Diamond Williams

110087-TP

From: WOODS, VICKIE (Legal) [vf1979@att.com]
Sent: Tuesday, April 19, 2011 4:30 PM
To: Filings@psc.state.fl.us
Subject: 110087-TP AT&T Florida's Response and Objections to Express Phone Service, Inc.'s Motion for Final Summary Order
Importance: High
Attachments: Document.pdf

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B. Docket No.: 110087-TP: Notice of the Adoption of existing interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunications, Inc. d/b/a AT& T Florida d/b/a AT&T Southeast and Image Access, Inc. d/b/a New Phone, Inc. by Express Phone Service, Inc.

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

on behalf of Manuel A. Gurdian

D. 28 pages total (includes letter, certificate of service and pleading)

E. BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Response and Objections to Express Phone Service, Inc.'s Motion for Final Summary Order

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at&t

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April 19, 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. 110087-TP: Notice of the Adoption of existing interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunications, Inc. d/b/a AT& T Florida d/b/a AT&T Southeast and Image Access, Inc. d/b/a New Phone, Inc. by Express Phone Service, Inc.

Dear Ms. Cole:

Enclosed is BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Response and Objections to Express Phone Service, Inc.'s Motion for Final Summary Order, 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. 110087-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 19th day of April, 2011 to the following:

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Manuel A. Gurdian

908733

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Notice of the Adoption of existing interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunications, Inc. d/b/a AT& T Florida d/b/a AT&T Southeast and Image Access, Inc. d/b/a New Phone, Inc. by Express Phone Service, Inc.	)	Docket No. 110087-TP
	)	Filed: April 19, 2011

AT&T FLORIDA'S RESPONSE AND OBJECTIONS TO
EXPRESS PHONE SERVICE, INC.'S MOTION FOR FINAL SUMMARY ORDER

BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T Florida") respectfully submits its Response and Objections to Express Phone Service, Inc.'s *Motion for Summary Final Order* ("Motion"), which was filed with the Florida Public Service Commission ("Commission") on April 12, 2011. In its Motion, Express Phone Service, Inc. ("Express Phone") requests that the Commission enter a summary order finding (1) that Express Phone's unilateral and contested "adoption" of the AT&T Florida/Image Access interconnection agreement ("Image Access ICA" or the "new agreement") is valid and was effective October 20, 2010, and (2) that AT&T Florida is required to reinstate service to Express Phone (a matter that is the subject of Docket No. 110071-TP). Motion, p.1 and p. 2 fn.1.

For the reasons explained below, Express Phone is not entitled to the relief that it seeks, or to any relief whatsoever, and the Commission should enter an Order denying the Motion.

I. BACKGROUND

Express Phone and AT&T Florida (collectively, "the parties") are parties to a Commission-approved Resale Agreement[1] that remains in effect until at least November 2, 2011 (the "Agreement" or the "existing Agreement").[2] That Commission-approved Agreement requires Express Phone, among other things, to pay *all* amounts it is billed, even if it disputes those amounts:

- Payment of ***all*** charges will be the responsibility of Express Phone.[3]
- Express Phone shall make payment to [AT&T Florida] for all services billed ***including disputed amounts***.[4]
- Payment for services provided by [AT&T Florida], ***including disputed charges***, is due on or before the next bill date.[5]

AT&T Florida rendered service to Express Phone pursuant to that Agreement beginning in 2006. At some point, however, despite the clear and unequivocal terms of the Agreement, Express Phone stopped remitting payment for "all services provided, including disputed charges" and began improperly withholding amounts it claims are in dispute. Express Phone consistently

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[1] AT&T Florida, for the purposes of this Response, sometimes uses the terms "interconnection agreement" and "resale agreement" interchangeably.

[2] Motion, pp 1-2. See *See* Docket No. 060714-TP, *In re: Request for approval of resale agreement, between BellSouth Telecommunications, Inc. and Express Phone Service, Inc.* The Agreement itself may be found at http://www.psc.state.fl.us/library/FILINGS/06/10149-06/10149-06.PDF . Per its terms, the Agreement became effective in November 2006, and the "initial term of this Agreement shall be five (5) years, beginning on the Effective Date . . . " Agreement, General Terms and Conditions, at pp. 1 and 3.

[3] Agreement, at Attachment 3, p. 6, § 1.4.

