BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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: March 29, 2012

REBUTTAL TESTIMONY OF DON J. WOOD

ON BEHALF OF EXPRESS PHONE SERVICE, INC.

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I. INTRODUCTION AND QUALIFICATIONS

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is Don J. Wood. My business address is 914 Stream Valley Trail, Alpharetta, Georgia 30022.

Q. ARE YOU THE SAME DON J. WOOD WHO PREFILED DIRECT TESTIMONY IN THIS PROCEEDING ON MARCH 1, 2012?

A. Yes. My credentials are set forth at pages 1-3 of my prefiled Direct Testimony and in Exhibit DJW-1 to that testimony.

II. PURPOSE AND SUMMARY OF TESTIMONY

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. The purpose of my rebuttal testimony is to respond to the prefiled Direct Testimony of AT&T witnesses David J. Egan and William E. Greenlaw.

For the reasons described in further detail below, the testimony of the AT&T witnesses offers no support for the position that AT&T has taken in this case. Neither witness provides relevant new facts, and neither Mr. Egan nor Mr. Greenlaw purport to offer any expert testimony on the issues set forth in Order No. PSC-12-0031-PCO-TP.

Q. DOES THE TESTIMONY OF THE AT&T WITNESS PROVIDE ANY REASON TO CHANGE THE CONCLUSIONS SET FORTH IN YOUR DIRECT TESTIMONY?

A. No, quite the contrary. This continues to be a straight-forward interconnection agreement (ICA) adoption case based on actions that should never have generated any

dispute between the parties. On October 20, 2010, Express Phone – pursuant to the requirements of §252(i) and 47 CFR §51.809 – adopted the NewPhone ICA and made the proper notification of the adoption to AT&T. The AT&T witnesses do not dispute that Express Phone provided such notice on that date; in fact, Mr. Greenlaw's Exhibit WEG-1 is a copy of an AT&T letter that memorializes the fact that Express Phone provided the notice, that AT&T received the notice, and that AT&T fully understood Express Phone's intent to adopt the ICA currently in effect "between BellSouth Telecommunications, Inc. d/b/a AT&T Florida (AT&T Florida) and Image Access, Inc. in the state of Florida."[1] *This is the central fact of this case, and it remains undisputed.*

It remains my recommendation that the Commission enter an order finding Express Phone's adoption of the NewPhone ICA valid and effective on October 10, 2010 (the date on which Express Phone notified AT&T of its adoption of this ICA). This notice of adoption is fully acknowledged in the testimony of Mr. Greenlaw[2] and Mr. Egan.[3]

[1] In Order No. PSC-12-0031-PCO-TP, the Commission refers to this entity as "Image Access, Inc. d/b/a NewPhone," and to the agreement as the "NewPhone ICA." In my testimony (and in that of Express Phone witness Mr. Armstrong), the entity is referred to as NewPhone and the ICA at issue is referred to as the NewPhone ICA. In their Direct Testimony, AT&T witnesses Egan and Greenlaw refer to the entity as "Image Access" and to the ICA at issue as the "Image Access ICA." While the shorthand references differ, there is a common understanding (beginning on October 20, 2010 and for the entire period of the dispute) between Express Phone and AT&T regarding the identity of the ICA that Express Phone has adopted.

[2] Direct Testimony of William Greenlaw, pp. 2, 3, 4, 5, 6, 7, 12.

[3] Direct Testimony of David Egan, pp. 3, 4.

III. RESPONSE TO THE DIRECT TESTIMONY OF DAVID EGAN

Q. WHICH ISSUES DOES MR. EGAN ADDRESS IN HIS TESTIMONY?

A. Mr. Egan states that the purpose of his testimony is to address Issue 2: "Is Express Phone permitted, under the applicable laws, to adopt the NewPhone Interconnection Agreement during the term of its existing agreement with AT&T Florida?" and Issue 3: "Is Express Phone permitted under the terms of the interconnection agreement with AT&T Florida to adopt the NewPhone Interconnection Agreement?"

Q. DOES MR. EGAN ACTUALLY ADDRESS THESE ISSUES IN HIS TESTIMONY?

A. No. It does not appear, based on his testimony, that Mr. Egan possesses the qualifications to do so. He does not claim to have expertise (or even a basic familiarity) with the requirements of the Act (including but not limited to §252) or the Federal Communications Commission (FCC) rules (including but not limited to §51), and does not claim to have expertise or familiarity with either the AT&T-Express Phone ICA or the AT&T-NewPhone ICA.

Instead, Mr. Egan states that he has experience "in the areas of credit & collections," and purports to be "a subject matter expert" in "the areas of escrow, payment of rates and charges, and non-payment and procedures for disconnection."

Q. DO ANY OF THE ISSUES IDENTIFIED BY THE COMMISSION IN ORDER NO. PSC-12-0031-PCO-TP RELATE IN ANY WAY TO "ESCROW," THE "PAYMENT OF RATES AND CHARGES," OR "NON-PAYMENT AND PROCEDURES FOR DISCONNECTION?"

A. No. The identified issues relate specifically to the adoption of the AT&T-NewPhone ICA by Express Phone, and Issues 2 and 3 – the purported subject of Mr. Egan's testimony – relate specifically to the provisions of the Act and FCC rules regarding the adoption of ICAs, and to the language of the AT&T-Express Phone ICA regarding the adoption of ICAs. No "credit & collections" issues have any bearing whatsoever on the identified issues.

Instead of addressing the issues identified by the Commission as relevant, Mr. Egan devotes the majority of his testimony to a description of AT&T's version of the billing dispute between AT&T and Express Phone. As Mr. Armstrong explains in his Rebuttal Testimony, Express Phone strenuously disagrees with Mr. Egan's and AT&T's description of this dispute, and particularly disagrees with any conclusion that Express Phone has a past due balance with AT&T.[4] The larger point, however, is that the billing dispute is *not* a part of this proceeding and has no bearing on the Commission-identified questions regarding the adoption of the AT&T-NewPhone ICA by Express Phone.

