

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Notice of 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 NewPhone, Inc. by Express Phone Service, Inc.

DOCKET NO. 110087-TP
ORDER NO. PSC-12-0208-PHO-TP
ISSUED: April 18, 2012

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code (F.A.C.), a Prehearing Conference was held on April 16, 2012, in Tallahassee, Florida, before Commissioner Eduardo E. Balbis, as Prehearing Officer.

APPEARANCES:

Vicki Gordon Kaufman, Esquire, 118 North Gadsden Street, Tallahassee FL 32301, and Mark Foster, Esquire, 707 Tenth Street Austin, Texas, 78701
On behalf of Express Phone Service (Express Phone).

Tracy Hatch and Suzanne L. Montgomery, Esquires, 150 South Monroe, Suite 400, Tallahassee FL 32301
On behalf of Bellsouth Telecommunications, LLC d/b/a AT&T Florida (AT&T Florida).

Lee Eng Tan, Esquire, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Florida Public Service Commission (Staff).

Mary Anne Helton, Deputy General Counsel, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
Advisor to the Florida Public Service Commission.

PREHEARING ORDER

I. CASE BACKGROUND

On March 29, 2011, Express Phone Service Inc. (Express Phone) filed a Notice of Adoption that it was adopting, in its entirety, the interconnection agreement (ICA) between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast (AT&T Florida) and Image Access, Inc. d/b/a NewPhone (New Phone ICA). On that same day, AT&T Florida filed a letter and non-consent to the adoption of the New Phone ICA.

On April 12, 2011, Express Phone filed a Motion for Summary Final Order. The Commission denied the Motion in Order No. PSC-11-0291-PAA-TP (PAA Order), issued July 6, 2011. On July 27, 2011, Express Phone protested the portions of the PAA Order which relate to

DOCUMENT NUMBER - DATE
02393 APR 18 2012
FPSC-COMMISSION CLERK

its adoption of the New Phone ICA and requested a formal proceeding. An Order Establishing Procedure, Order PSC-12-0031-PCO-TP, was issued on January 19, 2012 and modified in Order Nos. PSC-12-0058-PCO-TP and PSC-12-0130-PCO-TP, issued on February 10, 2012 and March 20, 2012 respectively.

II. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, F.A.C., this Prehearing Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

III. JURISDICTION

This Commission is vested with jurisdiction over the subject matter by the provisions of Chapter 364, Florida Statutes (F.S.). This hearing will be governed by said Chapter and Chapters 25-22, and 28-106, F.A.C., as well as any other applicable provisions of law.

IV. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

Information for which proprietary confidential business information status is requested pursuant to Section 119.07(1) F.S., and Rule 25-22.006, F.A.C., shall be treated by the Commission as confidential. The information shall be exempt from Section 119.07(1), F.S., pending a formal ruling on such request by the Commission or pending return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been made a part of the evidentiary record in this proceeding, it shall be returned to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of this proceeding, it shall be returned to the person providing the information within the time period set forth in Section 364.183, F.S.. The Commission may determine that continued possession of the information is necessary for the Commission to conduct its business.

It is the policy of this Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, F.S., to protect proprietary confidential business information from disclosure outside the proceeding. Therefore, any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, F.S., at the hearing shall adhere to the following:

- (1) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the court reporter, in red envelopes clearly marked with the nature of the contents and with the confidential information highlighted. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.

- (2) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise confidentiality. Therefore, confidential information should be presented by written exhibit when reasonably possible.

At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the court reporter shall be retained in the Office of Commission Clerk's confidential files. If such material is admitted into the evidentiary record at hearing and is not otherwise subject to a request for confidential classification filed with the Commission, the source of the information must file a request for confidential classification of the information within 21 days of the conclusion of the hearing, as set forth in Rule 25-22.006(8)(b), F.A.C., if continued confidentiality of the information is to be maintained.

V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties (and Staff) has been prefiled and will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to timely and appropriate objections. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Summaries of testimony shall be limited to ten minutes.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer. After all parties and Staff have had the opportunity to cross-examine the witness, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

The parties shall avoid duplicative or repetitious cross-examination. Further, friendly cross-examination will not be allowed. Cross-examination shall be limited to witnesses whose testimony is adverse to the party desiring to cross-examine. Any party conducting what appears to be a friendly cross-examination of a witness should be prepared to indicate why that witness's direct testimony is adverse to its interests.