[4] *Id.*

[5] *Id.* at § 1.4.1

refused AT&T Florida's repeated demands that Express Phone comply with the terms of the Agreement.[6]

Despite an exchange of correspondence in which AT&T Florida notified Express Phone that the existence of so-called "billing disputes" did not excuse non-payment and that Express Phone was in substantial breach of the Agreement, Express Phone refused to pay. Subsequently, in an admitted effort to evade its clear obligations under the Agreement to pay all amounts billed by AT&T Florida, Express Phone sent AT&T Florida correspondence in which it claimed that it wanted to adopt an interconnection agreement between "Southwestern Bell Texas ("AT&T") and Image Access, Inc. d/b/a NewPhone, Inc." Motion, p.2 (underscoring in original document).[7] Setting aside the fact that there is apparently no such agreement in Florida between Southwestern Bell Texas and Image Access, Inc., into which Express Phone could "opt," AT&T Florida replied that it would be willing voluntarily to accede to an adoption request once Express Phone, among other things, cured its substantial breach of its existing Agreement.[8] Express Phone refused to cure its breach, and on March 30, 2011, AT&T Florida terminated service to Express Phone for its failure to pay for the services rendered.

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[6] Express Phone euphemistically, though irrelevantly, refers to its admitted breach of the Agreement by failing to pay all amounts, even charges that it feels that it should not pay, as a "billing dispute." See Amended Notice of Adoption, filed in Docket No. 110087-TP on April 4, 2011, at p.3, fn. 5: "The [billing] dispute is moot under the adoption of the [Image Access] ICA."

[7] The result that Express Phone really wants is tellingly revealed at pages 17-18 of the Motion. It wants the Commission to rule that service—which AT&T Florida rendered under the existing Agreement and terminated for failure to pay pursuant to that Agreement—should not only be reinstated, but should also be made subject to the terms that are much different than the terms to which Express Phone agreed and that this Commission approved. The Commission should not condone this shell-game.

[8] There is a Commission-approved resale agreement in Florida between AT&T Florida and Image Access, Inc. d/b/a NewPhone, Inc., and it is that agreement to which AT&T Florida referred to in its November 2010 and March 2011 correspondence (see below) when it voluntarily offered to permit Express Phone to adopt it, conditioned as mentioned in the correspondence. AT&T Florida, however, will not voluntarily allow Express Phone to adopt a Texas agreement in Florida and, as explained below, Express Phone has no right to port an interconnection agreement from another state into Florida.

II. EXPRESS PHONE IS NOT ENTITLED TO A SUMMARY FINAL ORDER.

Express Phone is requesting that the contested adoption be summarily approved and the docket closed. However, Express Phone has failed to meet the standards for a Motion for Summary Final Order. Even assuming, *arguendo*, that there are no disputed issues of material fact (which we not concede), as noted below, Express Phone's Motion fails as a matter of law.

A. Express Phone's Motion Does Not Meet the Legal Standard for a summary final order.

Rule 28-106.204(4), Florida Administrative Code, provides that "any party may move for summary final order whenever there is no genuine issue as to any material fact." Pursuant to Section 120.57(1)(h), Florida Statutes, a summary final order shall be rendered if it is determined from the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order.

As a preliminary matter, in considering motions for a summary final order, it is important to consider the procedural posture of the underlying matter. In Order No. PSC-00-2388-AS-WU, issued December 23, 2000, in *Re: Application for increase in water rates in Orange County by Wedgefield Utilities, Inc.*; Docket No. 991437-WU ("*Wedgefield Order*"), for example, the Commission explained that it was premature to consider a motion for summary final order before the parties had the opportunity to "complete discovery and file testimony." In the present instance, the matter is at a preliminary stage, and the parties have not completed discovery nor have they filed testimony. AT&T Florida has not waived its right to fully complete and perfect

the evidentiary record. For that reason alone, it is obvious that the drastic remedy of a final summary order is not appropriate.

Under Florida law, it is well established that a party moving for summary judgment must show conclusively the absence of any genuine issue of material fact, and the court must draw every possible inference in favor of the party against whom a summary judgment is sought. *Moore v. Moore*, 475 So. 2d 666, 668 (Fla. 1985). A summary judgment cannot be granted unless the facts are so crystallized that nothing remains but questions of law. *Id.*; *McCraney v. Barberi*, 677 So. 2d 355 (Fla. 1st DCA 1996). If the evidence permits different reasonable inferences, it should be submitted as a question of fact. *Id.* The burden is on the movant to demonstrate that the opposing party cannot prevail. *Christian v. Overstreet Paving Co.*, 679 So. 2d 839 (Fla. 2nd DCA (1996). If the record reflects the existence of any issue of material fact, or even raises the slightest doubt that an issue might exist, summary judgment is improper. *Id.*

This Commission, in handling requests for summary orders, has also recognized that policy considerations need to be taken into account. *See* Order No. PSC-98-1353-PCO-WS, issued November 20, 1998. There the Commission recognized that caution must be exercised in granting a summary judgment because it forecloses the litigant from the benefit of and right to a trial on the merits of his or her claim. *Id.*; *See also* Order No. PSC-01-0360-PAA-WS, issued on February 9, 2001.