Q. IS THERE ANY SCENARIO IN WHICH A BILLING DISPUTE COULD BE RELEVANT TO THE ADOPTION OF AN ICA?

A. No. Such a dispute could only impact the adoption of an ICA by a Competitive Local Exchange Company (CLEC) if the relevant sections of the Act and FCC rules contained a restriction on the ability of a CLEC to adopt an existing ICA based on the presence of such a dispute.

[4] As Mr. Armstrong explains in his Rebuttal Testimony, his calculations indicate that AT&T currently owes Express Phone in excess of $1.5 million.

But as explained in detail in my Direct Testimony, the Act and FCC rules provide for a broadly-defined safeguard against discrimination by the ILEC, and contain no such restrictions. The "opt in" provision described in §252(i) is both clear and broadly-defined: an ILEC must make *any* interconnection agreement available to *any* requesting telecommunications carrier. The language of §252(i) contains no exceptions to the requirement that any telecommunications carrier be allowed to opt in to any existing ICA, and provides no restrictions on a carrier's ability to engage in this adoption process. The Act does not require that the CLEC and ILEC have a history of undisputed operation pursuant to previous or existing ICAs.

Similarly, the FCC's rule (47 CFR §51.809) implementing §252(i), like the language of the Act, creates a requirement that is both clear and broadly-defined. The rule clearly states that an ILEC (1) "*shall* make available," (2) "to *any* requesting telecommunications carrier," (3) "*any* agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to section 252 of the Act." Also consistent with the language of §252(i), §51.809 does not limit a CLEC's ability to "opt in" to an ICA[5] and does not require that the CLEC and ILEC have a history of undisputed operation pursuant to previous or existing ICAs.

Q. DOES MR. EGAN CITE TO ANY LANGUAGE IN THE ACT OR FCC RULES THAT HE BELIEVES WOULD RESTRICT EXPRESS PHONE'S

[5] The *only* exceptions to a CLEC's ability to adopt an ICA set forth in §51.809 are limited to instances in which an ILEC such as AT&T *proves* to a state commission that the cost of providing the requested service is higher or that it is technically infeasible to do so. In this case, AT&T has not claimed higher cost or technical infeasibility, and has certainly made no effort to prove either circumstance. Of course, such an attempt would be fruitless: because Express Phone is a reseller of AT&T services, no legitimate cost or technical feasibility issues can be present.

ABILITY TO ADOPT THE AT&T-NEWPHONE ICA BECAUSE OF THE EXISTENCE OF A BILLING DISPUTE?

A. No. Mr. Egan makes no reference to the Act or FCC rules in his testimony, even though one of the stated purposes of his testimony is to address Issue 2: "Is Express Phone permitted, under the applicable laws, to adopt the NewPhone Interconnection Agreement during the term of its existing agreement with AT&T Florida?" The reason for this omission is clear: the Act and FCC rules contain no language that would restrict the ability of a CLEC to adopt an ICA because of an existing dispute. Instead, the existing law creates a broad safeguard to prevent ILEC discrimination: the Act places no restrictions on a CLEC's adoption of an existing ICA, and the FCC rules set forth two explicit restrictions, neither of which can apply to a reseller such as Express Phone.

Q. DOES MR. EGAN CITE TO ANY LANGUAGE IN THE AT&T-EXPRESS PHONE ICA THAT HE BELIEVES WOULD RESTRICT EXPRESS PHONE'S ABILITY TO ADOPT THE AT&T-NEWPHONE ICA BECAUSE OF THE EXISTENCE OF A BILLING DISPUTE?

A. No. Mr. Egan makes no reference to any such language in the AT&T-Express Phone ICA in his testimony,[6] even though one of the stated purposes of his testimony is to address Issue 3: "Is Express Phone permitted under the terms of the interconnection agreement with AT&T Florida to adopt the NewPhone Interconnection Agreement?" The reason for this omission is also clear: the language of the AT&T-Express Phone ICA contains no language that would restrict the ability of Express Phone to adopt an

[6] Mr. Egan's only reference (at p. 4) to the language of the AT&T-Express Phone ICA is limited to his characterization of the billing dispute. He makes no reference in his testimony to any ICA provision that addresses the ability of Express Phone to adopt an existing ICA.

ICA because of an existing dispute. To the contrary, Paragraph 11 of the "General Terms and Conditions" section of the AT&T-Express Phone ICA states that AT&T "shall make available to Express Phone any entire resale agreement filed and approved pursuant to 47 U.S.C. §252." The language of this section in no way restricts Express Phone's ability to adopt an existing ICA based on the presence of a dispute.

Q. DOES MR. EGAN PROVIDE ANY FACT TESTIMONY THAT IS RELEVANT TO THE ISSUES IDENTIFIED BY THE COMMISSION?

A. No. Other than a description of AT&T's version of the billing dispute – a subject that is well beyond the scope of this proceeding – Mr. Egan's testimony is limited to a description of the dates on which Express Phone provided notice of adoption and the dates on which AT&T responded. For each of these facts, Mr. Egan does not claim to have personal knowledge but instead relies on the testimony of Mr. Greenlaw[7] as the basis for his testimony.

In the end, Mr. Egan provides no expert testimony regarding Issues 2 and 3, and provides no independent fact testimony on any issue relevant to this case. He instead relies directly on the testimony of Mr. Greenlaw as the basis for any facts relevant to the issues at hand, and offers no conclusions responsive to any of the four issues set forth in Order No. PSC-12-0031-PCO-TP.

[7] Direct Testimony of David Egan, p. 3 line 6, p. 3 line 12, p. 3 line 17, p. 3 footnote 1, p. 5 line 16.

