Diamond Williams 110087-TP

From: WOODS, VICKIE (Legal) [vf1979@att.com]
Sent: Monday, April 18, 2011 3:37 PM
To: Filings@psc.state.fl.us
Subject: 110087-TP AT&T Florida's Response in Opposition to Express Phone Service, Inc.'s "Amended Notice of Adoption"
Importance: High
Attachments: Document.pdf

A. Vickie Woods

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

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

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

"Amended Notice of Adoption"

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April 18, 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 in Opposition to Express Phone Service, Inc.'s "Amended Notice of Adoption", 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 18th day of April, 2011 to the following:

Theresa Tan
Staff Counsel
Florida Public Service Commission
Division of Legal Services
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Tallahassee, FL 32399-0850
ltan@psc.state.fl.us

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jimdry@razorline.com

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 18, 2011

AT&T FLORIDA'S RESPONSE IN OPPOSITION TO EXPRESS PHONE SERVICE, INC.'S "AMENDED NOTICE OF ADOPTION"

BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T Florida") respectfully submits its Response in opposition to Express Phone Service, Inc.'s "Amended Notice of Adoption" ("Amended Notice")[1], which was filed with the Florida Public Service Commission ("Commission") on April 4, 2011. As will be explained herein, Express Phone Service, Inc. ("Express Phone") is not entitled to any relief whatsoever, and the Commission should enter an Order rejecting Express Phone's purported Amended Notice.

I. INTRODUCTION

On March 29, 2011, Express Phone filed with the Florida Commission a letter[2] unilaterally announcing that, ". . . effective immediately[,] Express Phone has adopted[,] in its entirety the Interconnection, Unbundling, Resale and Collocation Agreement Between BellSouth Telecommunications, Inc. (AT&T) and Image Access, Inc. d/b/a New Phone, dated November 26, 2006, as amended (ICA)."[3] Thereafter, on April 4, 2011, Express Phone submitted its Amended Notice, wherein it announced that its purported unilateral "adoption" of the Image

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1 *See* http://www.psc.state.fl.us/library/FILINGS/11/02227-11/02227-11.pdf .

2 *See* http://www.psc.state.fl.us/library/FILINGS/11/02053-11/02053-11.pdf (the "Notice of Adoption").

3 Notice of Adoption, p. 1 (footnote omitted). AT&T Florida filed with the Commission on March 29, 2011, a letter objecting to the Notice of Adoption. *See* http://www.psc.state.fl.us/library/FILINGS/11/02065-11/02065-11.pdf .

Access agreement was actually effective on October 20, 2010, rather than (as alleged in its purported Notice of Adoption) on March 29, 2011.[4]

The reason for Express Phone's attempted "adoption" of the Image Access Agreement is revealed at footnote 5 of the Amended Notice—Express Phone claims that its purported unilateral adoption renders the "billing dispute"[5] "moot under the adoption of the [Image Access] ICA." Amended Notice, p. 3, fn. 5. AT&T Florida terminated Express Phone's service on March 30, 2011, for Express Phone's failure to pay significant amounts past due to AT&T Florida, as is required by the parties' current and effective interconnection agreement[6] ("Agreement"). Express Phone is simply trying to renege on its contractual commitment (in unambiguous language that was reviewed and approved by this Commission) to pay all amounts billed, including amounts that it disputes, by employing the artifice of "opting into" another interconnection agreement that does not contain the "pay disputed amounts" language to which Express Phone has committed itself.

To permit this sleight-of-hand, however, would make a farce of the federal Act's opt-in provisions, and the purported "adoption" should therefore be rejected by this Commission.

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[4] AT&T Florida notes that the Amended Notice, at page 3, refers to and includes as Attachments 1 and 3, correspondence to AT&T Florida from Express Phone dated October 20, 2010 and March 14, 2011, wherein Express Phone twice states its desire to "opt into" the interconnection agreement between "Southwestern Bell Texas" and "Image Access Inc. d/b/a New Phone, Inc." (emphaisis in original). There is no such agreement in Florida between "Southwestern Bell Texas" and New Phone. There is an Agreement in Texas between Southwestern Bell Telephone, L.P. d/b/a AT&T Texas and New Phone on file with the Texas Commission in Docket No. 32806. Express Phone has no right under Section 252(i) to "port" an interconnection agreement from Texas to Florida. Moreover, any "right" it may have had to "port" the Texas agreement from Texas to Florida under AT&T Florida's merger commitment to the FCC, expired on June 29, 2010.