Moreover, when considering whether it is appropriate to enter final summary orders, Florida administrative decisions show that such motions are rarely granted. *Wedgefield Order and* Consolidated Dockets Nos. 030867-TL, 030868-TL, 030869-TL, and 030961-TL ("Rate rebalancing dockets"), Order No. PSC -03-1469-FOF-TL. Again in the *Wedgefield* matter, the Commission recognized that:

> the granting of a summary judgment, in most instances, brings a sudden and drastic conclusion to a lawsuit, thus foreclosing the litigant from the benefit of and right to a trial on the merits of his or her claim. *Coastal Caribbean Corp. v. Rawlings,* 361 So.2d 719, 721 (Fla. 4th DCA 1978). It is for this very reason that caution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment must be observed. *Page v. Staley,* 226 So.2d 129, 132 (Fla. 4th DCA 1969); *McCraney v. Barberi,* 677 So.2d 355 (Fla. 1st DCA 1996) (finding that summary judgment should be cautiously granted). The procedural strictures are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim. They are not merely procedural niceties nor technicalities.[9]

The Commission denied a second request for summary final order in the *Wedgefield* matter, explaining that "[w]eighing the severity of the remedy sought in the summary final order against the diminutive avoided costs and delay available, we find that the better and more cautious course is to deny the summary final order." This Commission should likewise deny Express Phone's Motion—this matter remains at a preliminary stage, summary final orders are rarely granted, and granting Express Phone's Motion even if it met the legal standard (which it clearly does not) would fail to meet the policy objectives of avoiding costs and delay.[10]

B. Important Unresolved Genuine Issues of Material Fact Remain.

As is further discussed throughout this Response, all of the underlying substantive issues in this docket, necessarily involving genuine issues of material fact, remain unresolved, and therefore Express Phone's Motion should be denied.

For example, Express Phone stated in both its purported "Notice of Adoption" (which it sent to AT&T Florida on or about October 20, 2010, Exhibit 2 to the Motion) and in its

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[9] See Order No 01-1554-FOF-WU, issued July 27, 2001, in Docket No. 991437-WU, p. 8.

[10] Id. at p. 9.

purported "Amended Notice of Adoption" (which it sent to AT&T Florida on or about March 14, 2011, Exhibit 5 to the Motion), that it wished to adopt the "existing Interconnection Agreement ("ICA") between Southwestern Bell Texas ("AT&T") and Image Access, Inc. d/b/a NewPhone, Inc. in the state of Florida." (Underscoring in both original documents.) Express Phone now claims that identity of the "Southwestern Bell Texas ("AT&T") and Image Access, Inc. d/b/a NewPhone, Inc." agreement was a "scrivener's error" (Motion at p.2, fn. 2). It further apparently argues, in an effort to deflect attention from the fact that the precise agreement at issue was not correctly identified in its two "notices," that because AT&T referred to a Florida interconnection agreement in a response to Express Phone's notice,[11] the precise identity of the agreement that it wants to adopt is not an issue. That Express Phone is forced to use deductive reasoning to establish an "undisputed fact" defeats its claim that the fact is undisputed. Simply put, there is an ambiguity on the face of the documents presented by Express Phone[12] as to the intent or understanding of the parties, so summary judgment is inappropriate.

In an apparent effort to gloss over this issue, the existence of which alone defeats the Motion, Express Phone fails to include this "fact" in the statement of Undisputed Facts. Instead, it merely lists as a "fact" that it "faxed an Adoption Notice to AT&T stating that it adopted the existing interconnection agreement between AT&T and NewPhone." Motion, Undisputed Facts, No. 3.[13]

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[11] See footnote 7, above.

[12] From the documents presented in support of the Motion (as opposed to argument advanced in the Motion, which is not a "fact" when considering a motion for summary judgment), it is unclear the identity of exact agreement that Express Phone expressed a desire to adopt—is it the one that Express Phone states in the Motion that it really meant to adopt, or is it the one that it actually said (twice) that it wanted to adopt?

[13] Regardless, however, of what Express Phone says now, the fact is that *neither* the Southwestern Bell/Image Access agreement from Texas nor the AT&T Florida/Image Access agreement is adoptable as a matter of right, the latter for the reasons stated herein, and the former because (a) Express Phone has no right under section 252(i) to "port" an interconnection agreement between AT&T Florida's Texas ILEC affiliate and Image Access into Florida

Furthermore, Express Phone states, on its list of "Undisputed Facts" at No. 8, that "The NewPhone ICA is an interconnection agreement previously approved by this Commission; therefore, AT&T is required . . . to make the New Phone ICA available to Express Phone for adoption." This is a "fact" that is neither undisputed nor accurate. Although there is a New Phone resale agreement, it is not a "fact" that AT&T Florida is automatically required to provide it to Express Phone for adoption. As noted above, AT&T Florida disputes that the Agreement between "Southwestern Bell Texas" and Image Access is an agreement that has been approved by the Commission. Furthermore, just because an interconnection agreement has been approved by the Commission and one party files a notice with the Commission does not automatically mean, as a matter of fact, that the subject agreement is either available or appropriate for adoption, depending on the circumstances.