IV. RESPONSE TO THE DIRECT TESTIMONY OF WILLIAM GREENLAW

Q. WHICH ISSUES DOES MR. GREENLAW ADDRESS IN HIS TESTIMONY?

A. Mr. Greenlaw states (p. 1) that he is addressing Issues 1-4 as set forth in Order No. PSC-12-0031-PCO-TP.

Q. DOES MR. GREENLAW ACTUALLY ADDRESS EACH OF THESE ISSUES IN HIS TESTIMONY?

A. No. While his testimony is organized by issue, Mr. Greenlaw ultimately provides very little testimony that addresses Issues 1, 2 and 3. He does address issue 4, though as I will explain later in my testimony, his conclusion and recommendation are unsupported.

Q. DOES MR. GREENLAW ADDRESS §252(i) OF THE ACT?

A. Yes, in a very limited way. Although he professes to address Issue 2: "Is Express Phone permitted, under the applicable laws, to adopt the NewPhone Interconnection Agreement during the term of its existing agreement with AT&T Florida?," his testimony is limited to a simple citation of the relevant language. Mr. Greenlaw makes a single reference (pp. 6-7) to the requirements of §252(i), including the requirement that as an ILEC, AT&T must "make available *any* interconnection agreement" to "*any* other requesting telecommunications carrier." He does not reach any conclusions of his own, but simply states that he has been "advised" that AT&T's actions have been consistent with the requirements of the statute. Having been "advised" that AT&T's refusal to make the AT&T-NewPhone ICA available to Express Phone did not conflict with a statutory requirement that AT&T "make available *any* interconnection agreement" to "*any* other requesting

telecommunications carrier," Mr. Greenlaw offers no explanation – in the form of expert testimony or otherwise – why a course of action that is directly at odds with the language of the statute is nevertheless somehow "consistent" with the requirements of the statute.

Q. DOES MR. GREENLAW ADDRESS §51.809 OF THE FCC'S RULES?

A. No. Mr. Greenlaw's discussion of Issue 2 contains no reference to the FCC's rules. As a result, his testimony offers no explanation – in the form of expert testimony or otherwise – why AT&T's admitted refusal to permit Express Phone's adoption of the AT&T-NewPhone ICA is not directly at odds with a requirement that AT&T, as an ILEC, *shall* make available, to *any* requesting telecommunications carrier, *any* agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to §252 of the Act.

Q. DOES MR. GREENLAW OFFER ANY OTHER SUPPORT FOR HIS CONCLUSIONS, OTHER THAN HAVING BEEN "ADVISED" AS TO WHAT HIS CONCLUSIONS SHOULD BE?

A. No. Mr. Greenlaw does make a cursory reference (p. 7) to "precedent from the FCC, the New York Commission, and the First Circuit," but he provides no actual citations to these sources, quotes no language that he believes to be relevant to this proceeding, and offers no discussion to suggest what the content of these vague references might actually mean or how it might support his opinions or conclusions.

Q. WHEN ADDRESSING ISSUE 3: "IS EXPRESS PHONE PERMITTED UNDER THE TERMS OF THE INTERCONNECTION AGREEMENT WITH AT&T FLORIDA TO ADOPT THE NEWPHONE INTERCONNECTION

AGREEMENT?," DOES MR. GREENLAW PROVIDE A CITATION TO THE RELEVANT LANGUAGE IN THE AGREEMENT?

A. Yes. At page 9, he refers to Section 11 of the General Terms and Conditions section of the AT&T-Express Phone ICA, which states in part that AT&T "*shall* make available to Express Phone *any* entire resale agreement filed and approved pursuant to 47 U.S.C. Section 252" (emphasis added).

Having noted the correct language of the ICA, Mr. Greenlaw fails to offer any explanation why AT&T's refusal to make available to Express Phone the AT&T-NewPhone ICA – an agreement that both parties agree was "filed and approved pursuant to 47 U.S.C. Section 252" – did not represent a direct violation of the terms of the agreement.

Q. MR. GREENLAW ARGUES (P. 9) THAT THE ABOVE-CITED LANGUAGE OF THE AT&T-EXPRESS PHONE ICA DOES NOT "BREAK ANY NEW GROUND." DO YOU AGREE?

A. Generally yes. The language of the AT&T-Express Phone ICA describing the ability of the CLEC to "opt in" to another ICA is not unique or unusual; in my experience it is customary to include similar language that memorializes this important safeguard against discrimination.

Mr. Greenlaw goes on to argue (p. 9) that the language of the ICA "simply summarizes the provisions in the Act regarding adoption of other carrier agreements." To the extent that Mr. Greenlaw is testifying that the language of the ICA requiring AT&T to make any filed and approved ICA available to Express Phone – with no restrictions on the timing of the adoption and no restrictions related to outstanding

disputes – is consistent with the language of §252(i), which requires AT&T to "make available *any* interconnection agreement" to "*any* other requesting telecommunications carrier" – with no restrictions on the timing of the adoption and no restrictions related to outstanding disputes – then I agree with him. The language of the ICA is consistent with the language of the Act and also with the language of the FCC rules: each requires AT&T to make the AT&T-NewPhone ICA available to Express Phone for adoption upon request, none of the three contain any restrictions regarding the timing of adoption (except to require that the adoption be effective without unreasonable delay), and none of the three contain any restrictions related to outstanding disputes.

Q. YOU STATED THAT MR. GREENLAW DOES NOT CLAIM EXPERTISE REGARDING THE REQUIREMENTS OF THE ACT AND FCC RULES. DOES HIS TESTIMONY BETRAY A FUNDAMENTAL LACK OF FAMILIARITY WITH THESE REQUIREMENTS?

A. Yes. Mr. Greenlaw's testimony betrays a basic lack of understanding in several areas.

For example, throughout his testimony[8] Mr. Greenlaw refers to Express Phone's efforts to "unilaterally" adopt the AT&T-NewPhone ICA, and to AT&T's "willingness" to allow Express Phone to adopt the ICA.