[5] Express Phone euphemistically calls its failure to pay amounts that are clearly due under its current interconnection agreement with AT&T Florida a "billing dispute."

[6] *See* Docket No. 060714-TP, *In re: Request for approval of resale agreement, between BellSouth Telecommunications, Inc. and Express Phone Service, Inc.* 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..." General Terms and Conditions ("GTC") at pp. 1 and 3.

II. BACKGROUND

On November 2, 2006, AT&T Florida filed with the Commission a request for approval of the Interconnection Agreement with Express Phone.[7] By operation of law, on January 31, 2007, the Commission approved the Agreement between Express Phone and AT&T Florida.[8] 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."[9] Express Phone did not honor its commitments under the Agreement. Instead, under the guise of various credit requests and billing "disputes," Express Phone stopped paying substantial portions of its bills. On February 23, AT&T Florida sent Express Phone a letter[10] that, among other things, set forth Express Phone's substantial past due balance, quoted the operative language of the parties' Agreement, and demanded payment of all past due charges and prompt payment, or Express Phone's service would be disconnected. On March 30, 2011, not having received the payment from Express Phone, AT&T Florida disconnected Express Phone's service for its failure to comply with the clear and unambiguous terms of the Agreement.

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*. 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

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7 *Id.*

8 *See* Commission Staff Memorandum dated February 2, 2007 filed in Docket No. 060714-TP.

9 See Agreement (which may be found at http://www.psc.state.fl.us/library/FILINGS/06/10149-06/10149-06.PDF), Attachment 3, Billing, at §§1.4 and 1.4.1 (emphasis added).

10 The February 23, 2011 letter is attached as Exhibit "A" to Express Phone's Complaint filed in Docket No. 110071-TP.

stockholders will have to bear the burden of the substantial amounts that remain uncollectable from Express Phone. Express Phone is attempting to mis-use the federal Act's adoption procedures for purposes unrelated the purposes that underlie the Act. AT&T Florida, therefore, respectfully asks that the Commission deny the relief requested in Express Phone's Amended Notice of Adoption.

III. RESPONSE

A. Express Phone's Request to Opt-In to a Different Interconnection Agreement While It has a Current and Effective Interconnection Agreement is Improper.

Express Phone alleges in its Amended Notice that ". . . effective October 20, 2010, Express Phone has adopted in its entirety the Interconnection, Unbundling, Resale and Collocation Agreement Between BellSouth Telecommunications, Inc. (AT&T) and Image Access, Inc. d/b/a New Phone, dated November 26, 2006, as amended (Newphone ICA)."[11] Express Phone, however, has no right either to abandon an approved interconnection agreement with an unexpired term or to simply jump from one unexpired Agreement to another in mid-stream.

The Parties' Agreement became effective in November 2006,[12] and it clearly states that "[t]he initial term of this Agreement shall be five (5) years, beginning on the Effective Date. . . ."[13] 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,***"[14] which

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11 Amended Notice at p. 1.

12 *See* Agreement, 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).

13 *Id.*, p. 3, §2.1.

14 *Id.*, §2.3.1.

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,"[15] and Express Phone does not allege any such modification or amendment in its Amended Notice. 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 . . . ."[16] 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.[17] *See 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 Act does not authorize a state commission to alter terms within an approved negotiated agreement or to nullify an approved negotiated agreement.")

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15 *Id.*, p. 13, §12.2.

16 *Id.*, p. 3, §2.2.

17 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 below, 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 (6th 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 (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").

In erroneously suggesting otherwise, Express Phone relies on Section 252(i)[18] of the Telecommunications Act of 1996 ("the Act").[19] It is well-settled, however, 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, regardless of its motivation.

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, 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

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[18] *See* Amended Notice at p. 1. Express Phone also relies on Section 11 of the GTC. However, Section 11 of the GTC 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 any way. *See* Agreement, GTC §11, p.13.

[19] 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.

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.[20] 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."[21] 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."[22] 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

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20 *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).

21 *Id.* at p. 8.

22 *Id.* at p. 10.

agreement with Verizon."[23] 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.

