

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

DOCKET NO. 110087-TP

NOTICE OF ADOPTION OF EXISTING
INTERCONNECTION, UNBUNDLING,
RESALE, AND COLLOCATION AGREEMENT
BETWEEN BELL SOUTH 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.

VOLUME 1

Pages 1 through 201

PROCEEDINGS: HEARING

COMMISSIONERS
PARTICIPATING:

CHAIRMAN RONALD A. BRISÉ
COMMISSIONER LISA POLAK EDGAR
COMMISSIONER ART GRAHAM
COMMISSIONER EDUARDO E. BALBIS
COMMISSIONER JULIE I. BROWN

DATE: Thursday, May 3, 2012

TIME: Commenced at 9:30 a.m.
Concluded at 2:53 p.m.

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: JANE FAUROT, RPR
Official FPSC Reporter
(850) 413-6732

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P R O C E E D I N G S

CHAIRMAN BRISÉ: Good morning.

We're going to call this hearing to order;
Docket Number 110087-TP. And at this time I'm going to
ask staff to read the notice.

MS. TAN: By notice issued March 30th, 2012,
the time and place was set for this hearing in Docket
Number 110087-TP, 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. The purpose of this hearing is set forth
in that notice.

CHAIRMAN BRISÉ: Thank you.

At this time we're going to take appearances,
and we'll start from my left, your right.

MR. HATCH: Good morning, Commissioners.
Tracy Hatch, 101 -- or 150 South Monroe Street,
Tallahassee, Florida -- old addresses, and I move a
lot -- appearing on behalf of AT&T Florida. Also
appearing with me is Suzanne Montgomery, same address.

CHAIRMAN BRISÉ: Okay. Thank you.

MS. KAUFMAN: Good morning, Commissioners.
Vicki Gordon Kaufman of the law firm Keefe

1 Anchors Gordon and Moyle appearing on behalf of Express
2 Phone Service, Inc.

3 **CHAIRMAN BRISÉ:** Thank you.

4 **MS. TAN:** Lee Eng Tan of behalf of Commission
5 staff.

6 **MS. CIBULA:** I'm Samantha Cibula, advisor to
7 the Commission, and I'd also like to make an appearance
8 for Curt Kiser, the Commission's General Counsel.

9 **CHAIRMAN BRISÉ:** Thank you very much. Are
10 there any preliminary matters that we need to address?

11 **MS. TAN:** Yes. AT&T Florida has a motion for
12 official recognition that should be taken up as a
13 preliminary matter.

14 **CHAIRMAN BRISÉ:** Okay. We will do that at
15 this time, and I think the best way to proceed is for
16 AT&T to explain their motion and we'll take it from
17 there.

18 **MR. HATCH:** There's a list of cases that we
19 have requested official recognition. They are all
20 reported decisions from either commissions or courts
21 that we would think are relevant ultimately to this
22 case. Some of them are commission cases, some of them
23 are courts. We will discuss them in the briefs.

24 **CHAIRMAN BRISÉ:** Thank you.

25 Are there any objections to that?

1 **MS. KAUFMAN:** Yes, Commissioner.

2 My objection goes to two points. Just for the
3 record, I want to object to the lateness of this filing.
4 If you look at the rule on official recognition it
5 requires the parties -- the party seeking recognition to
6 provide the adverse party with time to respond and
7 review the information. We got this Monday afternoon,
8 and so I don't think we have had sufficient time.

9 That being said, I would suggest to you that
10 there is no need for the Commission to take official
11 recognition of cases anywhere, you know, reported
12 federal cases or state cases. I think any party is free
13 to cite cases in their brief if they think they are
14 appropriate.

15 Similarly, I think you can certainly take
16 recognition of your own orders. I would suggest to you
17 that contrary to Mr. Hatch, the cases that he has cited,
18 with the exception of the Nextel case, don't have
19 anything to do with opting into agreements. We don't
20 think they are relevant. We think you can notice the
21 cases for what you think they're worth. And I think I'm
22 not going to object on a similar basis to the decisions
23 of other state commissions. Again, we don't believe
24 they are relevant, but, you know, we're not going to
25 object to you noticing them.

1 What we do object to are two items Mr. Hatch
2 didn't mention in his remarks. Those are Number 6 and
3 Number 7 on the list, which are categorized or described
4 as all documents in certain cases. The first case is
5 the -- I assume the Image Access original
6 interconnection case and the second one is the Express
7 Phone. We were not provided with, nor have we reviewed,
8 nor do we know what all documents in those cases are.
9 We don't think that these sorts of documents are
10 appropriate for official recognition, and further we
11 don't think that -- we haven't been provided with them,
12 we don't have sufficient time to review them, and we
13 don't think that you should take official recognition of
14 them.

15 If counsel has a particular document, you
16 know, they're free to use it on cross if they like, if
17 it's appropriate. So out of this list, we would object
18 to recognizing Number 6 and Number 7.

19 **CHAIRMAN BRISÉ:** All right. Thank you very
20 much.

21 **MR. HATCH:** Mr. Chair, with respect to
22 lateness, the procedural order requires that we provide
23 our list of official recognition two days before the
24 hearing. We have done that, so we have complied with
25 the procedural order in this case.

1 With respect to all of the cases and so forth
2 that we have cited, technically I agree with Ms.
3 Kaufman. However, it goes both ways at the Commission,
4 and this is belt and suspenders for us just to bring it
5 to your attention. These are the cases we're going to
6 be dealing with usually in the ultimate brief, and some
7 of them will be discussed during the proceeding today.

8 With respect to the two dockets, what we are
9 interested in and why we identified those two dockets,
10 Numbers 6 and 7, is because there are documents that
11 were filed with the Commission in those dockets, and we
12 are interested in the dates of the documents that they
13 are filed. Not necessarily the truth of all the
14 information in them, but the dates that they were filed.

15 **CHAIRMAN BRISE:** Thank you.

16 **MR. HATCH:** And those documents would be
17 self-authenticating in any event, should we choose to
18 produce them and put them into the record.

19 **CHAIRMAN BRISE:** Thank you.