A basic familiarity with the requirements of the Act and FCC rules would cause Mr. Greenlaw to realize that the decision by a CLEC (such as Express Phone) to "opt in" to an ICA is expected to be a "unilateral" act. As described in detail in my Direct Testimony, the "opt in" requirements of the Act and FCC rules represent a

[8] Direct Testimony of William Greenlaw, pp. 2, 3, 5, 11, 12.

safeguard designed to limit the ability of an ILEC (such as AT&T) to discriminate against CLECs. The operation of this safeguard does not require the ILEC's agreement or consent; such a requirement would defeat the purpose of the safeguard, as illustrated in this case. As the FCC has concluded, pursuant to §51.809:

> 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.[9]

In order for this safeguard to be effective (and ultimately for it to have any meaning at all), CLECs must be able to unilaterally "adopt that agreement to gain the benefit of the incumbent LEC's discriminatory bargain." Conversely. a provision that permitted a CLEC to "opt in" to an agreement only at the discretion of the ILEC would be meaningless: the ILEC could enter into a discriminatory agreement and then simply refuse efforts by other CLECs to adopt the discriminatory agreement. Of course, the language of both the Act (§252(i)) and FCC rules (§51.809) directly addresses the rights of CLECs to adopt an ICA, and makes no reference whatsoever to a process in which the ILEC may decide to continue discriminating by somehow rejecting the CLEC's adoption.

Similarly, Mr. Greenlaw makes several references in his testimony to what AT&T is "willing" to allow Express Phone to do regarding its rights of adoption as set forth in §252(i) and §51.809. What Mr. Greenlaw fails to recognize is that in

[9] *Second Report and Order*, In the Matter of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, FCC 04-164, ¶19.

order for Express Phone to adopt the AT&T-NewPhone ICA, AT&T need not be "willing" to do anything beyond obey the law and perform in a way consistent with the requirements of the Act and FCC rules.

Q. HAS THE COMMISSION PREVIOUSLY REACHED A CONCLUSION THAT IS CONSISTENT WITH YOUR UNDERSTANDING?

A. Yes. In Order No. PSC-08-0584-FOF-TP,[10] the Commission reached conclusions that are fully consistent with the rights of a CLEC (in that case Nextel) to "unilaterally" adopt an ICA entered into by AT&T with another CLEC, and fully consistent with a conclusion that the ILEC cannot impose conditions on that adoption.

In the *Nextel Order*, the Commission found that "*at its sole discretion*, an interested carrier may choose to adopt an existing interconnection agreement on file with the Commission that best meets its business needs" (emphasis added).[11] The Commission went on to find that the ability of an ILEC to refuse such an adoption is limited to the specific circumstances set forth by the FCC:

> whether a telecommunications carrier may adopt an entire, effective interconnection agreement is determined by whether a genuine exception to the above provision exists. The rule which implements §252(i), 47 CFR §51.809, *describes the only two instances where an incumbent LEC may deny a requesting carrier the right to adopt an entire effective agreement* ... unless an incumbent LEC can demonstrate that its costs will be greater to provide the agreement to the new carrier(s), or the agreement is not technically feasible to provide to the new carrier(s), *the incumbent LEC may not restrict the carrier's right to adopt.*[12]

[10] Final Order Granting Adoption by Nextel of Sprint-AT&T Interconnection Agreement, Docket No. 070369-TP, Issued September 10, 2008 (*Nextel Order*).
[11] *Nextel Order*, p. 7, emphasis added.
[12] *Id.*

The Commission went on to note that "the FCC said that it would 'deem an incumbent LEC's conduct discriminatory if it denied a requesting carrier's request to adopt an agreement to which it is entitled under section 252(i) and [the FCC] rule'."[13] Pursuant to the standard adopted by the FCC and noted by this Commission, AT&T's conduct regarding Express Phone's ICA adoption has been discriminatory: AT&T has denied a requesting carrier's adoption of "an agreement to which it is entitled under section 252(i)."

As it did in Docket No. 070369-TP, AT&T is attempting to impose conditions not found in the Act or FCC rules. In this case, AT&T has acted to deny Express Phone its "opt in" rights by imposing new conditions related to the timing of the adoption and to the presence of a dispute under the previous ICA. But neither the "timing" condition nor the "existing dispute" condition are one of "*the only two instances* where an incumbent LEC may deny a requesting carrier the right to adopt an entire effective agreement" set forth in §51.809. As a result, the Commission's conclusion in the *Nextel Order* is equally applicable in this case: "all of AT&T's arguments are fatally flawed since each of them gives weight to considerations that are, at a minimum, inappropriate in the general context of adoptions."[14]

Q. IN HIS TESTIMONY, MR. GREENLAW REFERS TO LIMITATIONS ON EXPRESS PHONE'S ABILITY TO "OPT OUT" OF ITS PREVIOUS ICA. DO YOU AGREE WITH HIS TESTIMONY?

A. No. While his testimony is somewhat unclear on this point, it appears that Mr. Greenlaw may be suggesting that while Express Phone may have the right to "opt in"

[13] *Id.*
[14] *Id.*, p. 8.

to a new ICA at any time pursuant to §252(i) and §51.809, it nevertheless is limited in its ability to "opt out" of the prior agreement.[15] For example, he states at page 5 that "AT&T Florida is unwilling to allow a CLEC to unilaterally opt out of an existing ICA in mid-stream." Setting aside the fact that, pursuant to the Act and FCC rules, AT&T's "willingness" is not required for a CLEC to exercise its right to adopt another ICA, Mr. Greenlaw's attempt to somehow separate "opt in" and "opt out" rights is unprecedented in my experience. Presumably (in Mr. Greenlaw's view), a CLEC has the right to "opt in" to any ICA at any time (the clear language of the Act and FCC rules is inescapable, even for Mr. Greenlaw), but does not have the right to simultaneously "opt out" of its prior agreement. Such an interpretation is nonsensical for at least two reasons.