B. 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." was not valid.

In its "Request to Adopt Interconnection Agreement" dated October 20, 2010, Express Phone states that it "desires to exercise its right to opt into the existing interconnection agreement ("ICA") between Southwestern Bell Texas ("AT&T") and Image Access Inc. d/b/a New Phone, Inc. in the state of Florida."[24] However, an interconnection agreement between "Southwestern Bell Texas" and "Image Access Inc. d/b/a New Phone, Inc" does not exist in the state of Florida. There is an interconnection agreement between "Southwestern Bell Telephone LP d/b/a AT&T Texas" and Image Access, Inc, on file with the Public Utility Commission of Texas. *See In re: Joint Application of Southwestern Bell Telephone, LP d/b/a AT&T Texas and Image Access, Inc. for approval of Interconnection Agreement under PURA and the Telecommunications Act of 1996*, Docket No. 32806. However, as referenced in footnote 4, above, to the extent that Express Phone was trying to "port" this Agreement from Texas to Florida, nothing in Section 252(i) permits Express Phone to do so, and any merger commitments[25] that AT&T Florida may have had regarding "porting" of an interconnection agreement from one state to another expired on June 29, 2010.

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[23] *Id.* at p. 11-12.

[24] *See* Attachment 1 to Express Phone's Amended Notice.

[25] *In the Matter of AT&T Inc. and BellSouth Corp., Application for Transfer of Control*, FCC 06-189, 22 FCC Rcd. 5662 (*rel.* Mar. 26, 2007) ("FCC Merger Order"), Appendix F.

Most significantly, nowhere in its October 20, 2010 "adoption"[26] does Express Phone state that it wishes to adopt the existing interconnection agreement between "BellSouth Telecommunications, Inc. d/b/a AT&T Florida" and "Image Access, Inc. d/b/a NewPhone, Inc." that Express Phone is purportedly "adopting" via its Amended Notice.

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

Express Phone asserts 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 [Image Access] ICA." Amended Notice, at p. 3. 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) 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 being in breach of its obligations in its current Agreement.[27]

Even if Express Phone were otherwise permitted to opt out of an unexpired agreement in mid-stream (which it is not), it could not do so without first curing its blatant breach of its existing Agreement. Allowing Express Phone to opt into a new agreement without first requiring that it cure its existing breach would not be consistent with the public interest.

Contrary to Express Phone's assertions, 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

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[26] Express Phone's Amended Notice also fails to state that Express Phone wishes to adopt the existing interconnection agreement between "BellSouth Telecommunications, Inc. d/b/a AT&T Florida" and "Image Access, Inc. d/b/a NewPhone, Inc." *See* Attachment 3 to Express Phone's Amended Notice. AT&T Florida's not bringing this issue to New Phone's immediate attention in no way excuses New Phone's failure to identify the correct interconnection agreement that it actually wished to adopt.

[27] 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 Notice, p. 3, fn.5(emphasis supplied).

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 there has been "prior inappropriate conduct and actions of one of the parties." *See 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).[28]

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[28] 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 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

Similarly, at least one federal court has held that when a carrier tries to use section 252(i) to avoid its existing obligations, as Express Phone attempts to do here, the adoption can be rejected. *See Global NAPS, Inc. v. Verizon New England, Inc.*, 396 F.3d 16 (1st Cir. 2005). In *Global NAPS*, as discussed above, the First Circuit Court of Appeals concluded that section 252(i) does not grant a CLEC like Express Phone an unconditional right to opt out of one agreement and into another.[29]

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. The purpose of the statute is not 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 in order 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. 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 any adoption request until Express Phone

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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").

[29] More recently, as also discussed above, the New York Commission logically extended the First Circuit's ruling explained above to interconnection agreements, such as the Express Phone-AT&T Florida Agreement, that are negotiated instead of arbitrated. *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). The New York Commission held that "§251(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."

complies with its obligation under the Agreement to pay for all services billed, including disputed amounts.

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

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

- Payment of ***all*** charges will be the responsibility of Express Phone.[30]
- Express Phone shall make payment to [AT&T Florida] for all services billed ***including disputed amounts.***[31]
- Payment for services provided by [AT&T Florida], ***including disputed charges***, is due on or before the next bill date.[32]

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).").

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

31 *Id.*

32 *Id.* at § 1.4.1.

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 Mut. Auto Ins. Co.*, 507 So.2d 617, 619 (Fla. 3d DCA 1987).[33]

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*

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[33] 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.").