20 **MS. KAUFMAN:** Commissioner, I just want to
21 make -- if I might, I just want to make it clear, Mr.
22 Hatch mentioned belts and suspenders, but I don't think
23 there's any obligation on parties, as I said earlier, to
24 advise or to put into official recognition the cases
25 they intend to rely on in their brief, so I wouldn't

1 want that to be any prohibition. And I think he has
2 addressed 6 and 7. I would say that if he has got a
3 document that he would like to use, he may try to do so,
4 but to just have all documents officially recognized,
5 which, again, I don't know even know that you all were
6 provided with a copy of them, I think that's
7 inappropriate.

8 **CHAIRMAN BRISÉ:** Thank you.
9 Samantha.

10 **MS. CIBULA:** First, as to timeliness, I do
11 believe the motion is timely because it was filed two
12 days beforehand. If it was, like, 24 hours or 48 hours
13 I think that would have been an issue, but I think it's
14 timely.

15 In regard to the documents listed, all the
16 documents that are specifically listed I believe that
17 they would be appropriate for official recognition.
18 However, I do agree with Ms. Kaufman, that the 6 and 7
19 documents where there are just a general request for all
20 documents I think is too general, and they should
21 probably give us specific documents that they want us to
22 officially recognize.

23 **CHAIRMAN BRISÉ:** Okay. So are there specific
24 documents that you'd like --

25 **MR. HATCH:** I can provide those specific

1 documents to you.

2 CHAIRMAN BRISÉ: Okay. That would be helpful.

3 (Pause.)

4 CHAIRMAN BRISÉ: All right.

5 So at this time we will take official
6 recognition of the -- it's my decision, right?

7 MS. KAUFMAN: I just haven't seen the
8 documents yet, I'm sorry.

9 CHAIRMAN BRISÉ: Okay. (Pause.)

10 MS. KAUFMAN: Thank you, Mr. Chairman.

11 We don't have any objection to these four
12 documents. So will these be substituted or marked as
13 exhibits?

14 MR. HATCH: Your choice, Mr. Chairman.

15 CHAIRMAN BRISÉ: I suppose, due to your
16 comments initially, we'll substitute these for those, if
17 that works.

18 MR. HATCH: Yes, that's correct.

19 CHAIRMAN BRISÉ: Okay. So we will substitute
20 these for 6 and 7, and we will take official recognition
21 of the balance of the documents. And, of course, we
22 will give all of it the weight that we feel is
23 appropriate.

24 MS. KAUFMAN: Thank you.

25 CHAIRMAN BRISÉ: Are there any other

1 preliminary matters?

2 **MS. TAN:** Yes, Chairman. At this time staff
3 recommends that the Comprehensive Exhibit List be marked
4 as Exhibit Number 1 and moved into the record.

5 **CHAIRMAN BRISÉ:** Okay. We will do that at
6 this time. Thank you very much.

7 (Exhibit Number 1 marked for identification
8 and admitted into the record.)

9 **MS. TAN:** In addition, there are two
10 stipulated exhibits that staff recommends be marked as
11 Exhibit Number 2 and Exhibit Number 3 and have them
12 moved into the record.

13 **CHAIRMAN BRISÉ:** We will move those into the
14 record.

15 (Exhibit Number 2 and 3 marked for
16 identification and admitted into the record.)

17 **MS. TAN:** And staff would also like to add a
18 late-filed exhibit as Exhibit Number 35, which is
19 Express Phone's Affidavit to Staff's Discovery.

20 **CHAIRMAN BRISÉ:** Thank you. Are there any
21 objections?

22 **MR. HATCH:** No.

23 **CHAIRMAN BRISÉ:** Okay. Seeing none, we will
24 move Exhibit 35 into the record.

25 (Late-filed Exhibit Number 35 marked for

1 identification and admitted into the record.)

2 **CHAIRMAN BRISÉ:** Okay. Any other preliminary
3 matters?

4 **MS. TAN:** Yes. Staff notes that there is a
5 challenge to the expert qualifications for the witnesses
6 of AT&T. We believe that these objections should be
7 addressed at the time that the witness takes the stand
8 before his testimony is moved into the record via voir
9 dire.

10 **CHAIRMAN BRISÉ:** All right. Thank you.

11 At this time we are ready to move forward to
12 opening statements. We're going to allow for ten
13 minutes of opening statements. Express Phone will go
14 first and then followed by AT&T. So I am following the
15 prehearing order which provides for ten minutes for
16 opening statements. And I'm going to time you, so when
17 you hear my phone start buzzing, or beeping, or whatever
18 the sound is going to be, you know, you could wrap it
19 up. Now let me just make sure I found my alarm clock,
20 my timer. (Pause.)

21 **MS. KAUFMAN:** Mr. Chairman, as long as it
22 doesn't deduct from my ten minutes. I had -- it's not
23 really an exhibit; it's the pertinent parts of the law
24 that I'd just like to distribute and use in my opening
25 remarks. It doesn't need an exhibit number or anything.

1 I just thought it would be easier if we had it in front
2 of us.

3 CHAIRMAN BRISÉ: Okay, that's fine. So your
4 time will start after it's passed out.

5 MS. KAUFMAN: Thank you.

6 CHAIRMAN BRISÉ: And the former chairman,
7 which is great at managing time, will help me manage
8 time.

9 MS. KAUFMAN: Okay.

10 CHAIRMAN BRISÉ: All right. You may proceed.

11 MS. KAUFMAN: Good morning, Commissioners.

12 As I said, my name is Vicki Gordon Kaufman.
13 I'm here on behalf of Express Phone Service, Inc. Mr.
14 Armstrong will describe in more detail what Express
15 Phone does, but it is a small certificated CLEC in
16 Florida and it's also an ETC, meaning that it is
17 eligible to provide Link-Up and Lifeline service to
18 underserved customers in the state.

19 Commissioners, I suggest to you that the issue
20 in this case is very simple, and the issue is did
21 Express Phone validly opt in to the interconnection
22 agreement, or called ICA of NewPhone, another CLEC, on
23 October 20th, 2010. That's the issue. And I think that
24 unlike many other matters that come before you, the law
25 in this instance is clear, and that's why I distributed

1 it, and I'm going to talk about it in a moment. But I
2 want to give you just a little bit of background to kind
3 of set the stage for this case.

4 As you know, the Telecommunications Act of
5 1996 was a very comprehensive piece of federal
6 legislation, and its main goal was to open the markets
7 to competition. Now, the Act provides several ways in
8 which a competitor can engage with an incumbent like
9 AT&T to be able to provide service to end users and to
10 offer them choice.