First, if the Act and FCC rules created "opt in" rights without also creating corresponding "opt out" rights, the safeguard against discrimination that Congress and the FCC sought to create would be completely meaningless.

Second, Mr. Greenlaw's interpretation of §252(i) and §51.809 would create a scenario in which the ICA between an ILEC and a CLEC would be governed by two (and potentially more than two) ICAs with conflicting language. There is no reason to conclude that Congress and the FCC intended to create such an untenable situation.

A much more reasonable interpretation is that the Act and FCC rules create an opportunity for a CLEC to "opt in" to a different ICA in order to prevent discrimination by the ILEC, and that the adopted ICA then supersedes the previous ICA.

[15] Direct Testimony of William Greenlaw, pp. 3, 5, 12.

Q. THROUGHOUT HIS TESTIMONY, MR. GREENLAW REFERS TO A "RENEGOTIATION WINDOW" AS A JUSTIFICATION FOR AT&T'S REFUSAL TO RECOGNIZE EXPRESS PHONE'S ADOPTION OF THE AT&T-NEWPHONE ICA. IS THIS "RENEGOTIATION WINDOW" A RELEVANT CONSIDERATION IN THIS CASE?

A. No. By making this argument, Mr. Greenlaw is confusing one of the mechanisms for addressing the expiration of an ICA with the operation of an important statutory safeguard against discrimination.

Mr. Greenlaw is correct that one of the options available to a CLEC when entering into an ICA with an ILEC (whether for the first time or upon the expiration of an existing ICA) is the adoption of an ICA in effect between the ILEC and another CLEC.[16] This is one of two "opt in" scenarios that can take place. A second and independent "opt in" scenario is the operation of the antidiscrimination safeguard set forth and described in §252(i) and §51.809.

Mr. Greenlaw argues (p. 6) that Express Phone's October 20, 2010 notice of adoption – while acknowledged and fully understood by AT&T at that time – was not implemented by AT&T because it was made before the opening of the window for negotiating a new agreement: "because [the Express Phone] ICA was not subject to negotiation for a new agreement, AT&T Florida would not entertain Express Phone's request for a new ICA at that time."

Mr. Greenlaw's testimony completely misses the point. Express Phone was not making a "request" to advance the timing for negotiation of a new agreement at

[16] In the alternative, the CLEC may negotiate with the ILEC, and if negotiations are unsuccessful, seek arbitration of the disputed issues.

the expiration of the prior agreement; Express Phone was instead notifying AT&T that it (Express Phone) was availing itself of its statutory right to adopt an ICA "to which the incumbent LEC is a party" and that had been "approved by a state commission pursuant to section 252 of the Act." Whether AT&T wanted to "entertain" such a request is entirely moot: the application of the antidiscrimination safeguard *may* take place during the negotiation process for a new agreement, but there is no requirement in the language of the Act, FCC rules, or the prior AT&T-Express Phone ICA that limits the application of the safeguard to *only* this period of time.

By juxtaposing the unrelated concepts of the application of the antidiscrimination safeguard and the process of negotiating a new agreement, Mr. Greenlaw is proposing a process that is unprecedented and that would result in nonsensical scenarios. Under Mr. Greenlaw's interpretation, the ILEC would be able to freely discriminate for the life of any existing ICA. Suppose that CLEC A enters into a five-year ICA with AT&T, and subsequently learns of a discriminatory provision in an ICA entered into between AT&T and CLEC B. Pursuant to §252(i) and §51.809, CLEC A would have the right to adopt the ICA in effect between AT&T and CLEC B, and have this new ICA take effect without unreasonable delay on the part of AT&T. The application of this safeguard allows CLEC A to limit the impact of the discriminatory provision to a relatively short period of time, and minimizes the incentive for AT&T to enter into discriminatory ICAs. In direct contrast, under the Greenlaw theory, CLEC A might learn of the discriminatory provision immediately after its ICA with AT&T is executed, but would be unable to

limit the impact of the discrimination and would have to live with the disparate and anticompetitive treatment until the expiration of its existing ICA (and would be able to have AT&T even begin to discuss the issue only after the opening of the window for negotiation of a new agreement). Mr. Greenlaw provides no reference or citation to any source to support his novel theory.

Q. IN HIS TESTIMONY, MR. GREENLAW DISCUSSES THE REASONS THAT HE BELIEVES EXPRESS PHONE DECIDED TO ADOPT THE AT&T-NEWPHONE ICA. ARE A CLEC'S REASONS FOR ADOPTING AN ICA RELEVANT TO THE APPLICATION OF §252(i) AND §51.809?

A. No. The language of the Act and FCC rules do not limit a CLEC's right to adopt another ICA based on the CLEC's rationale for doing so. The ability of Express Phone to adopt the AT&T-NewPhone ICA is certainly not limited based on what Mr. Greenlaw and AT&T might believe to be the reasoning behind the adoption.

In his testimony, Mr. Greenlaw asserts that Express Phone sought to adopt the NewPhone ICA "for the sole purpose of evading its contractual obligations." As an initial matter, Mr. Greenlaw does not explain how he has personal knowledge of Express Phone's motivation for adopting the NewPhone ICA. It is also unclear, and Mr. Greenlaw does not offer to explain, how the adoption of the NewPhone ICA would allow Express Phone to "evade" any "contractual obligations." Both of these omissions certainly speak to the credibility of Mr. Greenlaw's testimony on this matter.