Third, AT&T Florida has not been given an opportunity to explore the facts as to how the exceptions to the "opt in" rule (which are embodied in the Code of Federal Regulations and various court and commission decisions) might come into play in this case. For example, if Express Phone is permitted to void its duty to remit payment for services undoubtedly rendered, is that cost to AT&T Florida a cost that is "greater that the costs of providing [the agreement] to the carrier that originally negotiated the agreement," as noted in 47 C.F.R. § 51.809 (b)(2)? That is a fact that AT&T is entitled to explore in discovery, and it therefore remains a disputed issue of material fact.

The existence of any one of these issues precludes the issuance of a summary final order in this case.

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and unilaterally make it an agreement binding on AT&T Florida, and (b) any "right" it may have had to "port" the agreement under the merger commitments AT&T Florida's parent company made to the Federal Communications Commission expired on June 29, 2010, well before any date relevant to the relief requested in this Motion.

III. EXPRESS PHONE IS NOT ENTITLED TO THE RELIEF THAT IT SEEKS.

Express Phone has asked the Commission to do a number of extraordinary things for it in this Docket, most of which have nothing to do with the Image Access ICA. It wants the Commission to retroactively relieve Express Phone of its obligation to pay for services that admittedly were rendered under the existing Agreement; to reform the existing Agreement on both a retroactive and prospective basis under the guise of "adoption" of another agreement; to require AT&T to reinstate service to Express Phone, despite the fact that Express Phone refuses to pay for services already rendered under the terms of the existing Agreement; and to retroactively and prospectively re-write and re-set Express Phone's duties and obligations under the existing Agreement. This the Commission cannot, and should not, do.

Express Phone claims that the "interpretation of the existing Agreement "is not at issue in this docket, but it is the subject of a complaint in Docket No. 110071-TP." Motion at p. 2, fn. 1. Express Phone is correct in one sense—no interpretation of the terms of the existing Agreement needs to be done, as its terms are crystal clear: Express Phone must pay **all** amounts, including "disputed" amounts, before the next bill date. (It did not do that, obviously.) Express Phone is incorrect, however, in asserting that the terms of the existing Agreement are not at issue in this Docket. The terms of the existing Agreement are inextricably intertwined with Express Phone's attempt to evade its legal duties by attempting to employ the artifice of adopting the Image Access ICA.[14] Express Phone cannot be permitted, under the guise of section 252(i), to avoid its accrued obligations.

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[14] Express Phone as much as admits the interrelatedness of the existing Agreement with the Motion and this Docket by requesting, *in this Docket*, that the Commission order AT&T Florida to reinstate the service that was terminated for non-payment of services rendered under the existing Agreement. See Motion, pp. 17-18. Express Phone is without a doubt, in this Docket, seeking an adjudication (actually, a retroactive re-writing) of the terms of the existing Agreement that is the subject of Docket No. 1100071-TP.

A. Express Phone cannot use an adoption request to avoid its debt to AT&T Florida under the parties' Agreement.

Express Phone asserts that its right to adopt another carrier's interconnection agreement is broad.[15] That right, however, is no broader than what is granted by section 252(i) of the federal Telecommunications Act of 1996,[16] which is incorporated by reference into the governing agreement.[17] To be sure, Section 252(i) *generally* permits a requesting carrier to obtain an interconnection agreement with an incumbent local exchange carrier, such as AT&T Florida, by adopting another carrier's agreement. But not always, not automatically, and certainly not without following a process.

Express Phone states that on two occasions, in October 2010 and in March 2011, it attempted to secure AT&T's "acknowledgement" of Express Phone's adoption of the interconnection agreement between "Southwestern Bell Texas ("AT&T") and Image Access, Inc."[18] Express Phone further asserts that AT&T refused to allow it to opt into a different interconnection agreement "by imposing conditions . . . which appear nowhere in section 252(i)

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15 Motion, p. 2.

16 Section 252(i) of the federal Act provides:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

17 See Agreement, General Terms and Conditions, section 11 (emphasis supplied):

> *Pursuant to 47 U.S.C. § 252(i) and 47 C.F.R. § 51.809*, [AT&T Florida] 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.

Contrary to Express Phone's position, this section of the Agreement is not an independent, or broader, expression of any adoption rights than exists under the statute.