11 One of the ways this can happen is the
12 incumbent and the competitor can attempt to negotiate an
13 agreement. For small CLECs like Express Phone this is
14 not a really a very meaningful option because typically
15 these small CLECs are presented by AT&T with what they
16 call their template or standard agreement and are told
17 it's sort of a take it or leave it situation.

18 The second way that the two parties can reach
19 agreement is through arbitration, coming before you
20 litigating the terms of the agreement. Again, it's a
21 very time consuming and it is an expensive proposition.

22 The third way is what we are going to talk
23 about in this case, and that is that the CLEC can opt in
24 to another CLEC's agreement that you have already
25 approved. That agreement has already been through the

1 process and you have approved it. This is what Express
2 Phone wanted to do or tried to do in this case.

3 On October 20th, 2010, Express Phone sent a
4 notice of adoption to AT&T. There is no dispute that
5 AT&T got the notice; there is no dispute that AT&T knew
6 what agreement was being discussed. And really those
7 are the only facts, I think, that are pertinent here,
8 and the letter is attached to Mr. Armstrong's testimony.
9 And Express said to AT&T we are opting into the NewPhone
10 agreement. Upon AT&T's receipt of that notice, which
11 there is no dispute about, the opt-in became effective.

12 Now, I passed out the two provisions of the
13 law that I think are applicable in this case, and
14 luckily for all of us they are fairly short. The first
15 is the federal statute that governs. It should be the
16 first page, and it's 252(i). This is what we call the
17 opt-in or adoption provision. It is short and it's
18 clear and it says the local exchange carrier shall.
19 There is no discretion. It's not a discretionary act.
20 They shall make available any interconnection service or
21 element provided under an agreement approved under this
22 section to which it's a party to any other requesting
23 telecommunications carrier. So if the agreement is
24 approved by the state, the incumbent has to make it
25 available to a CLEC to opt-in to.

1 The Federal Communications Commission looked
2 at this statute and then adopted rules to implement it.
3 That is the second page of your handout. This is 47 CFR
4 51.809. That's the FCC's rules implementing the opt-in.
5 Again, they are very clear. An incumbent shall make
6 available to any requesting carrier any agreement in its
7 entirety to which the incumbent is a party and which has
8 been approved by the Commission.

9 There are two exceptions that the FCC
10 promulgated and those are in (b)(1) and (b)(2). Those
11 exceptions have no application in this case. They have
12 not been raised by AT&T as an exception, and so they are
13 just -- they are inapplicable and there is really no
14 need to discuss them in any great detail.

15 I think it's also important when you look at
16 the law and you hear the testimony today, the purpose of
17 the opt-in provision was to prevent discrimination in
18 the marketplace, discrimination between the incumbent
19 and the carrier and discrimination among the CLECs that
20 are out there competing with each other. And I'm going
21 to give you, you know, what I admit is a very simplistic
22 example, but if you have CLEC Number 1 and they have an
23 agreement in which they are purchasing from AT&T an
24 element, an item for a dollar, they are in that
25 agreement, then AT&T starts to sell under another

1 agreement this same item for 25 cents, clearly that is
2 discrimination as to the first carrier and the FCC
3 wanted to prevent that by allowing a carrier to opt-in
4 to the most favored -- instead of a most favored nation,
5 to the most favorable agreement so everybody would be on
6 a level playing field and there wouldn't be
7 discrimination from one carrier to the other.

8 Now, I think the price example is pretty easy,
9 but it's not only prices that can be discriminatory.
10 Clearly terms and conditions in an agreement can be
11 discriminatory. And in this case you have one
12 competitor in the market that has to pay all amounts to
13 the incumbent, disputed or not, under their agreement,
14 and there is another CLEC that only has to pay amounts
15 that are not in dispute. Clearly the first CLEC is
16 being discriminated against, and the FCC and the
17 Congress wanted to prevent that by permitting the
18 opt-in.

19 So I have suggested to you this is a pretty
20 easy case and you are probably thinking, well, then why
21 are we here? You know, what is AT&T's position on all
22 of this? And when Express Phone opted into the
23 agreement on October 20th they received a letter back
24 from AT&T which we are going to probably discuss at some
25 length, and AT&T said, well, you can't opt into this

1 agreement because you are not in the window for
2 negotiation with your current agreement. And recall the
3 three separate ways that I discussed. They said you're
4 stuck in your agreement, that's it, we're done. It is
5 the only reason that was provided in that November 1st
6 letter.

7 Now, if you read the testimony, AT&T has come
8 up with some additional reasons, and I suggest to you
9 their position has evolved as this case has gone on, but
10 that was the only reason they gave, and I would
11 challenge you to look at the two pages of the law and
12 see if there is anywhere in there where this -- I
13 wouldn't even call it an exception, but this suggestion
14 by AT&T has any place in the law, and there is not.
15 It's just not in there.

16 And I know that you all know the statutory
17 maxim that, you know, when the law is plain and clear
18 you have to read it and interpret it as it says. I also
19 suggest to you, going back to my competition discussion,
20 that if AT&T's position were correct, you could have a
21 situation where a CLEC was in an ICA which was for five
22 years, which is not an atypical term paying that one
23 dollar to buy the same item for five years that another
24 CLEC is buying for 25 cents. Again, it just doesn't
25 make any sense when you think of the reason behind the

1 opt-in to begin with.

2 Now, as I said when we opted in on
3 October 20th, AT&T said, no, you can't do that because
4 you're not in the negotiation window. Express Phone,
5 small, to their credit they kept trying to, you know,
6 get AT&T to recognize and implement the opt-in, and
7 subsequently AT&T sent another letter in which they
8 changed their reasons for not recognizing the adoption.
9 That is also attached to Mr. Armstrong's testimony.
10 They have reasons in there that, again, I challenge you
11 to find anywhere in the law that it is your duty to
12 apply in this case.

13 I will go out on a limb, not too much, though,
14 and make a prediction that you're going to hear a lot
15 from AT&T about the amounts that it claims Express Phone
16 owes to it, and I want to be clear right up front that
17 Express Phone totally disagrees that these amounts are
18 owed, these amounts --

19 **CHAIRMAN BRISÉ:** You have one minute.