But setting these issues aside, Mr. Greenlaw offers no basis for his theory that a CLEC's ability to adopt an ICA pursuant to §252(i) and §51.809 is somehow

limited by the CLEC's rationale for doing so. Section 252(i) does *not*, as Mr. Greenlaw would have the Commission believe, state that an ILEC must "make available *any* interconnection agreement" to "*any* other requesting telecommunications carrier," but only if the ILEC determines that it agrees with the CLEC's rationale for the adoption. Similarly, §51.809 does *not* state that an ILEC *shall* make available to *any* requesting telecommunications carrier *any* agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to §252 of the Act, but only if the ILEC is "willing to entertain" the basis for the CLEC's adoption.

Ultimately, Mr. Greenlaw is trying to create a role for AT&T in the ICA adoption process that simply does not exist. It is not up to AT&T to decide whether it will allow an adoption based on its (AT&T's) evaluation of the reasons for the adoption. Once it receives a notice of adoption by a CLEC, AT&T's role – and its only role – is to execute the adopted ICA with the CLEC without unreasonable delay.

Q. WITH THE UNDERSTANDING THAT §252(i) AND §51.809 DO NOT REQUIRE THAT A REASON BE PROVIDED, WHY DID EXPRESS PHONE DECIDE TO ADOPT THE AT&T-NEWPHONE ICA?

A. While operating under its prior ICA, Express Phone became aware of an ICA in effect between AT&T and another CLEC that contained discriminatory provisions that put Express Phone at a competitive disadvantage *vis-a-vis* the other CLEC. In order to eliminate this discrimination, Express Phone decided to avail itself of the remedy set forth in §252(i) and §51.809, and notified AT&T that it was adopting the NewPhone ICA on October 20, 2010.

It is the "what," not the "why," that is relevant in this case: as the AT&T witnesses have acknowledged, Express Phone provided notice of adoption to AT&T on October 20, 2010, AT&T received that notice, and AT&T fully understood that Express Phone intended to adopt the ICA then in effect "between BellSouth Telecommunications, Inc. d/b/a AT&T Florida (AT&T Florida) and Image Access, Inc. in the state of Florida."[17] The "why" of Express Phone's decision to adopt the NewPhone ICA is simply not relevant.

Q. MR. GREENLAW ARGUES THAT EXPRESS PHONE SHOULD NOT BE PERMITTED TO ADOPT THE AT&T-NEWPHONE ICA BECAUSE THE NEWPHONE ICA WAS IN EFFECT AT THE TIME EXPRESS PHONE ENTERED INTO ITS ICA WITH AT&T. DO YOU AGREE?

A. No. At page 4 of his Direct Testimony, Mr. Greenlaw characterizes the dates of the Express Phone ICA and NewPhone ICA as "relevant dates," and apparently believes it to be significant that the NewPhone ICA "was entered, filed and approved before Express Phone entered into its ICA with AT&T Florida in October of 2006." But he offers no citations or reasoning to support a conclusion that the order of the initiation of the agreements is somehow relevant to the question of whether Express Phone can adopt the NewPhone ICA.

The Act and FCC rules place no restriction on the timing or sequence of the ICAs. Section 252(i) requires AT&T to make available for adoption "*any* interconnection agreement;" it does not limit that availability to only those agreements entered into at certain points in time. Similarly, §51.809 requires AT&T to make available for adoption "*any* agreement in its entirety to which the incumbent

[17] See Exhibit WEG-1.

LEC is a party that is approved by a state commission pursuant to section 252 of the Act;" it does not limit the availability to only those agreements entered into either before or after any other agreement.

Mr. Greenlaw offers no basis for a conclusion that Express Phone's opportunity to adopt the NewPhone ICA was somehow limited to the time of Express Phone's initial ICA with AT&T, nor can he: no such restriction exists in ether the Act or FCC rules. Pursuant to his theory, a CLEC that becomes aware of an existing discriminatory provision only after it has entered into an ICA would have no recourse but to suffer the discrimination for the life of its ICA. Such an outcome is directly at odds with the stated purpose of §252(i) and §51.809.

Q. IS MR. GREENLAW'S TESTIMONY ON THIS ISSUE CONSISTENT WITH HIS TESTIMONY ON OTHER ISSUES?

A. No. Elsewhere in his testimony, Mr. Greenlaw argues that Express Phone can only adopt the NewPhone ICA during the "window for negotiation." In fact, in its November 1, 2010 response to Express Phone (attached to Mr. Greenlaw's Direct Testimony as Exhibit WEG-1), AT&T's *only* stated reason for failing to recognize Express Phone's adoption of the NewPhone ICA is that the adoption was "not within the timeframe to request a successor agreement."

But at page 4 of his Direct Testimony, Mr. Greenlaw argues as follows: "although it could have done so, we have no record of any request by Express Phone to adopt the [NewPhone] ICA in 2006, or, for that matter, at any time before October 2010." Mr. Greenlaw cannot have it both ways. At some points in his testimony, he states that AT&T failed to recognize Express Phone's adoption of the NewPhone ICA

because Express Phone provided notice too *early* (that is, before the 270 day negotiation window was open), and argues (albeit incorrectly) that Express Phone could not avail itself of the antidiscrimination safeguard except when negotiating a replacement agreement. Here, Mr. Greenlaw states that Express Phone's adoption of the NewPhone ICA was too *late* because it should have occurred either in 2006 or "at any time" between 2006 and October 2010, and argues (also incorrectly) that Express Phone could only avail itself of the antidiscrimination safeguard either at the time its own ICA was executed or at some point in time afterwards (but before the time the adoption actually took place). When a single AT&T witness first takes issue with the fact that Express Phone's adoption took place before February 6, 2011 (the time when the window for negotiation started),[18] and then takes issue with the fact that the adoption took place after October 2006 "or, for that matter, at any time before October 2010," it becomes abundantly clear that AT&T is simply manufacturing restrictions that exist nowhere in the Act or FCC rules, and making excuses for its failure to act in accordance these requirements.