18 Motion, pp. 2-3.

or its implementing regulations." Id. Stated more directly, Express Phone's position is that it should be permitted to obtain a new contract at its unilateral request, despite unquestionably being in breach of its obligations in its current Agreement.[19]

As explained below, however, Section 252(i) does not bestow upon Express Phone the unilateral right to abandon a Commission-approved agreement and adopt a different one in mid-stream. And even if that were not the case, it would be inconsistent with the public interest to allow Express Phone to opt into a new agreement without first curing its blatant breach of its existing agreement by paying all past due amounts (including disputed amounts as required by the clear and unambiguous provisions of the parties' Agreement).

1. Contrary to Express Phone's wishes, it is not allowed to unilaterally abandon a Commission-approved interconnection agreement in mid-stream.

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 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.

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[19] In Express Phone's words, " . . . AT&T should be required to reinstate service to Express Phone, which it terminated on March 29, 2010 due to a billing dispute [under the Agreement]. *The dispute is moot under the adoption of the [Image Access] ICA.*" Amended Adoption, p. 3, fn.5(emphasis supplied).

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), noted above,[20] 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.[21] 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

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[20] Express Phone takes issue with this Commission decision because it pre-dates the FCC's Second Report and Order, which adopted the current "All or Nothing" Rule. However, as the Commission knows, § 252(i) and the FCC's implementing rules have always been based on the pro-competitive nature of the federal Act. *See, e.g.*, the FCC's First Report and Order, ¶¶ 1296 *et seq*.

[21] *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).

into a different interconnection agreement, claiming that "unilateral termination is authorized whenever a §252(i) option is exercised."[22] 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."[23] 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."[24] 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.

This is not to say that AT&T Florida could not, *as a matter of voluntary negotiation and subject to certain conditions (such as payment of all amounts due under its existing Agreement)*, agree to let Express Phone adopt another agreement prior to the expiration of the existing Agreement, particularly where, as here, the existing agreement is nearing the end of its initial term. Indeed, that is what AT&T Florida has done. See Motion, Exhibits 4 and 6. Express Phone, however, rejected (in no uncertain terms) AT&T Florida's offer, which offer was understandably conditioned on Express Phone's curing its blatant breach of the existing Agreement. That leaves the unexpired status of the existing Agreement as a bar to Express Phone's purported "adoption."

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22 *Id.* at p. 8.

23 *Id.* at p. 10.

24 *Id.* at p. 11-12.

2. Even when adoptions are otherwise appropriate (and Express Phone's is not), they are subject to "public interest" scrutiny.

Contrary to Express Phone's assertions, "adoptions" of other carriers' interconnection agreements are not automatic. The 1996 Act and the FCC's implementing regulations do not permit telecommunications carriers to adopt interconnection agreements to avoid substantive federal legal and policy determinations, nor do they permit telecommunications carriers to adopt interconnection agreements solely to avoid their contractual obligations, as Express Phone is admittedly trying to do here. On the contrary, interconnection agreement adoptions are subject to public interest scrutiny. The Commission has previously held that it has "authority to reject [a requesting company]'s adoption of the [ILEC/CLEC] Agreement as not being consistent with the public interest," when—as is the case here--there has been "prior inappropriate conduct and actions of one of the parties."[25]

The Commission is not alone in applying a "public interest" standard in reviewing adoption requests for interconnection agreements. *See, e.g.*, Order Approving Negotiated Interconnection Agreement, *In the Matter of the Joint Application of Verizon Washington, DC, Inc. and Networks Plus, Inc. for approval of an Interconnection Agreement Under Section 252(e) of the Telecommunications Act of 1996,* Order No. 12296, FC No. TIA 01-13, available at 2002 WL 1009261 (D.C. P.S.C. January 11, 2002) (recognizing parties' acknowledgement that interconnection agreement adopted under section 252(i) "must be consistent with the public

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[25] *In re: Notice by BellSouth Telecommunications, Inc. of adoption of an approved interconnection, unbundling, and resale agreement between BellSouth Telecommunications, Inc. and AT&T Communications of the Southern States, Inc. by Healthcare Liability Management Corporations d/b/a Fibre Channel Networks, Inc. and Health Management Systems, Inc.*, Docket No. 990959-TP, Order No. PSC-99-1930-PAA-TP (Issued September 29, 1999). This decision, and the ones that follow in the text, put to rest Express Phone's argument, Motion at pp.7-8, that there are only two "exceptions" to Express Phone's newly-minted "automatic retroactive effectiveness" rule.