20 **MS. KAUFMAN:** Oh, my gosh. All right. We
21 disagree that the amounts are owed. Let me just go very
22 quickly to the other question, which is the date of the
23 adoption. The effective date of the adoption is the
24 date on which AT&T received the notice. You said that
25 in your Nextel order. AT&T took that order to the

1 federal court across the street. The federal court
2 affirmed, and they said the incumbent is not allowed to
3 profit from litigation delay. And so when they got the
4 notice, no matter how long they want to litigate it,
5 that is the date that it was effective. And what we are
6 asking the Commission to do is to find that Express
7 Phone's opt-in of the NewPhone agreement was effective
8 on October 20th, 2010, and govern the parties'
9 relationship as that agreement states.

10 Thank you.

11 **CHAIRMAN BRISÉ:** Thank you.

12 Mr. Hatch.

13 **MR. HATCH:** Good morning, Commissioners.

14 The basic facts in this case are not in
15 dispute. You're going to hear essentially what you
16 heard last summer. That's not going to change because
17 the facts have not changed.

18 Express Phone entered into an interconnection
19 agreement, a contract with AT&T back in -- effective
20 November of 2006. That contract had a term of five
21 years, which means that that contract did not expire
22 until November of 2011. Express Phone's
23 Commission-approved ICA has a provision in it that says
24 you must pay all billed amounts including disputed
25 amounts. Now, Express Phone doesn't dispute this. They

1 did not honor that contract and withheld substantial
2 amounts of billings that were owed to AT&T under the
3 terms of their ICA. Express Phone is and continues to
4 be in breach of that agreement by failing to pay what is
5 now approximately almost a million and a half dollars.
6 Now, I understand there is a dispute over the amounts,
7 but those are the amounts that you will hear in the
8 testimony later on.

9 Now in an attempt to escape these undisputed
10 facts, what Express Phone now wants you to do is void
11 its prior interconnection agreement and then order AT&T
12 to enter into a new interconnection agreement, a
13 different agreement that has a provision in it that says
14 you have to pay billed amounts, but you can withhold
15 disputed amounts. The net effect of this provision
16 would be to allow Express Phone with the new ICA to now
17 claim that the amounts owed, whatever that is, are now
18 disputed amounts and then they don't have to pay that.

19 And Express Phone doesn't dispute this. It's
20 very clear. If anybody doubts where this is going to
21 end, one needs to look only at Express Phone's alterego,
22 a company called Digital Express, which you will hear
23 referred to later in the testimony. Digital Express
24 upon billings in excess of \$300,000, has paid AT&T
25 exactly \$100. That is what Express Phone's goal is in

1 this proceeding, make no mistake.

2 Now, in order to support all of this,
3 basically what Express Phone wants you to do as a legal
4 analysis is look at Section 252(i) in the Telecom Act,
5 and it wants you to put on blinders and focus solely on
6 the text in the statute, in 252(i), and also the text of
7 the rule. And just as a note, I would direct your
8 attention to what Ms. Kaufman handed out, which is 41
9 CFR 51.809, and the first sentence of that says an
10 incumbent shall make available -- and then there is the
11 phrase that she didn't talk about -- without
12 unreasonable delay. That phrase in and of itself must
13 mean -- to ascribe any meaning must mean that a notice
14 of opt-in cannot be automatic. It just can't and comply
15 with the terms of that.

16 But more importantly, what Express Phone wants
17 you to do is ignore all of the cases that construe
18 252(i) that have arisen over time after 252(i) came
19 about in the Telecom Act. And there is a series of
20 cases, most of which are on the list that we talked
21 about earlier in official recognition, and we will go
22 through those. We will certainly talk about those at
23 great length in our brief, and they will be referred to
24 briefly both in cross and in the testimony of our
25 witnesses.

1 Essentially, based -- when you look at the
2 case law, and based on the undisputed facts in this
3 case, you will see, you must come to the conclusion that
4 Express Phone is not entitled to and should not be
5 allowed to opt-in to the Image Access ICA. For to do
6 that, you would have to declare that all of these cases
7 construing 252(i) or the bulk of them are literally
8 legally wrongly decided. It would more practically make
9 voidable every ICA simply at the will of a CLEC that
10 doesn't like the terms of its ICA and just chooses it
11 wants another ICA for whatever reason. This would
12 clearly destroy any notion that an ICA is a binding and
13 enforceable agreement. It's binding and enforceable
14 only until the CLEC doesn't like it, then he opts into
15 another agreement.

16 Express Phone's attempt here to abrogate its
17 ICA and essentially wipe its slate clean with a new ICA
18 is clearly not supported in the law and it cannot be
19 supported in public policy, and we respectfully request
20 that that attempt be rejected.

21 Thank you.

22 **CHAIRMAN BRISÉ:** Thank you.

23 At this time we are going to move into
24 testimony, and I'm going to ask that all of those who
25 are here to testify, if you would rise so we can swear

1 you in.

2 Raise your right hand.

3 (Witnesses collectively sworn.)

4 **CHAIRMAN BRISE:** Thank you very much.

5 Okay. We are going to move into testimony,
6 and I believe we are going to begin with Express Phone.
7 Okay. And so, Express Phone, you may call your first
8 witness.

9 **MS. KAUFMAN:** Thank you, Mr. Chairman.

10 Express Phone would call Mr. Tom Armstrong.

11 **THOMAS M. ARMSTRONG**

12 appeared as a witness on behalf of Express Phone
13 Services, and, swearing to tell the truth, testified as
14 follows:

15 **DIRECT EXAMINATION**

16 **BY MS. KAUFMAN:**

17 **Q.** Good morning, Mr. Armstrong.

18 **A.** Good morning, Ms. Kaufman.

19 **Q.** Would you state your name and business address
20 for the record, please.

21 **A.** Tom Armstrong, 1803 West Fairfield, Unit 1,
22 Pensacola, Florida 32501.

23 **Q.** And you are the President of Express Phone?

24 **A.** That is correct.

25 **Q.** On March 1, Mr. Armstrong, did you cause to be

1 filed 14 pages of Direct Testimony in this case?

2 A. I did.

3 Q. Do you have any changes or corrections to that
4 testimony?

5 A. I do not.

6 Q. If I asked you those questions today, would
7 your answers be the same?

8 A. They would.

9 MS. KAUFMAN: Mr. Chairman, I would ask that
10 Mr. Armstrong's Direct Testimony be entered into the
11 record as though read.