VI. ORDER OF WITNESSES

Each witness whose name is preceded by a plus sign (+) will present direct and rebuttal testimony together.

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
<u>Direct and Rebuttal</u>		
+Thomas M. Armstrong	Express Phone	1-4
+Don J. Wood	Express Phone	1-4
+David J. Egan	AT&T Florida	2 and 3
+William E. Greenlaw	AT&T Florida	1, 2, 3 and 4

VII. BASIC POSITIONS

**EXPRESS
PHONE:**

On October 20, 2010, Express Phone sent notice to AT&T of its adoption of the NewPhone interconnection agreement (ICA); AT&T has refused to acknowledge this adoption. This case involves the straight-forward adoption of an ICA by Express Phone and AT&T's refusal to recognize that adoption.

Express Phone has, pursuant to the requirements of §252(i) and 47 CFR §51.809, adopted the NewPhone ICA, effective October 20, 2010. It made the proper notification of the adoption to AT&T. Despite this, AT&T has refused to recognize the adoption.

Section 47 U.S.C. §252(i) sets out the requirements for adoption of an ICA:

(i) Availability to Other Telecommunications Carriers.—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.

This federal statute requires AT&T to “make available *any* interconnection agreement” to “*any* other requesting telecommunications carrier.” While AT&T has attempted to contrive numerous additional restrictions on the federal adoption right – varying its roadblocks with each response to Express Phone – no restrictions on the timing of the adoption and no restrictions related to outstanding disputes appear in the law.

The Federal Communications Commission (FCC) has enacted a rule to implement the federal statute. 47 CFR §51.809 describes the only two instances where the adoption statute quoted above is inapplicable. Those are:

(1) The costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement or (2) The provision of a particular agreement to the requesting carrier is not technically feasible.

Neither of these exceptions has been raised by AT&T, nor could they have been, as they are inapplicable.

Instead, AT&T has claimed, at various times, different theories in support of its failure to follow the adoption requirements. AT&T has claimed that Express Phone's adoption was inappropriate because:

- Express Phone's adoption was too early because the window for negotiation of a new agreement had not opened;
- Express Phone's adoption was too late because the NewPhone ICA was in effect at the time Express Phone signed an ICA with AT&T;
- There are outstanding billing disputes between the parties;
- AT&T does not like the reason for Express Phone's adoption.

None of these "exceptions" appear in the law or may be applied to bar Express Phone's adoption of the NewPhone ICA.

As pointed out in Mr. Wood's testimony, the reason that underlies the adoption statute and rule is to prevent an incumbent, like AT&T, from discriminating as to its agreements with and among CLECs – just as AT&T has done in this case. When an ICA with more favorable terms is available, a CLEC is entitled to adopt it so as to prevent discrimination.

The FCC explained the purpose of the adoption requirement in its *Second Report and Order* (emphasis supplied):

We conclude that under an all-or-nothing rule, requesting carriers will be protected from discrimination, as intended by section 252(i). *Specifically, an incumbent LEC will not be able to reach a discriminatory agreement for interconnection, services, or network elements with a particular carrier without making that agreement in its entirety available to other requesting carriers.* If the agreement includes

terms that materially benefit the preferred carrier, other requesting carriers will likely have an incentive to adopt that agreement to gain the benefit of the incumbent LEC's discriminatory bargain. Because these agreements will be available on the same terms and conditions to requesting carriers, the all-or-nothing rule should effectively deter incumbent LECs from engaging in such discrimination.

Finally, the effective date of Express Phone's adoption is October 20, 2010. As this Commission has already ruled in the *Nextel Order*: "When an interconnection agreement is available for adoption under 47 C.F.R. 51.809(a), the adoption is considered presumptively valid and effective upon receipt of the notice by the adoption [sic] party." AT&T should not be able to profit from its unwarranted delay in recognizing Express Phone's valid adoption.

AT&T
FLORIDA:

Express Phone is not entitled to and should not be allowed to adopt the Interconnection Agreement between AT&T Florida and Image Access, Inc. d/b/a NewPhone Inc. (the "Image Access ICA")¹ under the circumstances underlying this case. Allowing Express Phone to adopt the Image Access ICA before Express Phone's existing ICA with AT&T Florida was subject to renewal or renegotiation would eviscerate Express Phone's contract with AT&T Florida and make every other interconnection agreement in which a CLEC decides it does not like its existing ICA simply voidable at the will of the CLEC. Moreover, allowing Express Phone to adopt a new agreement when it is undisputed that Express Phone is in breach of its existing agreement for failing to pay its bills in full when due would destroy any notion that ICAs are binding enforceable contracts. Express Phone's attempt to abrogate its ICA and "wipe the slate clean" with a new contract is not supported by law or good public policy and is clearly against the public interest. Such an unreasonable result should not be countenanced by the Commission. Express Phone's improper attempt to adopt the Image Access ICA should be rejected.

