

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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COMMISSION
CLERK

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. 11087-T

Filed: August 12, 2011

EXPRESS PHONE SERVICE, INC.'S RESPONSE TO AT&T'S MOTION TO DISMISS, OR, IN THE ALTERNATIVE, MOTION FOR DEFINITE STATEMENT

Express Phone, Inc. (Express Phone), pursuant to 28-106.204, Florida Administrative Code, hereby responds to BellSouth Telecommunications, LLC d/b/a AT&T Florida's (AT&T) Motion to Dismiss, or, in the Alternative, Motion for More Definite Statement. AT&T's Motion is without merit and should be denied. As grounds, therefor, Express Phone states:

Background

1. On October 20, 2010, March 14, 2011, and April 4, 2011, Express Phone filed notices of adoption of the Interconnection Agreement (ICA) between AT&T and Image Access Inc. d/b/a NewPhone (NewPhone). AT&T objected to the adoption.

2. On April 12, 2011, Express Phone filed a Motion for Final Summary Order. Express Phone's motion was heard before the Commission on June 14, 2011. The Commission

COM _____ denied Express Phone's request for a Final Summary Order, noting that there were facts in
APA _____
ECR _____ dispute regarding the requested adoption. It also denied Express Phone's request to adopt the
GCL _____
RAD 1 _____ NewPhone agreement; however, that decision was issued as Proposed Agency Action (PAA).¹
SSC 6 _____
ADM _____
OPC _____
CLK _____
¹ Order No. PSC-11-0291-PAA-TP (PAA Order), issued July 6, 2011.

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FPSC-COMMISSION CLERK

When the Commission issues a PAA order, any party may protest the order and request a hearing. Further, the PAA order becomes null and void upon protest.

3. The PAA Order states:

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code.²

Express Phone filed a protest of that portion of the PAA order (PAA Protest) denying its request to adopt the NewPhone ICA on July 27, 2011.³ The reasons for Express Phone's protest are amply and clearly set out in its protest.

4. Express Phone exercised its right to challenge the Commission's PAA in an evidentiary proceeding, as is its right, when it protested the Commission's preliminary decision to not recognize Express Phone's adoption of the NewPhone ICA. Express Phone clearly challenged and disputed the Commission's decision that it did not have the right to adopt the NewPhone ICA and alleged that the Commission erred when it considered matters outside those set forth in 47 U.S.C. § 252(i) and 47 C.F.R. § 51.809.

5. AT&T has filed a Motion to Dismiss Express Phone's Protest or in the Alternative, for a More Definite Statement. Both such requests are based on AT&T's meritless claim that Express Phone somehow has failed to comply with Rule 25-22.029 and 28-106.201, Florida Administrative Code, and section 120.569, Florida Statutes. The rules upon which AT&T relies set out the information which should be included in a petition determining substantial interests. Express Phone's pleading explicitly follows these rules and not only conforms to, but exceeds, all applicable pleading requirements.

² PAA Order at 15.

³ The other portion of the PAA Order sets the issues of the credits due to Express Phone directly for hearing and was not protested.

6. AT&T's motion is nothing more than an attempt to impose additional expense on a small company, rather than turning to the issues which are at the center of this case. That this is AT&T's motivation is illustrated by AT&T's contention that many of the "facts" at the heart of the case are now somehow "stipulated." Common sense indicates that if such issues were stipulated, there would be no need for a protest or hearing. AT&T's "stipulations" would amount to approval of AT&T's disputed position in this case. This is simply another example of AT&T's attempt to stifle competition in violation of federal law and Federal Communications Commission rules.

7. Despite AT&T's apparent failure to understand the issues in this case, Express Phone's PAA Protest makes it abundantly clear that Express Phone disagrees with and protests the Commission's decision to fail to recognize and validate Express Phone's adoption of the NewPhone ICA, including the Commission's decision to look at issues beyond federal law. It is also clear that Express Phone disputes AT&T's breach claim. Express Phone fails to see how it could make the issues any clearer. AT&T's frivolous motion should be summarily denied.

AT&T Has Failed to State a Basis for Dismissal or More Definite Statement

Standard for Motion to Dismiss

8. AT&T's claim that Express Phone's protest to the PAA Order should be dismissed is without merit. The standard for review of a motion to dismiss is clear. A motion to dismiss raises as a question of law the sufficiency of the facts alleged to state a cause of action. *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must show that, accepting all allegations as true, the petition still fails to state a cause of action for which relief may be granted. *Id.* at 350. The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations.

Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960). A sufficiency determination should be confined to the petition and documents incorporated therein, and the grounds asserted in the motion to dismiss. *Barbado v. Green and Murphy, P.A.*, 758 So. 2d 1173 (Fla. 4th DCA 2000), and Rule 1.130, Florida Rules of Civil Procedure. AT&T has woefully failed to state any basis upon which a motion to dismiss could be granted.

Express Phone Has Met All Pleading Requirements

9. AT&T's motion turns on its claim that Express Phone has failed to comply with the requirements of rule 28-106(2)(e), Florida Administrative Code. This portion of the rule requires a concise statement of the ultimate facts alleged. Express Phone refers the Commission to paragraph 13 (a) – (f) of Express Phone's PAA Protest, in which Express Phone explicitly sets out the ultimate facts in this case.⁴ For example, one ultimate fact Express Phone alleged is that it validly adopted the NewPhone ICA on October 10, 2010. It also alleged that requirements or issues outside section 252(i) may not be considered in an adoption request. These are all facts and legal issues, which if decided in Express Phone's favor, would result in a different Commission decision.

10. To attempt to support its meritless claim, AT&T relies on *Brockwood Extended Care Center of Homestead LLP v. Agency for Healthcare Administration*, 870 So.2d 834 (Fla. 3rd DCA 2003). Its reliance is sorely misplaced. In *Brockwood Extended Care*, the Agency for Healthcare Administration (ACHA) issued a long list of deficiencies to a healthcare facility. In response to a "thirty-seven page complaint and forty-eight page Statement of Deficiencies," Brockwood generally denied "each and every factual allegation. . . ." *Id.* at 836-837. That is, in contrast to the Express Phone PAA Protest, Brockwood simply provided a general denial.

⁴ Express Phone's PAA Protest is attached hereto as Exhibit A.

ACHA refused to refer the petition to the Division of Administrative Hearings (DOAH).⁵ In this case, there is no issue of a referral to DOAH. Rather, here the Commission will hear the case and determine the issues.

11. Though Express Phone clearly has complied with all applicable rules, it is important to note that the *Brockwood* Court did not require a “strict compliance” standard, but instead focused on providing an opportunity for hearing and resolution on the merits:

While a petitioner's efforts to comply with the above stated statutory requirements should be viewed for substantial compliance so as to allow the opportunity for a hearing and resolution of the matter on its merits, the agency in this case was faced with no more than a Petitioner's insistent refusal to follow the above stated statutory provisions.

Id. at 841. The problem in *Brockwood* was the petitioner's absolute lack of compliance with pleading requirements. Such is certainly not the case here.

12. *Blackwood v. Agency for Healthcare Administration*, 869 So.2d 656 (Fla. 4th DCA 2004), is also inapposite. In *Blackwood*, an applicant for license renewal failed to address allegations of abuse in her request for hearing.

13. In contrast, Express Phone has specifically detailed the ultimate facts and law in dispute in paragraph 13 of its PAA Protest. These allegations make it clear that the adoption of the NewPhone ICA and the facts surrounding the Commission's denial of that adoption are the matters in dispute in this case. Express Phone's pleading is “crystal clear.” Of course, these facts and pertinent legal arguments will be developed at hearing and in briefing. Express Phone is not required to present its entire case in order to protest a preliminary decision.

14. In addition, paragraph 12 of the PAA Protest also deals with material and disputed facts and law. Contrary to AT&T's assertion that Express Phone has not raised any facts as to

⁵ Similarly, in Order No. PSC-07-0724-PCO-EQ, cited by AT&T, the Commission described the allegations in the petition at issue in that matter as “vague and general statements.” *Id.* at 5.

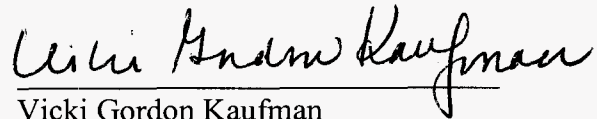
whether it was in breach of its ICA, that issue is explicitly raised in paragraph 12. Further, Express Phone has raised the issue of whether a breach is grounds to deny an adoption in paragraph 13(c). Express Phone specifically alleges that non-252(i) requirements may not be placed on an adoption. All the “allegations” that AT&T raises in paragraph 13 of its motion are found in Express Phone’s PAA protest. It should also be noted that some of these issues are issues of law, some are issues of fact, and others are mixed questions. All of these will be developed at hearing and/or in briefs and are not, contrary to AT&T’s assertions, stipulated.