interest, convenience, and necessity"); *Re MCI Telecommunications Corporation,* Cause No. 41268-INT-03, available at 1998 WL 971880, at *2 (Ind. U.R.C. November 25, 1998) (reviewing an interconnection agreement submitted for adoption pursuant to section 252(i) and "find[ing] that the adoption is consistent with the public interest, convenience and necessity"); *Joint Petition of CTSI, LLC and Sprint Spectrum, L.P. et al. for Approval of a Negotiated Interconnection Agreement under Section 252(i) of the Telecommunications Act of 1996, by Means of Adoption of an Interconnection Agreement between CTSI, LLC and Cellco Partnership and Allentown SMSA Limited Partnership d/b/a Verizon Wireless,* Docket No. A-310513F7008, available at 2003 WL 22908789, at *2-*3 (Pa. P.U.C. October 2, 2003) (recognizing application of section 252(e)'s public interest test in considering requests for adoption under section 252(i); *Joint Petition of Verizon Pennsylvania, Inc. and Broadview NP Acquisition Corp d/b/a Broadview Net Plus for Approval of an Interconnection Agreement Under Sections 252 (i) of the Telecommunications Act of 1996, by Means of Adoption of an Interconnection Agreement Between Verizon Pennsylvania, Inc. and Level 3 Communications, LLC,* Docket No. A-311188F7000, available at 2003 WL 21916399, at *3 (Pa. P.U.C. July 10, 2003) (same); Order Rejecting Interconnection Agreement, Requiring Further Filing, *In the Matter of an Application for Approval of an Interconnection Agreement Adopted Under the Federal Telecommunications, Act of 1996, Section 252(i),* Docket No. P-407, 5654/M-98-1920, available at 1999 WL 33595189 (Minn. P.U.C. February 19, 1999) ("the Commission has consistently held that it may reject the adoption of previously-approved agreements and require modifications in the public interest"); Order Rejecting Interconnection Agreement, Requiring Further Filing, *In the Matter of the Request to Approve the Adoption Agreement of GTE Midwest and AT&T Communications Interconnection Agreement for Use Between GTE Midwest and OCI Communications,* Docket

No. p-407, 5478/M-98-511, available at 1998 WL 1305525 (Minn. P.U.C. June 9, 1998) ("The Commission does not read 47 U.S.C. § 252(i) to preclude the Commission from modifying the terms of previously-approved contracts in order to apply the insight and experience it has gained through the numerous interconnection proceedings. To hold otherwise would be poor public policy and would also render meaningless the Act's requirement that negotiated agreements, including §252(i) agreements, be submitted for state commission approval").

3. Permitting Express Phone to adopt the Image Access Agreement before it completes performance of its obligations under the existing Agreement would be inconsistent with the public interest and would pervert the intent of the Federal Act.

The purpose of section 252(i) of the Act is to prevent an ILEC from discriminating among competing carriers by requiring the incumbent to make its agreement with one carrier available to another. It is *not* the purpose of the statute, nor should the statute be construed, to allow a carrier to escape its payment obligations under an existing agreement. If the Commission were to permit Express Phone to opt into another agreement without first curing its contractual breach, it would allow Express Phone to engage in "inappropriate conduct and actions" with no consequences whatsoever, thus negating the express and unambiguous terms of the parties' Agreement. Here, where Express Phone seeks a new agreement primarily—or perhaps solely—to avoid its obligation to pay its significant past due balance that it owes AT&T Florida under the parties' existing Agreement, sound public policy precludes the adoption.

Put another way, even if Express Phone were eligible to adopt another carrier's agreement in this situation—which it isn't—it should nevertheless be required to satisfy its accrued obligations under the Existing Agreement prior to the new agreement's becoming effective. Thus, if as of December 1 Express Phone had consumed $1 million worth of services

under an existing agreement and opted on December 2 into a different agreement, under which the price of the same services would have been $1 instead of $1 million, Express Phone would still owe the $1 million. The terms of the opted-into agreement are not applied retrospectively to permit the adopter to "game the system" by magically re-characterizing accrued obligations. Here, Express Phone clearly owes what it owed under the existing Agreement, under the same terms and conditions contained in the existing Agreement, up to the date that it satisfies its obligations thereunder. AT&T is entitled to enforce the terms of the existing Agreement, including terminating service for non-payment. Sound pubic policy requires that the effectiveness of the purported adoption not take place unless and until Express Phone satisfies its existing obligations, obligations that are not magically extinguished by section 252(i).

Any notion that adoption requests are to be granted automatically as a matter of course is squarely at odds with the precedent cited above. Accordingly, the Commission should, in the public interest, reject Express Phone's attempt to evade its contractual obligations under its current Agreement that require Express Phone to pay for all services billed, including disputed amounts.[26]

B. The Commission is required to enforce the Agreement between Express Phone and AT&T Florida; it cannot nullify an approved, negotiated Agreement.