STAFF:

Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions stated herein.

¹ Issues 2, 3, and 4 refer to this contract as the "New Phone Interconnection Agreement." AT&T Florida uses the term "Image Access ICA" here for consistency with the Direct and Rebuttal Testimony of William Greenlaw.

VIII. ISSUES AND POSITIONS

ISSUE 1:

Is Express Phone's Notice of Adoption or AT&T Florida's denial of the adoption barred by the doctrines of equitable relief, including laches, estoppel and waiver?

POSITIONS

**EXPRESS
PHONE:**

As an initial matter, Express Phone notes that it is not AT&T's role to deny or approve Express Phone's adoption request. However, AT&T's refusal to honor such request is barred by the doctrines of equitable relief, including laches, estoppels and waiver. First, AT&T has not come to the Commission with clean hands because it acted in bad faith when it failed to offer the NewPhone ICA to Express Phone when Express Phone first sought to execute an ICA. Second, AT&T representatives advised Express Phone that AT&T would work with Express Phone to resolve billing disputes; after Express Phone relied on this representation, AT&T reversed its position. Though AT&T claims it may ignore Express Phone's notice of adoption because there are billing disputes between the parties, AT&T took no action to resolve such disputes or to collect amounts it claims are owed until well after the NewPhone adoption was effective.

In contrast, Express Phone has timely and appropriately exercised its rights to adopt the NewPhone ICA, but has been met with resistance at every turn from AT&T.

**AT&T
FLORIDA:**

Express Phone's Notice of Adoption is barred by the doctrines of equitable relief, including laches, estoppel and waiver. It is seeking to adopt the Image Access ICA, which was publicly filed with and approved by the Commission before Express Phone entered into its current Commission-approved interconnection agreement with AT&T Florida. Express Phone had a full and fair opportunity to adopt the Image Access ICA in 2006 and, instead, voluntarily chose to enter into a different interconnection agreement. The interconnection agreement that Express Phone voluntarily entered into had a five year initial term, which ended on November 2, 2011, more than a year after Express Phone first sought to adopt the Image Access ICA. Express Phone cannot now simply abandon its Commission-approved interconnection agreement midstream to adopt a contract that it could have adopted earlier, but chose not to.

Moreover, Express Phone's Notice of Adoption is barred by the equitable doctrine of unclean hands, which bars a party from obtaining relief if it has not acted in good faith or with good intent or where the party is seeking relief for selfish or ulterior purposes. The equitable doctrine of unclean hands bars Express Phone from adopting the Image Access ICA because it is in breach of its payment obligations under its effective interconnection agreement with AT&T Florida, and is seeking to adopt the Image Access ICA to avoid those very payment obligations.

STAFF: Staff has no position at this time.

ISSUE 2: Is Express Phone permitted, under the applicable laws, to adopt the New Phone Interconnection Agreement during the term of its existing agreement with AT&T Florida?

POSITIONS

**EXPRESS
PHONE:**

Yes. 47 U.S.C. §252(i) requires AT&T to "make available *any* interconnection agreement" to "*any* other requesting telecommunications carrier." The FCC rule implementing this statute provides two exceptions to the adoption requirement: 1) the costs of providing the ICA to the adopting party is greater than to the original party or 2) provision of the ICA to the adopting party is not technically feasible. Neither of these exceptions have any applicability in this instance and thus Express Phone is entitled to adopt the NewPhone ICA effective October 20, 2010.

**AT&T
FLORIDA:**

No. The Express Phone ICA has an initial term of five years, which ended on November 2, 2011. Express Phone is currently in breach of its ICA for failure to pay AT&T Florida the amounts it has been billed.