Q. AT PAGE 10 OF HIS DIRECT TESTIMONY, MR. GREENLAW SUGGESTS THAT EXPRESS PHONE HAS NOT ACTED IN GOOD FAITH. DO YOU AGREE?

A. Absolutely not. As an initial matter, Mr. Greenlaw's assertion of bad faith is based directly on his assertions regarding Express Phone's reason for adopting the NewPhone ICA – a fact for which Mr. Greenlaw has no direct personal knowledge. His claim is also based on his assumption that, through the adoption, Express Phone

[18] Direct Testimony of William Greenlaw, p. 6.

would somehow "evade its contractual obligations" – a claim for which he presents no evidence and articulates no theory of how it could occur.

In direct contrast to Mr. Greenlaw's unsupported suppositions, there are at least two instances in which the undisputed facts reveal that AT&T has failed to act in good faith. First, prior to October 2006, AT&T presented Express Phone with a draft ICA that contained terms and conditions that AT&T knew to be discriminatory; AT&T was certainly aware that it had entered into an agreement with more favorable terms with NewPhone earlier than April 4, 2006 when the NewPhone ICA was filed with the Commission. Nonetheless, it failed to mention this or offer the NewPhone ICA to Express Phone.

Second, as Mr. Greenlaw, Mr. Egan and AT&T readily acknowledge, Express Phone provided proper notice to AT&T of its adoption of the NewPhone ICA on October 20, 2010, yet AT&T failed to meet its statutory duty to make that agreement available without unreasonable delay. Instead, AT&T refused to permit the safeguard to take effect, and continued to discriminate against Express Phone, placing Express Phone at a competitive disadvantage compared to other CLECs. It is certainly arguable that AT&T's failure to meet its clear and unambiguous statutory duty is an act of bad faith.

Q. AT PAGE 10 OF HIS DIRECT TESTIMONY, MR. GREENLAW ARGUES THAT INSTEAD OF APPLYING THE PLAIN LANGUAGE OF THE STATUTE, THE COMMISSION SHOULD INTRODUCE AN UNDEFINED "PUBLIC INTEREST" ELEMENT TO ITS ANALYSIS IN THIS CASE. DO YOU AGREE?

A. No. Mr. Greenlaw does not define the "public interest" standard that he wishes the Commission to adopt, does not explain how the Commission would have the authority to apply restrictions not found in the Act or FCC rules, and does not explain how the public interest would be served if the Commission were to somehow sign off on AT&T's refusal to meet its clear statutory obligations.

Contrary to Mr. Greenlaw's unsupported assertion, the public interest would be served by the implementation of the antidiscrimination safeguard set forth in §252(i) and §51.809. While the merits of the collections dispute will be decided in another case, it is undisputed that AT&T has in place discriminatory dispute resolution provisions and has continued to discriminate against Express Phone – placing it at a competitive disadvantage – since October 20, 2010. The public interest would have been served if AT&T had made the NewPhone ICA available without unreasonable delay. Since AT&T chose not to meet its obligations at that time, the best that the Commission can do is to enter an order finding that Express Phone's adoption of the NewPhone ICA was valid and effective on October 20, 2010.

Q. MR. GREENLAW (P. 10) MAKES A REFERENCE TO THE COMMISSION'S ORDER NO. PSC-99-1930-PAA-TP IN DOCKET NO. 990939-TP, AND ARGUES THAT THE FACTS OF THAT CASE ARE SIMILAR TO THIS PROCEEDING. ARE YOU FAMILIAR WITH ORDER NO. PSC-99-1930-PAA-TP?

A. Yes.

Q. ARE THE FACTS IN THIS CASE COMPARABLE TO THOSE IN DOCKET NO. 990939-TP?

A. Absolutely not. In Order No. 99-1930-PAA-TP, the Commission did in fact reject the adoption of an ICA by Health Liability Management Corporations d/b/a Fibre Channel Networks, Inc. and Health Management Systems, Inc. (HLMC). But the reason was not, as Mr. Greenlaw suggests, the existence of a dispute between AT&T (then BellSouth) and HLMC. Instead, the Commission rejected the adoption because HLMC was not a telecommunications carrier eligible to enter into an ICA with an ILEC and had not been granted a certification of Public Convenience and Necessity by the Commission (in fact, the Commission could find no record of HLMC being registered as a corporation in the state of Florida). It was explicitly for this reason that the Commission found as it did:

> As noted above, we denied HLMC a certificate because HLMC failed to complete its application and failed to establish that it had the technical, financial or managerial capability to operate a telecommunications company. Because HLMC has failed to obtain a Certificate of Public Convenience and Necessity pursuant to Section 364.337, Florida Statutes, HLMC cannot provide telecommunications services in Florida, and therefore, does not meet the statutory definition of a "telecommunications carrier" under Section 47 USC 153 (44), nor can it operate as an interexchange carrier in Florida. Although Section 252(i) of the Act mandates that BellSouth make available its interconnection agreement with AT&T to any requesting telecommunications carrier," *we do not believe BellSouth is obligated to provide such an agreement to HLMC because it is not currently a "telecommunications carrier"* (emphasis added).[19]

Q. HAS EXPRESS PHONE BEEN GRANTED A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY BY THIS COMMISSION?

A. Yes.

Q. IS EXPRESS PHONE A "TELECOMMUNICATIONS CARRIER" AS DEFINED IN 47 USC 153 (44)?

[19] Order No. PSC-99-1930-PAA-TP, p. 3.

A. Yes.

Q. DOES A 1999 DECISION IN WHICH THE COMMISSION REJECTED THE ADOPTION OF AN ICA BY AN ENTITY THAT WAS FOUND NOT TO MEET THE DEFINITION OF A TELECOMMUNICATIONS CARRIER HAVE ANY BEARING WHATSOEVER ON THE ISSUES IN THIS CASE?