15. AT&T also complains that Express Phone has reserved the right to raise ultimate facts at a future point in time. As the Commission and AT&T itself are well aware, once a proceeding has been initiated, the parties meet to identify the issues.⁶ It is at that time that the parties and Staff discuss and refine the issues. Express Phone is not required to set in stone in its initial pleading all the issues the Commission may consider. Again, if this were the case, there would be no need to identify the issues at a meeting among the parties and Staff.

16. Further, AT&T complains that Express Phone has not shown how the alleged facts (PAA Protest, ¶ 12) relate to the pertinent rules or statutes (PAA Protest, ¶ 14 claim). However, the authority set out in paragraph 14(b)-(c) of the PAA Protest is the very law warranting that the adoption be recognized and relates directly back to paragraphs 12 and 13.

⁶ And in fact, such a meeting is scheduled in this docket for September 7, 2011.

WHEREFORE, AT&T's motion to dismiss, or in the alternative, for more definite statement should be denied.



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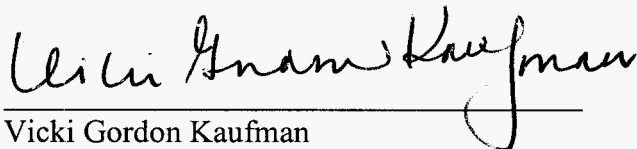
Attorneys for Express Phone

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Express Phone Service, Inc.'s Response to AT&T's Motion to Dismiss, or, in the Alternative, Motion for More Definite Statement as been furnished by U.S. Mail this 12th day of August, 2011, to the following:

Lee Eng Tan
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399
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Manuel Gurdian
AT&T
150 South Monroe Street, Suite 400
Tallahassee, FL 32301
manuel.gurdian@att.com



Vicki Gordon Kaufman

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Emergency Complaint of
Express Phone Service, Inc.
against BellSouth Telecommunications,
Inc. d/b/a AT&T Florida regarding
Interpretation of the parties'
Interconnection agreement

DOCKET NO. 110071-TP

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

Filed: July 27, 2011

**EXPRESS PHONE SERVICE, INC.'S
PROTEST OF PORTIONS OF ORDER NO. PSC-11-0291-PAA-TP AND
PETITION FOR FORMAL HEARING**

Express Phone Service, Inc. (Express Phone), by and through undersigned counsel, pursuant to sections 120.569 and 120.57, Florida Statutes, and rules 25-22.029 and 28-106.201, Florida Administrative Code, hereby protests those portions of Order No. PSC-11-0291-PAA-TP (PAA Order), issued July 6, 2011, which relate to Express Phone's adoption of another carrier's Interconnection Agreement (ICA). Express Phone further requests the initiation of formal proceedings. As required by the PAA Order, Express Phone states that this protest applies to all issues in Docket No. 110087-TP.¹

AGENCY AFFECTED AND DOCKET

1. The name and address of the affected agency is:

The Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

¹ Express Phone does not protest the Commission's decision in Docket No. 110071-TP to directly set for evidentiary hearing all issues related to the calculation and appropriate credit of promotional credits.

The Docket No. is 110087-TP.

PETITIONER'S INFORMATION

2. The name and address of Petitioner is:

Express Phone Service, Inc.
1803 W. Fairfield Drive, Unit 1
Pensacola, Florida 32501

3. Copies of all correspondence, pleadings, notices, orders and other documents in

this docket should be provided to:

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NOTICE OF RECEIPT OF ACTION

4. Express Phone received notice of this proceeding through receipt of the Commission's PAA Order.

BACKGROUND

5. Express Phone is a Florida corporation holding Florida Public Service Commission Alternative Local Exchange Telecommunications Certificate No. 5636.²

² See, Order No. PSC-00-1495-PAA-TX; Docket No. 000776-TX.

6. On August 23, 2006, Express Phone entered into a Resale Agreement with BellSouth Telecommunications, Inc. (now known as AT&T). The Resale Agreement was filed for approval in Docket No. 060714-TP. The Resale Agreement became effective on or about November 4, 2006 and expires shortly. Express Phone is now in the negotiation window.