Express Phone has no right to either abandon a Commission - approved interconnection agreement with an unexpired term or to simply jump out of an unexpired Agreement in mid-stream. The Express Phone ICA became effective on November 3, 2006, and Section 2.1 of the General Terms and Conditions states that "[t]he initial term of this Agreement shall be five (5) years, beginning on the Effective Date. . . ." The ICA further states in Section 2.2 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” There is no authority under the Telecommunications Act of 1996 (the “Act”), FCC regulations, or court and commission precedent that allows Express Phone to unilaterally back out of the obligations under its existing ICA and, in turn, proclaim that it is adopting a different agreement in midstream. In fact, the precedent is to the contrary and supports AT&T Florida’s position. *See, e.g., Global NAPS, Inc. v. Verizon*, 396 F.3d 16 (1st Cir. 2005) (rejecting CLEC’s effort to adopt a different interconnection agreement after the state commission held an arbitration for a new agreement and the arbitrated agreement was not to the CLEC’s liking); *In re: Petition of Supra Telecomms. & Info. Sys. for generic proceeding to arbitrate rates, terms, and conditions of interconnection with BellSouth Telecomms., 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) (rejecting CLEC’s improper request for arbitration of a new interconnection agreement while the parties were operating under an existing agreement and holding that “[t]he Act does not authorize a state commission to alter terms within an approved negotiated agreement or to nullify an approved negotiated agreement”); Declaratory Ruling, *Petition of Pac-West Telecomm, Inc. for a Declaratory Ruling Respecting Its Rights to Interconnection with Verizon N.Y., Inc.*, Case No. 06-C-1042 (N.Y. Comm’n Feb. 27, 2007) (extending *Global NAPS* decision to negotiated interconnection agreements and rejecting CLEC’s argument that § 252(i) allowed it to void a negotiated contract to adopt another interconnection agreement).

Similarly, public interest is a critical factor in the analysis of whether the applicable law allows Express Phone to adopt the Image Access ICA. Allowing Express Phone to adopt a new interconnection agreement while it is in breach of its existing ICA would not only be a violation of basic contract law, but would also be contrary to the public interest.

STAFF:

Staff has no position at this time.

ISSUE 3:

Is Express Phone permitted under the terms of the interconnection agreement with AT&T Florida to adopt the New Phone Interconnection Agreement?

POSITIONS

**EXPRESS
PHONE:**

Yes. The terms of Express Phone's prior ICA with AT&T, at paragraph 11, expressly provides that AT&T "shall make available to Express Phone any entire resale agreement filed and approved pursuant to 47 U.S.C. §252." This language is consistent with the law on the subject and does not restrict in any way Express Phone's ability to adopt the NewPhone ICA at any time during the term of Express Phone's prior ICA with AT&T. To accept one of AT&T's arguments – that Express Phone cannot adopt another ICA during the term of a current ICA – flies in the face of the antidiscrimination purposes of §252. Acceptance of AT&T's view would allow an incumbent to discriminate against a CLEC during the entire term of an ICA.

**AT&T
FLORIDA:**

No, the Express Phone ICA does not give Express Phone the right to adopt the Image Access ICA unilaterally or at any time it desires. Section 2.1 of the General Terms and Conditions specifically provides that the initial term of the Express Phone ICA is five years; that term began on November 3, 2006 and ended on November 2, 2011. Section 11 does not provide Express Phone with the contractual right to void the term of the contract. It is merely a recitation of the relevant section of the Act and the FCC regulations. It does not grant any rights beyond the rights and obligations that the parties already have by law. As noted above in response to Issue 2, Express Phone does not have the right under the applicable law to unilaterally adopt a new interconnection agreement while it has an existing agreement and/or while it is in breach of its existing agreement.

STAFF:

Staff has no position at this time.

ISSUE 4:

If the New Phone Interconnection Agreement is available for adoption by Express Phone, what is the effective date of the adoption?

POSITIONS

**EXPRESS
PHONE:**

The effective date of the adoption is October 20, 2010, the date Express Phone notified AT&T of the adoption. As the Commission said in the *Nextel Order*, Docket No. 070369-TP,

Order No. PSC-08-0584-FOF-TP at 11, *affirmed*, *BellSouth Telecommunications, Inc. v. Florida Public Service Commission*, Case No. 4:09-cv-102/RS/WCS (April 19, 2010): “When an interconnection agreement is available for adoption under 47 C.F.R. 51.809(a), the adoption is considered presumptively valid and effective upon receipt of the notice by the adoption [sic] party.” Thus, October 20, 2010 is the effective date of the adoption.