12 CHAIRMAN BRISÉ: Okay. It's entered.

13 Thank you.

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INTRODUCTION, QUALIFICATIONS, AND PURPOSE

1 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

2 A. My name is Thomas M. Armstrong. My business address is 1803 W. Fairfield Drive,
3 Unit 1, Pensacola, Florida 32501.

4 **Q. WHAT IS YOUR OCCUPATION AND BY WHOM ARE YOU EMPLOYED?**

5 A. I am President of Express Phone Service, Inc. (Express Phone).

6 **Q. PLEASE STATE YOUR EDUCATIONAL BACKGROUND AND**
7 **EXPERIENCE.**

8 A. I have an Associate's degree (summa cum laude) in Electronic Technology from State
9 Technical Institute of Memphis. During my 20-year career with the United States
10 Marine Corps, I completed the United States Navy curriculum in Advanced Avionics
11 and in Instructor Training. From 1992 to 1998, I was designated as a Master Training
12 Specialist and served as lead instructor of remote training at Special Boat Unit in the
13 Panama Canal Zone, Naval Submarine Base in Groton, Connecticut, Navy/Marine
14 Corps School of Music in Little Creek, Virginia, and the Naval Diving and Salvage
15 Training Center in Panama City, Florida.

16 After my honorable discharge and retirement from the United States Marine
17 Corps in 1998, I began working for Express Phone Service at the very beginning of
18 its existence. I personally processed the first approximately 500 customers' local
19 service requests manually via fax with BellSouth and implemented its first billing
20 process. During this time, I personally hosted and met with the BellSouth CLEC
21 implementation team in Pensacola, Florida. Since that first order, I have been
22 intimately involved in every aspect of Express Phone and its daily operations, both
23 with its customers and its vendors.

1 **Q. DO YOU BELONG TO ANY ORGANIZATIONS?**

2 A. Yes. I have been a member of the National Alternative Local Exchange Company
3 Association/Prepaid Communications Association (NALA/PCA) from 2006 to
4 present. In 2007, I was elected to the board of directors for NALA and have served
5 as the chairman of the association since 2009. During my tenure as chairman, I have
6 coordinated and moderated bi-annual member meetings for review and discussions of
7 pertinent industry matters, including but not limited to ILEC/CLEC relations, billing,
8 promotional disputes, interconnection agreements, and regulatory proceedings.
9 Through my work with NALA/PCA, as well as Express Phone, I have kept up with
10 developments and issues in the industry. My qualifications are attached to this
11 testimony as Exhibit No. TMA-1.

12 **Q. WHAT IS THE PURPOSE OF YOUR DIRECT TESTIMONY?**

13 A. The purpose of my testimony is to describe:

- 14 • Express Phone's operations and customer base, and;
- 15 • Express Phone's attempts to adopt another CLEC's interconnection agreement
16 and AT&T's continual refusal to recognize the adoption as required by the
17 Telecommunications Act of 1996, FCC regulations and orders, and federal
18 law.

19 **Q. ARE YOU FILING ANY EXHIBITS IN CONNECTION WITH YOUR**
20 **TESTIMONY?**

21 A. Yes. I am filing Exhibit Nos. TMA-1 through TMA-13.

22 **Q. PLEASE SUMMARIZE THE ACTIONS THAT YOU BELIEVE THE**
23 **COMMISSION SHOULD TAKE IN THIS MATTER.**

1 A. The issue in this case relates to AT&T's failure to recognize Express Phone's
2 adoption of another carrier's interconnection agreement (ICA). I recommend that,
3 based on the evidence and circumstances in this case, the Commission require AT&T
4 to recognize Express Phone's adoption of the ICA between AT&T and Image Access,
5 Inc. d/b/a NewPhone, Inc. (NewPhone), effective October 20, 2010. This effective
6 date should be applicable to all actions involving the parties. As explained in detail in
7 Mr. Wood's testimony, this action comports with the meaning and intent of both the
8 adoption requirements and the language in Express Phone's ICA with AT&T.

9 **EXPRESS PHONE**

10 **Q. PLEASE DESCRIBE EXPRESS PHONE.**

11 A. Express Phone is a Florida corporation. It is a CLEC and holds Florida Certificate
12 No. 5636. It is assigned Company Code TX481. Express Phone is also an Eligible
13 Telecommunications Carrier (ETC), pursuant to section 364.10, Florida Statutes. An
14 ETC is a carrier authorized to provide a Lifeline Assistance Plan to qualified
15 residential consumers. The Lifeline program is intended to make telephone service
16 affordable for low income consumers.

17 **Q. DESCRIBE THE SERVICES EXPRESS PHONE PROVIDES IN FLORIDA.**

18 A. Since its certification in 1998, Express Phone has provided service to approximately
19 100,000 Floridians via an ICA with AT&T. The majority of these customers use the
20 Lifeline/Linkup program.

21 **Q. DESCRIBE THE LIFELINE PROGRAM AND ITS PURPOSE.**

22 A. The Lifeline/Linkup program is in place to further both federal and state goals of
23 ensuring that all Americans have access to the critical service of local
24 telecommunications in their homes. For customers who qualify, the program

1 provides a one-time initial and a recurring monthly subsidy to the customer so that the
2 customer will be able to afford local telephone service.

3 **Q. DOES IT BENEFIT THE PUBLIC TO HAVE MULTIPLE LIFELINE**
4 **CARRIERS IN THE FLORIDA MARKET?**

5 A. Yes. It is most definitely in the best interest of the public to have open and fair
6 competition in the Florida market by having multiple carriers, both those offering
7 Lifeline programs and those that do not. Having multiple carriers available in the
8 Florida market accomplishes the underlying main purpose of the Telecommunications
9 Act of 1996 and helps to ensure that the citizens of Florida have a choice when
10 selecting their telecommunications provider. Not having multiple carriers fosters the
11 same monopolistic, abusive actions that the incumbent local exchange companies like
12 BellSouth (now known as AT&T Florida) engaged in prior to the competitive market
13 created by the Telecommunications Act of 1996.

14 **Q. WHAT IS THE CURRENT STATUS OF EXPRESS PHONE'S PROVISION**
15 **OF SERVICE IN FLORIDA?**

16 A. Express Phone provided service to its Florida customers until March 31, 2011. On
17 that date, AT&T cut off service to Express Phone's entire Florida customer base of
18 over 3,000 customers due to a billing dispute between the parties. Express Phone's
19 customers were forced to either change carriers or suffer the loss of their home
20 telephone service. These customers were deprived of the ability to call their medical
21 providers, use their telephones to gain employment, or do any of the essential daily
22 activities customers use their telephone service to do. Thus, we can no longer provide
23 service to those customers who have now lost a competitor in the marketplace.