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).[34]

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, 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 reject Express Phone's Amended Notice, in which Express Phone does nothing more than ask to be relieved of its contractual obligations.

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[34] 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. 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. It cannot seek to adopt a different agreement for the reasons discussed herein. Accordingly, Express Phone's Amended Notice should be rejected.

IV. ANSWER

1. The allegations of Paragraph 1 of the Amended Notice regarding Express Phone's "adoption" of the Interconnection, Unbundling, Resale and Collocation Agreement between BellSouth Telecommunications, Inc. and Image Access, Inc. d/b/a NewPhone, as amended is effective as of October 20, 2010 are denied. No response is required as to where on the Commission's website the New Phone ICA or its amendment may be found.

2. The allegations of Paragraph 2 of the Amended Notice regarding Section 252(i) speak for themselves, and no response from AT&T Florida is required. AT&T Florida denies that Express Phone has "adopted" the NewPhone ICA.

3. The allegations of Paragraph 3 of the Amended Notice regarding 47 U.S.C. §51.809 (a) speak for themselves, and no response from AT&T Florida is required.

4. The allegations of Paragraph 4 of the Amended Notice regarding the FCC's *Second Report and Order* speak for themselves, and no response from AT&T Florida is required.

5. The allegations of Paragraph 5 of the Amended Notice regarding the Commission's prior orders speak for themselves, and no response from AT&T Florida is required.

6. The allegations of Paragraph 6 of the Amended Notice regarding Express Phone's "adoption" of the ICA between AT&T Florida and NewPhone are denied. AT&T Florida

expressly avers that Attachment 1 to the Amended Notice expressly provides that Express Phone attempted to "opt into" the interconnection agreement between "Southwestern Bell Texas" and "Image Access Inc. d/b/a New Phone, Inc". AT&T Florida denies that it unlawfully refused to recognize this alleged "adoption." AT&T Florida admits that it notified Express Phone that its Agreement with AT&T Florida had not expired. AT&T Florida affirmatively asserts that AT&T Florida and Express Phone's Agreement is currently effective and unexpired. *See* Docket No. 060714-TP, *In re: Request for approval of resale agreement, between BellSouth Telecommunications, Inc. and Express Phone Service, Inc.* AT&T Florida admits that Attachments 1 and 2 to the Amended Notice speak for themselves.

7. The allegations of Paragraph 7 of the Amended Notice regarding Section 11 of the GTC of the parties' current and effective Agreement speak for themselves, and no response from AT&T Florida is required.

8. The allegations of Paragraph 8 of the Amended Notice regarding Express Phone's "adoption" of the ICA between AT&T Florida and NewPhone are denied. AT&T Florida expressly avers that Attachment 3 to the Amended Notice expressly provides that Express Phone attempted to "opt into" the interconnection agreement between "Southwestern Bell Texas" and "Image Access Inc. d/b/a New Phone, Inc." AT&T Florida admits that Attachments 3, 4 and 5 to the Amended Notice speak for themselves.

9. The allegations of Paragraph 9 of the Amended Notice regarding Express Phone contacting AT&T Florida about the "adoption" of the NewPhone interconnection agreement are admitted. AT&T Florida denies that Express Phone's has properly "adopted" the "NewPhone" ICA.

10. The allegations of Paragraph 10 of the Amended Notice regarding Express Phone's "adoption" are denied. AT&T Florida affirmatively asserts that Express Phone did not "adopt" the "NewPhone ICA" on October 20, 2010. AT&T Florida further asserts that the "NewPhone ICA" has not replaced the Agreement between Express Phone and AT&T Florida currently on file in Docket No. 060714-TP.

11. Except as expressly admitted herein, AT&T Florida denies the allegations contained in Express Phone's Amended Notice and demand strict proof thereof.

V. AFFIRMATIVE DEFENSES

12. The Amended Notice fails to state a cause of action for which relief can be granted.

13. 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.

14. 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.

15. 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).

16. 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.

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

18. 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.

19. 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.

20. 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.

21. 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.

22. 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.

AT&T Florida respectfully requests that the Commission conduct a full evidentiary hearing pursuant to Section 120.57(1), Florida Statutes.

WHEREFORE, AT&T Florida requests that the Commission enter an order denying Express Phone's "adoption."

Respectfully submitted this 18th day of April, 2011.

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