AT&T
FLORIDA:

For the reasons discussed in Issues 1, 2 and 3, the Image Access ICA is not available for adoption by Express Phone. Assuming, arguendo, however, that the Image Access ICA is available for adoption, the adoption should be effective some time after March 29, 2011, which is the date Express Phone filed its first Notice of Adoption with the Commission. Express Phone’s October 20, 2010 and March 14, 2011 requests for adoption of the Image Access ICA were not sufficient to create a binding contract. Instead, letters such as those are intended to simply start the process by which AT&T Florida would then review the request for adoption and the factors that could impact the request. To find that October 20, 2010 or March 14, 2011 is the effective date of the adopted ICA would be to find that AT&T Florida can be forced to be a party to a contract without its consent and deny AT&T Florida its right to evaluate the request subject to the provisions of 47 C.F.R. § 51.809. In its *Nextel Adoption Order*, Dockets Nos. 070368-TP and 070369-TP, Order No. PSC-08-0584-FOF-TP (Sept. 8, 2008), the Commission held that the effective date is the date the notice of adoption is filed with this Commission.

STAFF:

Staff has no position at this time.

IX. EXHIBIT LIST

<u>Witness</u>	<u>Proffered By</u>		<u>Description</u>
<u>Direct</u>			
Don J. Wood	Express Phone	DJW-1	Description of qualifications and list of previous testimony
Thomas M. Armstrong	Express Phone	TMA-1	Qualifications
Thomas M. Armstrong	Express Phone	TMA-2	Excerpt from Express Phone/ AT&T ICA, § 26
Thomas M. Armstrong	Express Phone	TMA-3	ICA between AT&T and Image Access d/b/a NewPhone
Thomas M. Armstrong	Express Phone	TMA-4	October 20, 2010, Express Phone adoption notice to AT&T
Thomas M. Armstrong	Express Phone	TMA-5	November 1, 2010 AT&T response
Thomas M. Armstrong	Express Phone	TMA-6	March 14, 2011 Express Phone notification to AT&T
Thomas M. Armstrong	Express Phone	TMA-7	March 25, 2011 AT&T response
Thomas M. Armstrong	Express Phone	TMA-8	March 28, 2011 correspondence from counsel for Express Phone to AT&T
Thomas M. Armstrong	Express Phone	TMA-9	April 6, 2011 AT&T response
Thomas M. Armstrong	Express Phone	TMA-10	Notice of Adoption
Thomas M. Armstrong	Express Phone	TMA-11	AT&T objection

<u>Witness</u>	<u>Proffered By</u>		<u>Description</u>
Thomas M. Armstrong	Express Phone	TMA-12	April 4, 2011 Express Phone amended notice of adoption
Thomas M. Armstrong	Express Phone	TMA-13	Express Phone's ICA with AT&T, Paragraph 11 of the General Terms and Conditions
William E. Greenlaw	AT&T Florida	WEG-1	Letter dated 11/1/2010 to M. Foster from Reed; Re: Express Phone Service, Inc.'s Section 252(i) adoption requests
William E. Greenlaw	AT&T Florida	WEG-2	Portions of Express Phone's ICA
William E. Greenlaw	AT&T Florida	WEG-3	Letter dated 3/25/2011 to M. Foster from Bockelman; Re: Express Phone Service, Inc.'s Section 252(i) adoption requests
William E. Greenlaw	AT&T Florida	WEG-4	Portions of Digital Express ICA
William E. Greenlaw	AT&T Florida	WEG-5	Alabama PSC Decision in the LifeConnex Docket
William E. Greenlaw	AT&T Florida	WEG-6	KPSC LifeConnex Order
William E. Greenlaw	AT&T Florida	WEG-7	NCUC Order Ruling on Dockets
William E. Greenlaw	AT&T Florida	WEG-8	FPSC Request to Hold Dockets in Abeyance in Docket No. 110071-TP
William E. Greenlaw	AT&T Florida	WEG-9	FPSC Order Denying Request for Abeyance in Docket No. 110071-TP

<u>Witness</u>	<u>Proffered By</u>		<u>Description</u>
William E. Greenlaw	AT&T Florida	WEG-10	Express Phone's Voluntary Dismissal Without Prejudice in Docket No. 110071-TP
William E. Greenlaw	AT&T Florida	WEG-11	Express Phone's Application
David J. Egan	AT&T Florida	DEG-1	Revised Notice of Suspension and Termination
David J. Egan	AT&T Florida	DEG-2	CD containing Express Phone bills for Billing Account Number 305Q926878 (Confidential)
David J. Egan	AT&T Florida	DEG-3	CD containing Express Phone bills for Billing Account Number 561Q926878 (Confidential)
David J. Egan	AT&T Florida	DEG-4	CD containing Express Phone bills for Billing Account Number 904Q926878 (Confidential)
<u>Rebuttal</u>			
Thomas M. Armstrong	Express	TMA-14	Amounts Due to Express Phone from AT&T
Thomas M. Armstrong	Express	TMA-15	September 24, 2010 Email from Reginald Greene to Mark Foster (Confidential)

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

X. PROPOSED STIPULATIONS

EXPRESS PHONE: None at this time.