A. No. Mr. Greenlaw's carefully selected and incomplete passages fail to provide essential information regarding the Commission's decision in the prior case. When the complete Order is considered, it is clear that the Commission's decision was based directly on facts that are fundamentally different than those in this case. The Commission did not, as Mr. Greenlaw attempts to suggest, adopt a broad "public interest" standard to apply to ICA adoptions; in reality, it appears that the Commission simply applied the clear language of the Act without adding any additional criteria.

Q. AT PAGES 11-12 OF HIS DIRECT TESTIMONY, MR. GREENLAW ADDRESSES THE EFFECTIVE DATE OF EXPRESS PHONE'S ADOPTION OF THE AT&T-NEWPHONE ICA. DO YOU UNDERSTAND HIS CONCLUSION AND RECOMMENDATION?

A. No. Based on my reading of his testimony, Mr. Greenlaw does not actually propose a date, but instead argues (p. 12) that "the effective date should be some time after the date Express Phone filed its Notice of Adoption with the Commission."

Q. DOES MR. GREENLAW PROVIDE ANY LEGITIMATE SUPPORT FOR HIS RECOMMENDATION OF THIS AMBIGUOUS EFFECTIVE DATE?

A. No. Mr. Greenlaw's discussion is based on a number of fundamental misunderstandings regarding the ICA adoption process.

First, he argues (incorrectly) that the ICA cannot be effective on the date that the CLEC notifies the ILEC of the adoption, because such letters of notification "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." As explained previously in my testimony, Mr. Greenlaw is just wrong about this. §252(i) and §51.809 create a safeguard against discrimination by an ILEC by providing an opportunity for a CLEC to "opt in" to any ICA, as long as the ICA being adopted has been approved by a state commission pursuant to section 252 of the Act. There is no "review process" for AT&T to consider whether it is willing to agree to the adoption; AT&T must permit any such adoption of any agreement by any telecommunications carrier. Similarly, there are no "factors that could impact the request" except for the two factors explicitly set forth in §51.809 (neither of which can apply in the case of a reseller such as Express Phone), and AT&T does not have the option of creating additional "factors" or qualifications. Pursuant to the Act and FCC rules, AT&T's only role is to make the adopted agreement available to the adopting CLEC.

Second, Mr. Greenlaw argues that "an ICA is not an enforceable contract until both parties have signed the contract, it is filed with the Commission for approval, and has been approved." Once again, Mr. Greenlaw is confusing the execution of a new ICA with the process of ICA adoption. A newly-negotiated ICA must be filed for approval with the Commission, because the Commission must review the agreement and reject it if it finds the ICA to be discriminatory. Similarly, an

arbitrated agreement is reviewed to ensure that it reflects the terms of the arbitration decision. In contrast, a CLEC may only adopt an ICA that has already been "approved by a state commission pursuant to section 252 of the Act." By definition, any ICA that is adopted by a CLEC – including the AT&T-NewPhone ICA adopted by Express Phone – has already been reviewed and approved by the Commission prior to the notice of adoption. Mr. Greenlaw's proposal represents the kind of unreasonable delay that §51.809 explicitly prohibits.

Third, Mr. Greenlaw argues that "to find that October 20, 2010 is the effective date of the new ICA would be to find that AT&T Florida can be forced to be a party to a contract without its consent." What Mr. Greenlaw fails to consider is that this is exactly what §252(i) of the Act requires: AT&T must make available any interconnection agreement" to "any requesting telecommunications carrier." The requirement that AT&T must enter into such a contract – with or without its consent – is a statutory safeguard to prevent exactly the kind of anti-discriminatory behavior engaged in by AT&T when it offered more favorable dispute resolution terms to NewPhone than it offered to Express Phone.

Q. AT PAGE 12 OF HIS DIRECT TESTIMONY, MR. GREENLAW GOES ON TO ASSERT THAT THE NEXTEL ORDER PROVIDES SUPPORT FOR HIS RECOMMENDATION. DO YOU AGREE?

A. No. Mr. Greenlaw's testimony is unclear on this point: in support of his erroneous conclusion that AT&T cannot be "forced to be a party to a contract without its consent," he argues that the Commission "reached a somewhat similar decision" in the *Nextel Order*. While I'm not sure what he intends the phrase "a somewhat similar

decision" to mean, a review of the actual language of the *Nextel Order* reveals no support for Mr. Greenlaw's argument.

As an initial matter, the issues in Docket No. 070369-TP addressed attempts by AT&T to add conditions to the adoption of an ICA by a CLEC, just as it is attempting to do in this case. In Order No. PSC-08-0584-FOF-TP, the Commission rejected AT&T's attempts to impose conditions not found in §252(i) and §51.809, and should reach the same conclusion in this case.

When citing this order in his testimony, Mr. Greenlaw fails to mention that the question of whether an adoption should be effective on the date of notification to AT&T or on the date of filing with the Commission was not at issue. The Commission found the effective date of the ICA adopted by Nextel to be the date of the notice filed with the Commission, because the CLEC in that case had requested such a date. The Commission did not conclude, contrary to Mr. Greenlaw's suggestion, that the adoption of an ICA cannot be effective on the date of a CLEC's notice to AT&T.

Unfortunately, Mr. Greenlaw does not cite any actual language from Order No. PSC-08-0584-FOF-TP to support his claim. A review of the actual language supports a different conclusion: "when an interconnection agreement is available for adoption under 47 CFR 51.809(a), the adoption is considered presumptively valid and effective upon receipt of the notice by the adoption [sic] party."[20] Here, the AT&T-NewPhone ICA was "available for adoption under 47 CFR 51.809(a)" on October 20, 2010, and Express Phone's adoption was presumptively valid on that date.

[20] *Nextel Order*, p. 11.

Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

A. Yes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Rebuttal Testimony of Don J. Wood has been furnished by hand delivery* and U.S. Mail this 29th day of March, 2012, to the following:

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