As noted above, the parties' Commission-approved Agreement requires Express Phone to pay all amounts it is billed, even if it disputes those amounts:

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[26] Express Phone claims (Motion at pp. 11-12) that it will be discriminated against in billing matters if it is not allowed to opt-in to the Image Access Agreement because it will not have the same terms and conditions as other CLECs. This is a red herring. As shown in Exhibit 3 to the Motion, the Image Access Agreement in Florida is dated April 19, 2006. Express Phone did not enter into its existing Agreement until August 23, 2006. Thus, the Image Access Agreement was already available to Express Phone at the time it entered into its binding Agreement, and it chose not to adopt the Image Access agreement then..

- Payment of ***all*** charges will be the responsibility of Express Phone.[27]
- Express Phone shall make payment to [AT&T Florida] for all services billed, ***including disputed amounts***.[28]
- Payment for services provided by [AT&T Florida], ***including disputed charges***, is due on or before the next bill date.[29]

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. 1st 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. 1st 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. 1st 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*

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27 Agreement, at Attachment 3, p. 6, § 1.4.

28 *Id.*

29 *Id.* at § 1.4.1.

Mut. Auto Ins. Co., 507 So.2d 617, 619 (Fla. 3d DCA 1987).[30] In short, the Commission cannot re-write the terms of the existing Agreement under the guise of approving an adoption of another one, at least as to services that were rendered and consumed under the existing Agreement.

Federal law is in agreement with Florida law. The parties' Agreement is not only a binding contract, it is 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 (6th Cir. 2003). 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 (6th 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, as this Commission has held, "**The 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*

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[30] 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. 4th 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.").

alternative, petition for arbitration of interconnection agreement, Docket No. 980155-TP; Order No. PSC-98-0466-FOF-TP (March 31, 1998)(emphasis supplied).

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).[31]

The language quoted above from Sections 1.4 and 1.4.1 of the billing section of parties' Agreement is unambiguous, and the Commission-approved Agreement is a "valid contract." The Commission, therefore, is required to enforce the Agreement as written, as it enforced an Agreement with identical language in Docket No. 100021-TP. Express Phone has, in essence, 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 Motion, in which Express Phone does nothing more than ask to be relieved of its contractual obligations.

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[31] Commissions in Kentucky, North Carolina and Alabama have all reached similar conclusions regarding ICA 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.

III. ANSWER

In answer to Express Phone's allegations presented in the "Case Background" section of the Motion, AT&T states:

1. On information and belief, AT&T Florida admits that Express Phone is a Florida Corporation holding a CLEC certificate.

2. AT&T Florida admits that it entered into a Resale Agreement with Express Phone in August, 2006, which agreement is on file with the Commission and became effective sometime in November, 2006,

3. AT&T Florida admits that the agreement contains a reference to certain provisions of federal law regarding adoptions of agreements of other carriers, but notes that the provision of the agreement and law speak for themselves.

4. AT&T Florida admits that Express Phone sent it a purported Notice of Adoption on or about October 20, 2010, states that the Notice of Adoption speaks for itself, and denies that the purported adoption was effective on that date, or any other.

5. AT&T Florida admits that a Resale Agreement exists between it and Image Access, Inc., d/b/a NewPhone, Inc., but states that the agreement and its amendments speak for themselves.

6. AT&T Florida denies that Express Phone has a right to "opt in" to the Image Access/Express Phone agreement in Florida. AT&T Florida admits that it informed Express Phone of its position on the matter.

7. AT&T Florida admits that Express Phone sent it a purported Amended Notice of Adoption on or about March 14, 2011, but that such Notice demanded an agreement entered into by Southwestern Bell Texas (an inaccurate representation of AT&T Texas's corporate name), and denies that the purported amended adoption took effect on that date or any other. AT&T Florida admits that it informed Express Phone of its position on the matter on or about March 25, 2011, and that there was a subsequent exchange of correspondence regarding the matter, all of which create a fact issue that is yet to be resolved. AT&T Florida admits that Express Phone has made filings with the Commission on this subject in this Docket and in Docket No. 110087-TP, all of which speak for themselves.

8. AT&T denies any factual allegations not specifically admitted, and denies the legal conclusions alleged by Express Phone, at pages 1-3 of its Motion.

Responding to the purported "Undisputed Facts" alleged by Express Phone at pages 5-6 of the Motion, AT&T Florida says:

1. AT&T Florida admits, on information and belief, the allegations contained in Paragraph 1.

2. AT&T Florida admits that the Resale Agreement entered into by the parties contains a reference to certain provisions of federal law regarding adoptions of agreements of other carriers, but notes that the provision of the agreement and law speak for themselves.