AT&T FLORIDA: To date, the parties have not entered into any stipulations.

STAFF: Staff is not aware of any stipulated issues at this time.

XI. PENDING MOTIONS

EXPRESS PHONE: None at this time.

AT&T FLORIDA: There are no pending motions.

STAFF: There are no pending motions at this time.

XII. PENDING CONFIDENTIALITY MATTERS

**EXPRESS
PHONE:**

On March 29, 2012, Express Phone filed a Notice of Intent as to Exhibit No. TMA-15, attached to Mr. Armstrong's rebuttal testimony. While Express Phone does not consider this document confidential, AT&T may.

**AT&T
FLORIDA:**

AT&T Florida has provided confidential information as exhibits to testimony and responses to discovery filed on AT&T Florida's behalf and may provide additional confidential information in response to future discovery. AT&T Florida has requested confidentiality for the following:

1. AT&T Florida's Response to Express Phone's First Request for Production of Documents, Nos. 1 and 6 filed under a Notice of Intent to Request Specified Confidential Classification on February 13, 2012 and a Request for Specified Confidential Classification on March 5, 2012.
2. AT&T Florida's Supplemental Response to Express Phone's First Request for Production of Documents, Nos. 2, 3, 7 and 8 filed under a Notice of Intent to Request Specified Confidential Classification on February 14, 2012 and a Request for Specified Confidential Classification on March 6, 2012.
3. AT&T Florida's Second Supplemental Response to Express Phone's First Request for Production of Documents No. 6, filed under a Notice of Intent to Request Specified Confidential

Classification on February 22, 2012 and a Request for Specified Confidential Classification on March 6, 2012.

In addition, AT&T Florida intends to request confidentiality of portions of Exhibit TMA-15, which was attached to the Rebuttal Testimony of Express Phone witness, Thomas Armstrong, filed on March 29, 2012.

AT&T Florida reserves the right to use any such information at hearing, subject to appropriate measures to protect its confidentiality.

STAFF:

There are four pending requests for confidentiality by AT&T.

- 1) AT&T Florida's Request for Specified Confidential Classification of DN 01297-12.
- 2) AT&T Florida's Request for Specified Confidential Classification of DN 00998-12.
- 3) AT&T Florida's Request for Specified Confidential Classification of DN 01319-12 [x-ref. DN 00863-12].
- 4) AT&T Florida's Request for Specified Confidential Classification of DN 01867-12 [x-ref DN 02296-12]

XIII. OBJECTIONS TO WITNESS QUALIFICATIONS AS AN EXPERT

**EXPRESS
PHONE:**

1. **Mr. Egan:** To the extent that AT&T seeks to have Mr. Egan render any expert opinions as to the requirements of, implementation of or purpose of 47 U.S.C. §252(i) and/or 47 CFR §51.809 or as to the content of, purpose of or interpretation of the former ICA between Express Phone and AT&T and/or the NewPhone ICA, Express Phone objects to his qualifications to render any such opinions.
2. **Mr. Greenlaw:** To the extent that AT&T seeks to have Mr. Greenlaw render any expert opinions as to the requirements of, implementation of or purpose of 47 U.S.C. §252(i) and/or 47 CFR §51.809, Express Phone objects to his qualifications to render any such opinions.

XIV. POST-HEARING PROCEDURES

If no bench decision is made, each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be

included in that statement. If a party's position has not changed since the issuance of this Prehearing Order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, F.A.C., a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages and shall be filed at the same time.

XV. RULINGS

Opening statements, if any, shall not exceed ten minutes per party.

It is therefore,

ORDERED by Commissioner Eduardo E. Balbis, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner Eduardo E. Balbis, as Prehearing Officer, this 18th day of April, 2012.



EDUARDO E. BALBIS
Commissioner and Prehearing Officer
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
www.floridapsc.com

Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

TLT

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.