1 **Q. IS EXPRESS PHONE'S BILLING DISPUTE WITH AT&T AT ISSUE IN**
2 **THIS DOCKET?**

3 A. No, it is not. However, it should be noted that from 1998 to December 2008, Express
4 Phone paid all amounts AT&T claimed were due. During that time, AT&T only paid
5 61% of the disputes Express Phone filed. As of February 2011, just prior to the
6 disconnection of over 3,000 Florida residents described above, AT&T paid only 34%
7 of the promotional disputes Express Phone filed. Express Phone initially believed
8 that AT&T would proceed in good faith under our agreement to promptly and
9 reasonably deal with disputes, including those relating to promotional credits. See,
10 Exhibit No. TMA-2 (excerpt from Express Phone/ AT&T ICA, § 26). AT&T has
11 consistently failed in this obligation because not only has it not resolved the majority
12 of the billing disputes it has with Express Phone, it has provided no reason for failing
13 to provide a resolution as to such disputes. Rather, AT&T simply denies them. Many
14 of these disputes remain outstanding.

15 **Q. IN YOUR OPINION, HAS AT&T DISCRIMINATED AGAINST EXPRESS**
16 **PHONE REGARDING ITS FAILURE TO IMPLEMENT THE ADOPTION**
17 **YOU HAVE REQUESTED?**

18 A. Yes. As explained in detail in the testimony of Mr. Wood, the requirement for AT&T
19 to make available to Express Phone the NewPhone ICA for adoption is a prime
20 example of the FCC's intent to prevent discrimination and foster transparent
21 competition for the benefit of the public. While the billing dispute itself is not at
22 issue in this docket, the ability of AT&T to discriminate between NewPhone and
23 Express Phone by refusing to acknowledge the adoption of the NewPhone ICA is.
24 Simply put, AT&T first discriminates against Express Phone by providing its retail

1 customers promotional offerings that it refuses to make available to Express Phone.
2 AT&T does this to a large number of CLECS that have entered into ICAs with
3 AT&T, so here AT&T is engaged in a wide- spread pattern of discrimination against
4 most CLECs. In some cases, such as NewPhone, AT&T has entered into an ICA that
5 permits disputed amounts to be withheld by the CLEC until such time as the disputes
6 are resolved. This means that NewPhone, who is a competitor of Express Phone in
7 the state of Florida, doesn't have to pay the same amount to AT&T on a bill where
8 every other aspect is identical between NewPhone and Express Phone. I submit to
9 you that allowing one party to have permission to do a certain thing while denying
10 another party that is in the identical situation the same ability is a classic definition of
11 discrimination. It is that kind of discrimination that § 252 (i) prevents when it is
12 followed.

13 **EXPRESS PHONE'S ADOPTION ATTEMPTS**

14 **Q. HAS EXPRESS PHONE ATTEMPTED TO INVOKE ITS ADOPTION**
15 **RIGHTS WITH AT&T?**

16 A. Yes, it has. However, AT&T has, at every turn, refused to recognize its obligations
17 and thwarted Express Phone's legitimate right to adopt another CLEC's ICA. AT&T
18 has blatantly ignored and continues to ignore its obligations to Express Phone's
19 detriment. AT&T has caused Express Phone irreparable harm in violation of the
20 Telecommunications Act of 1996, FCC regulations and federal law.

21 **Q. WHAT ICA HAS EXPRESS PHONE ATTEMPTED TO ADOPT?**

1 A. Express Phone has attempted to adopt the ICA between AT&T and Image Access
2 d/b/a NewPhone. That ICA, as well as the amendment extending its effective date,
3 are attached hereto as Exhibit No. TMA-3.¹

4 **Q. PLEASE EXPLAIN THE ACTIONS EXPRESS PHONE HAS TAKEN TO**
5 **ADOPT ANOTHER CLEC'S ICA WITH AT&T.**

6 A. Express Phone has promptly and repeatedly exercised its adoption rights. It has tried
7 for over 18 months to effectuate an adoption of the NewPhone ICA. Express Phone
8 has sent correspondence to AT&T numerous times exercising its adoption rights only
9 to be met with resistance from AT&T at every turn.

10 **Q. PLEASE DESCRIBE THE SPECIFIC ACTIONS EXPRESS PHONE HAS**
11 **TAKEN TO ADOPT THE NEWPHONE ICA AND AT&T'S RESPONSES.**

12 A. Express Phone has taken numerous actions to attempt to adopt the ICA. First, on
13 October 20, 2010, Express Phone sent an adoption notice to AT&T in which it
14 indicated its intent to adopt the Florida ICA between AT&T and Image Access d/b/a
15 NewPhone, Inc. pursuant to the federal statute and rules. (Exhibit No. TMA-4).
16 AT&T responded on November 1, 2010. AT&T refused to recognize Express
17 Phone's adoption request on the sole basis that Express Phone's current ICA with
18 AT&T was still in effect. (Exhibit No. TMA-5).

19 **Q. DID AT&T RAISE ANY OTHER BASIS IN ITS LETTER FOR REFUSING**
20 **TO IMPLEMENT EXPRESS PHONE'S ADOPTION?**

21 A. No.

¹ Due to the length of the ICA, I have attached one copy to the original of my testimony. The ICA can be found at <http://www.psc.state.fl.us/library/FILINGS/06/03022-06/03022-06.PDF> and the amendment can be found at <http://www.psc.state.fl.us/library/FILINGS/09/03179-09/03179-09.pdf>. To the extent the Commission requires additional paper copies, Express Phone will provide them.

1 Q. DOES THE BASIS AT&T RAISED FOR REFUSING TO RECOGNIZE
2 EXPRESS PHONE'S OCTOBER 20, 2010 ADOPTION REQUEST – THAT
3 EXPRESS PHONE WAS CURRENTLY PARTY TO AN ICA -- APPEAR IN
4 YOUR ICA OR ELSEWHERE?

