nothing Order*, ¶13.



CLECs, not as an unconditional right on the part of CLECs to modify their clear obligations... ”<sup>27</sup>

The *Global NAPs* decision<sup>28</sup> not only refutes Pac-West’s contention that it has an unconditional right to opt-in to another agreement but also that §252(i) authorizes voiding a contract. The *Global NAPs* decision arose from the context of a Massachusetts Department of Transportation and Energy (DTE) matter in which the DTE rejected the argument that §252(i) conferred “the right to void an existing binding contract and enter into a new, and more favorable contract, at any point.”<sup>29</sup> Global NAPs’ argument was based on a provision in its agreement with Verizon that is almost identical to the “252(i) Obligations” section in Pac-West/Verizon template agreement.<sup>30</sup> The Massachusetts DTE determined that provision did not authorize

unilateral termination of an existing contract:

GNAPs would have us conclude that it has the right to void an existing binding contract and enter into a new, more favorable contract, at any point. Such a conclusion is at odds with the definition of a contract. A contract binds both parties - - - a contract that permits

---

<sup>27</sup> *Global Naps* at 25.

<sup>28</sup> In *Bellsouth Telecommunications, Inc. v. Southeast Telephone, Inc.*, 462 F. 3d 650, 659 (6<sup>th</sup> Circuit 2006), the Court cited the *Global NAPs* conclusion refuting that “the opt-in right conferred by the Act and the regulation was unconditional and automatic.”

<sup>29</sup> D.T.E. 02-45, *Order on Verizon New England, Inc. d/b/a Verizon Massachusetts’ Motion for Approval of Final Arbitration Agreement or, in the alternative, for Clarification*, 11(February 19, 2003).

<sup>30</sup> The referenced provisions in the GNAPs/ Verizon agreement stated:  
“[t]o the extent required by Applicable Law, each Party shall comply with Section 252(i) or the Act....” Section 46.1  
“To the extent that the exercise by GNAPs of any rights it may have under Section 252(i)...results in the rearrangement of Services by Verizon, GNAPs shall be solely liable for all costs associated therewith, as well as for any termination charges associated with the termination of existing Verizon Services.” Section 46.2

one party absolute discretion to void the contract and to enter into another contract of its choosing is no contract at all. Under GNAPs interpretation of §252(i) of the Act and §46.1 of the arbitrated agreement, nothing prevents GNAPs from voiding and adopting a more favorable contract, and from doing so repeatedly as soon as it discovers a more favorable agreement to adopt.<sup>31</sup>

The *US West Communications* case cited by Pac-West as allowing a CLEC to amend an interconnection agreement by opting-in to another agreement concerned a tariff opt-in provision. Previously, the district court had concluded that the tariff opt-in “violated §§ 251 and 252 because...it had the potential to negatively impact the negotiation of interconnection agreements.”<sup>32</sup> The 10<sup>th</sup> Circuit Court of Appeals determined, however, that the district court’s concerns were unfounded because the parties remained bound by their interconnection agreement and the opt-in provision at issue did not eliminate the agreement. This decision is consistent with the Court’s concern in *Global NAPs* about honoring the binding effect of prior agreements. Unlike the situation presented in *US West* in which the tariff opt-in did not eliminate the existing agreement, sections in the Cablevision agreement, which Pac-West seeks to adopt, would displace the existing template agreement’s provisions related to VFX traffic. Currently, sections 7.2.1 and 7.2.9 of the template agreement exclude VFX traffic from reciprocal compensation. The Cablevision agreement, Pac-West’s opt-in choice, does not exclude VFX traffic from reciprocal compensation.

Based on the provisions in the current interconnection agreement between Pac-West and Verizon, unilateral early termination is not authorized. In addition, §252(i)

---

<sup>31</sup> *Petition of Global NAPs, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Interconnection Agreement with Verizon New England, Inc. d/b/a Verizon Massachusetts, f/k/a/ New England Telephone & Telegraph Co. d/b/a Bell Atlantic-Massachusetts, Commonwealth of Massachusetts Department of Telecommunications and Energy, D.T.E. 02-45, Order on Verizon New England, Inc. d/b/a Verizon Massachusetts’ Motion for Approval of Final Arbitration Agreement or, in the Alternative, for Clarification (February 19, 2003) at 11-12.*

<sup>32</sup> *US West v. Sprint* at 1250.

does not confer an unconditional right<sup>33</sup> to opt-in to an existing agreement or authorize unilateral termination of an existing interconnection agreement. Moreover, there is no support for voiding Pac-West's template agreement, despite its contention that there were no feasible alternatives. It is not necessary at this time to determine if the Cablevision agreement is available for adoption because there is no basis for authorizing early termination of Pac-West's interconnection agreement with Verizon.<sup>34</sup>

The Commission finds and declares:

1. Pac-West is not authorized to terminate its current template interconnection agreement with Verizon.
2. This proceeding is closed.

By the Commission

(SIGNED)

JACLYN A. BRILLING  
Secretary

---

<sup>33</sup> A CLEC's ability to pick and choose provisions from existing agreements was restricted from the FCC's first interpretation of §252(i) in the *Local Competition Order, i.e.*, ILEC's were required to make provisions available only for a reasonable period of time and could avoid the rule based on technical nonfeasibility or greater cost. *47 C.F.R. §51.809.*

<sup>34</sup> We do not decide the relationship between termination and opt-in provisions in the context of an opt-in request involving an agreement approved subsequent to the agreement that is being terminated or superseded.