3. AT&T Florida admits that Express Phone faxed a document purporting to be an "Adoption Notice" to AT&T Florida on or about October 21, 2010, in which it purported to adopt the agreement between "Southwestern Bell Texas ("AT&T") and Image Access, Inc. d/b/a NewPhone, Inc.," and denies that the document effected an adoption of any agreement.

4. AT&T Florida admits that it responded to the purported Notice of Adoption on or about November 1, 2010, but denies that the stated objections to the Notice of Adoption were exhaustive.

5. AT&T admits that, on or about March 14, 2011, Express Phone again purported to notify AT&T Florida that Express Phone whished to adopt the agreement between "Southwestern Bell Texas ("AT&T") and Images Access, Inc d/b/a NewPhone, Inc.," asserts that the document speaks for itself, and denies that the document effected an adoption of any agreement.

6. AT&T Florida admits that it responded to the March 14, 2011 "notification," but denies that its stated objections were exhaustive.

7. AT&T admits that it takes the position that the attempted adoption of the Image Access ICA was ineffective.

8. AT&T Florida denies that the agreement entered into between "Southwestern Bell Texas ("AT&T") and Image Access, Inc. d/b/a NewPhone, Inc." has been approved by this Commission, and it denies that it is required to make such an agreement available to Express Phone for adoption under federal or state law.

9. AT&T Florida admits that Express Phone made a filing with the Commission on or about March 29, 2011, and states that the filing speaks for itself.

10. AT&T Florida admits that Express Phone made a filing with the Commission on or about April 4, 2011, and states that the filing speaks for itself.

11. AT&T Florida denies any allegations not specifically admitted above, and it denies that the purported adoption of any agreement by Express Phone on Florida is effective.

IV. AFFIRMATIVE DEFENSES

1. The Motion fails to state a cause of action for which relief can be granted.

2. Express Phone is not permitted to unilaterally opt out of a Commission-approved interconnection agreement during the term of that agreement.

3. Express Phone's adoption of another interconnection agreement in order to avoid payment to AT&T Florida for all amounts due under its current and effective interconnection agreement would not be in the public interest.

4. Express Phone's adoption of another interconnection agreement in order to avoid payment to AT&T Florida for all amounts due would not be consistent with the terms of the Parties' current and unexpired interconnection agreement.

5. Express Phone's adoption of another interconnection agreement in order to avoid payment to AT&T Florida for all amounts due under its current and effective interconnection agreement would not be consistent with Section 252(i).

6. One or more exceptions to the availability of other agreements for adoption by New Phone contained in 47 C.F.R. § 51.809 and relevant case law applies.

7. Express Phone's Amended Notice is barred by the doctrines of laches, estoppel, unclean hands, and waiver.

8. Express Phone's October 20, 2010 attempt to "opt into" the interconnection agreement between "Southwestern Bell Texas" and "Image Access Inc. d/b/a New Phone, Inc." is null and void, as Express Phone attempted to adopt an agreement not available in Florida.

9. Express Phone's October 20, 2010 attempt to "opt into" the interconnection agreement between "Southwestern Bell Texas" and "Image Access Inc. d/b/a New Phone, Inc."

is not a proper "adoption" under Section 252(i), as Express Phone attempted to adopt an agreement of which "BellSouth Telecommunications, Inc. d/b/a AT&T Florida" is not a party.

10. Express Phone's March 14, 2011 attempt to "opt into" the interconnection agreement between "Southwestern Bell Texas" and "Image Access Inc. d/b/a New Phone, Inc." is null and void, as Express Phone attempted to adopt an agreement not available in Florida.

11. Express Phone's March 14, 2011 attempt to "opt into" the interconnection agreement between "Southwestern Bell Texas" and "Image Access Inc. d/b/a New Phone, Inc." is not a proper "adoption" under Section 252(i), as Express Phone attempted to adopt an agreement of which "BellSouth Telecommunications, Inc. d/b/a AT&T Florida" is not a party.

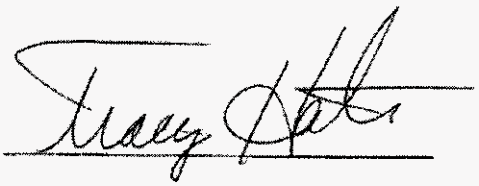
12. Express Phone may not "port" the "Southwestern Bell Telephone, LP d/b/a AT&T Texas" and "Image Access Inc. d/b/a New Phone, Inc." interconnection agreement from Texas to Florida.

IV. 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. Express Phone cannot unilaterally adopt a different agreement for the reasons discussed herein. AT&T Florida respectfully requests that the Commission deny Express Phone's Motion for Final Summary Order and conduct further proceedings in this matter, as necessary.

[Signature page follows.]

Respectfully submitted this 19th day of April, 2011.



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