5 A. No, it does not. As Mr. Wood explains, AT&T's "rejection" is contrary to my
6 understanding of the very purpose of the federal adoption obligation. As I understand
7 it, the reason behind the adoption requirement is to ensure that the ILEC (here,
8 AT&T) cannot offer more favorable terms to one CLEC than it does to another. And,
9 to the extent AT&T does this, a CLEC (like Express Phone) is permitted to opt into
10 the more favorable agreement, just as Express Phone attempted to do here. 47 USC
11 § 252 (i) is fairly short – 45 words. Section 11, entitled Adoption of Agreements, of
12 the ICA in effect between Express and AT&T on October 19, 2010 is slightly longer
13 – 69 words. Reading them both takes all of 5 minutes at best. Nowhere in either of
14 these two documents is there any mention of any exception to AT&T's obligation to
15 make the NewPhone ICA available to Express Phone for adoption that would even
16 remotely support AT&T's illegal act of refusing the adoption request.

17 Q. DID EXPRESS PHONE AGAIN ATTEMPT TO ADOPT THE NEWPHONE
18 ICA?

19 A. Yes. On March 14, 2011, Express Phone sent another notification to AT&T opting
20 into the NewPhone ICA. (Exhibit TMA-6). This time, AT&T provided different
21 reasons for its rejection. AT&T said prior to adoption Express Phone would have to
22 pay all amounts in dispute between the parties, provide "suitable" security, and that
23 the ICA must be available for adoption. (Exhibit TMA-7).

24 Q. IS THIS THE FIRST TIME AT&T RAISED THESE ISSUES?

1 A. Yes.

2 Q. DOES THE BASIS AT&T RAISED FOR REFUSING TO RECOGNIZE
3 EXPRESS PHONE'S MARCH 14, 2011 ADOPTION REQUEST APPEAR
4 ANYWHERE THAT YOU ARE AWARE OF?

5 A. No. In my view, and as Mr. Wood testifies, this is just another attempt by AT&T to
6 thwart its obligations and to pressure a small CLEC, like Express Phone, to spend
7 time and financial resources litigating with AT&T rather than serving its customers.
8 AT&T is aware that it requires a lot of time and even more money for a CLEC to
9 petition for relief at the Commission. AT&T does not face this burden because it
10 maintains a legal staff in its employment and also in residence at the same locale as
11 the Commission. AT&T is actually eliminating competition and discriminating
12 against smaller carriers it is obligated to resell to by use of a financial stranglehold –
13 refusing to comply with the legal obligations of the Telecommunications Act of 1996
14 while knowing that those small carriers are hard pressed to challenge AT&T.

15 Q. DID EXPRESS PHONE RESPOND TO AT&T'S MARCH 14, 2011
16 DEMANDS?

17 A. Yes. Counsel for Express Phone pointed out the deficiencies in AT&T's position in
18 correspondence dated March 28, 2011. (Exhibit TMA-8). Specifically, AT&T was
19 notified that:

20 The statute makes no exception to the requirement that an
21 ILEC such as AT&T must allow a CLEC to adopt an
22 interconnection agreement between the ILEC and another CLEC.
23 It certainly doesn't say that the ILEC can require that all past due
24 amounts, including disputed amounts, be "cured" prior to adoption
25 of another interconnection agreement. The statute makes no
26 provision for a "suitable form of security" to be provided prior to
27 adoption. . . .
28

1 Moreover, the existing resale agreement between the
2 parties provides at Section 11 of General Terms and Conditions
3 that BellSouth shall make available to Express Phone any entire
4 resale agreement filed and approved.
5

6 **Q. DID AT&T RESPOND TO EXPRESS PHONE COUNSEL'S LETTER**
7 **QUOTED ABOVE?**

8 A. Yes. AT&T responded that Express Phone had not fulfilled a "necessary condition"
9 that AT&T unilaterally required and that Express Phone's request was "denied."
10 (Exhibit TMA-9). Not only is this "condition" not found in our agreement, but
11 AT&T again sets itself up as the sole judge of the law's requirements.

12 **Q. WHEN DID EXPRESS PHONE NEXT ATTEMPT TO ADOPT THE**
13 **NEWPHONE ICA?**

14 A. On March 29, 2011, counsel for Express Phone filed a Notice of Adoption with this
15 Commission. (Exhibit TMA-10). Again, AT&T objected. (Exhibit TMA-11). On
16 April 4, 2011, Express Phone filed an amended notice of adoption. (Exhibit TMA-
17 12).

18 **Q. WHAT IS YOUR REACTION TO AT&T'S VARIOUS REFUSALS TO**
19 **ACCEPT EXPRESS PHONE'S ADOPTION NOTICES?**

20 A. My lay reaction is that AT&T is making up its own rules and requirements as it goes
21 along and that none of AT&T's "objections" appear anywhere in the pertinent law or
22 regulations. AT&T is simply attempting to stonewall Express Phone's legitimate
23 adoption and drag this dispute out as long as possible. AT&T'S actions demonstrate
24 its interference with competition in the marketplace and its ability to wield its
25 resources and market power to the disadvantage of small carriers. Express Phone
26 simply cannot match the staff and resources within AT&T, and one might suspect that
27 this may be the reason for some of AT&T's actions.

1 **Q. HAS THIS BEEN YOUR EXPERIENCE WITH AT&T OVER THE TERM OF**
2 **YOUR RELATIONSHIP?**

3 A. Yes. AT& T has consistently acted in this manner throughout its relationship with
4 Express Phone and other CLECs over the years. For example, some of AT&T's
5 actions as to small CLECs include:

- 6 • Here is our stock ICA, take it or leave it;
- 7 • Your dispute claim is denied and we are not giving you any other reason that
8 we said so;
- 9 • We'll give our customers \$50 but you only get \$5 on the same promotion;

10 This attitude clearly demonstrates that in this case, as in so many others, AT&T
11 considers itself able to shoot first and ask questions later. Historically, those that
12 have taken similar abusive and monopolistic positions have, as AT&T has done here,
13 only done so when the other party doesn't have the ability or resources to fight back.

14 **Q. IN YOUR VIEW, HAS EXPRESS PHONE TAKEN ALL ACTION**
15 **NECESSARY TO ADOPT THE NEWPHONE ICA?**

16 A. Yes. As I understand it, we have followed the appropriate notification procedures by
17 sending notice to AT&T and complied with all statutes, laws, rules and regulations
18 regarding the adoption of the NewPhone ICA. AT&T, conversely, has instead raised
19 issues not found in or even contemplated by any pertinent statute or regulations and
20 has assumed the de facto position as judge, jury and executioner.