7. On October 20, 2010, Express Phone sent an Adoption Notice to AT&T regarding its adoption of the Interconnection Agreement (ICA) between AT&T and Image Access, Inc., d/b/a NewPhone, Inc. (NewPhone ICA).³ Subsequent notices were sent to AT&T on March 14, 2011 and April 4, 2011.

8. AT&T refused to recognize Express Phone's right to adopt the NewPhone ICA. Nor did it file the Adoption Notice with the Commission as its ICA with Express Phone requires.

9. On April 12, 2011, Express Phone filed a Motion for Summary Order with the Commission addressing the adoption issues and other issues.

10. On July 6, 2011, the Commission entered the PAA Order which is the subject of this protest. In the PAA Order, the Commission found that Express Phone was not permitted to adopt the NewPhone ICA.

STATEMENT OF SUBSTANTIAL INTERESTS

11. Express Phone is entitled under federal law, this Commission's orders, and its ICA with AT&T to adopt the NewPhone ICA. Express Phone's substantial interests are affected by AT&T's failure to recognize and implement Express Phone's lawful adoption under federal law. Thus, Express Phone's substantial interests will be directly affected by the Commission's decision in this proceeding and are the type of interests that this proceeding is designed to protect. *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So.2d 478 (Fla. 2nd DCA 1981).

³ See, Docket Nos. 060319-TP, 090176-TP.

DISPUTED ISSUES OF MATERIAL FACT AND LAW

12. Express Phone's allegations of disputed issues of material fact and law include, but are not limited to, the following:

- a. Whether Express Phone is permitted under federal law, this Commission's orders, and the terms of its ICA with AT&T to adopt the NewPhone ICA;
- b. Whether Express Phone's ICA with AT&T requires AT&T to recognize and file Express Phone's Notice of Adoption;
- c. Whether the Commission may consider matters outside the applicable federal law in determining if Express Phone's adoption is valid;
- d. The date of Express Phone's adoption of the NewPhone ICA;
- e. The effective date of Express Phone's adoption of the NewPhone ICA;
- f. Whether Express Phone is entitled to adopt the NewPhone ICA during the term of a current ICA;
- g. Whether there was an alleged breach of the ICA at the time of Express Phone's October 2010 adoption request;
- h. The date on which AT&T notified Express Phone regarding an alleged breach of the ICA.

STATEMENT OF ULTIMATE FACTS

13. Without waiving or relinquishing the right to allege additional ultimate facts should they become known through discovery or otherwise, Express Phone's allegations of ultimate facts include the following:

- a. Express Phone validly adopted the NewPhone ICA on October 20, 2010;

- b. The adoption became valid upon AT&T's receipt of Express Phone's Notice of Adoption;
- c. AT&T may not place additional non-252(i) requirements upon Express Phone's adoption;
- d. AT&T's failure to recognize the Express Phone's adoption results in discrimination among carriers and is contrary to federal law;
- e. It is AT&T's responsibility to file the notice of adoption with the Commission;
- f. AT&T erroneously terminated service to Express Phone and such service should be restored.

**STATEMENT OF SPECIFIC RULES AND STATUTES REQUIRING
REVERSAL OF THE AGENCY'S DECISION**

- 14. Express Phone is entitled to relief pursuant to:
 - a. Sections 120.569 and 120.57, Florida Statutes, which entitle Express Phone to a hearing when its substantial interests are affected as they are in this matter;
 - b. 47 U.S.C. § 252(i) which requires incumbents to make all ICAs available for adoption; and
 - c. 47 C.F.R. § 51.809, which requires ICAs to be made available for adoption, with only two exceptions which are inapplicable in this docket.

RELIEF REQUESTED

WHEREFORE, Express Phone requests that the Commission:

- a. Require AT&T to recognize the valid adoption by Express Phone on the NewPhone ICA on October 20, 2010;
- b. Require AT&T to restore service to Express Phone;

- c. Set this matter for evidentiary hearing; and
- d. Grant such other relief as appropriate.

s/ Vicki Gordon Kaufman
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Attorneys for Express Phone

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Express Phone Service, Inc.'s Protest of Portions of Order No. PSC-11-0291-PAA-TP and Petition for Formal Hearing has been furnished by electronic mail and U.S. Mail this 27th day of July, 2011, to the following:

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manuel.gurdian@att.com

s/ Vicki Gordon Kaufman
Vicki Gordon Kaufman