21 **Q. ARE THERE ANY PROVISIONS IN EXPRESS PHONE'S ICA WITH AT&T**
22 **WHICH EXPLICITLY REQUIRE AT&T TO RECOGNIZE EXPRESS**
23 **PHONE'S ADOPTION?**

1 A. Yes. In addition to the requirements of the law, which Mr. Wood describes in detail,
2 there is explicit language in Express Phone's ICA with AT&T addressing adoption.
3 Paragraph 11 of the General Terms and Conditions section of the ICA provides:

4 **Adoption of Agreements**

5 Pursuant to 47 U.S.C. §252(i) and 47 C.F.R. § 51.809, BellSouth
6 shall make available to Express Phone any entire resale agreement
7 filed and approved pursuant to 47 U.S.C. §252. The adopted
8 agreement shall apply to the same states as the agreement that was
9 adopted, and the term of the adopted agreement shall expire on the
10 same date as set forth in the agreement that was adopted.

11
12 (Exhibit TMA-13). This language – in our very own ICA with AT&T - makes it
13 clear that Express Phone is permitted to adopt another CLEC's ICA. None of
14 phantom requirements AT&T has sought to impose during this arduous process are
15 mentioned in this paragraph of the ICA.

16 **EFFECTIVE DATE OF EXPRESS PHONE'S ADOPTION**

17 **Q. IS THE EFFECTIVE DATE OF EXPRESS PHONE'S ADOPTION OF THE**
18 **NEW PHONE ICA AT ISSUE IN THIS DOCKET?**

19 A. Yes.

20 **Q. WHAT IS THE EFFECTIVE DATE OF EXPRESS PHONE'S ADOPTION OF**
21 **THE NEWPHONE ICA?**

22 A. The effective date of Express Phone's adoption is October 20, 2010, the date the first
23 notice of adoption was sent to AT&T. AT&T cannot change the adoption date by
24 continuing to delay and litigate the adoption. In his testimony, Mr. Wood describes
25 why this is the correct date.

26 **Q. WHAT IS THE EFFECT OF RECOGNITION OF THE APPROPRIATE**
27 **ADOPTION DATE OF OCTOBER 20, 2010?**

1 A. The effect of using the correct adoption date of October 20, 2010 is to make all terms
2 of the adopted ICA effective on that date, including, but not limited to, how disputed
3 amounts at issue between the parties are treated. The terms of the NewPhone ICA
4 speak for themselves.

5 **Q. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?**

6 A. Yes.

1 **BY MS. KAUFMAN:**

2 **Q.** Mr. Armstrong, attached to your Direct
3 Testimony, did you have 13 exhibits?

4 **A.** I do.

5 **Q.** Do you have any changes or corrections to
6 those exhibits?

7 **A.** I do not.

8 **Q.** You did file a Revised Exhibit Number 1, did
9 you not?

10 **A.** We did.

11 **MS. KAUFMAN:** And, Commissioners, that Revised
12 Exhibit 1 was filed at the beginning of the week and all
13 the parties have it. I do have extra copies if anybody
14 needs it.

15 **BY MS. KAUFMAN:**

16 **Q.** With the exclusion of Revised Exhibit 1, are
17 all of the exhibits true and correct to the best of your
18 knowledge?

19 **A.** To the best of my knowledge, yes, they are.

20 **MS. KAUFMAN:** So, Mr. Chairman, I guess we
21 have already prenumbered Mr. Armstrong's exhibits as 4
22 through 16 to his direct.

23 **BY MS. KAUFMAN:**

24 **Q.** Mr. Armstrong, did you also cause to be filed
25 in this matter eight pages of Rebuttal Testimony?

1 **A.** I did.

2 **Q.** Do you have any changes or corrections to that
3 rebuttal?

4 **A.** I do not.

5 **Q.** And if I asked you those questions today would
6 your answers be the same?

7 **A.** They would.

8 **MS. KAUFMAN:** Mr. Chairman, I would ask that
9 Mr. Armstrong's rebuttal testimony be inserted into the
10 record as though read.

11 **CHAIRMAN BRISÉ:** Okay. Without any
12 objections. Seeing none.

13 **MS. MONTGOMERY:** We have no objection, Mr.
14 Chairman.

15 **CHAIRMAN BRISÉ:** All right. Thank you.
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INTRODUCTION

Q. PLEASE STATE YOUR NAME, BUSINESS ADDRESS AND OCCUPATION.

A. My name is Thomas M. Armstrong. My business address is 1803 W. Fairfield Drive, Unit 1, Pensacola, Florida 32501. I am President of Express Phone Service, Inc. (Express Phone).

Q. HAVE YOU PREVIOUSLY FILED TESTIMONY IN THIS PROCEEDING?

A. Yes.

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. My rebuttal testimony will respond to certain assertions contained in the direct testimony of AT&T witnesses David J. Egan and William E. Greenlaw.

REBUTTAL TO WITNESS EGAN

Q. MR. EGAN STATES ON PAGE 3 OF HIS DIRECT TESTIMONY THAT AT&T IS TREATING EXPRESS PHONE'S OCTOBER 10, 2010 ADOPTION NOTICE AS A REQUEST TO ADOPT THE AGREEMENT BETWEEN AT&T FLORDIA AND IMAGE ACCESS, INC. D/B/A NEWPHONE, INC. DO YOU AGREE?

A. Yes. That is the agreement Express Phone adopted. It is clear that AT&T understood this because when it responded to Express Phone on November 1, 2010, it said:

Your letter states that Express Phone desires to adopt the **Florida Interconnection Agreement** between BellSouth Telecommunications, Inc. d/b/a AT&T Florida (AT&T Florida) and Image Access, Inc. in the State of Florida.

(Exhibit No. TMA-5, emphasis added). Therefore, this is not an issue in this case.

(Mr. Greenlaw makes a comment similar to Mr. Egan in his testimony on this matter).

1 Both parties understood the exact nature of the adoption and the agreement that was
2 adopted.

3 However, I do quarrel with Mr. Egan's use of the word "request" to describe
4 our adoption notice. We sent the October 20, 2010 notice of adoption pursuant to
5 federal law – it was not a "request" and it does not require AT&T's approval.

6 **Q. ON PAGE 2 OF HIS TESTIMONY, MR. EGAN SAYS HE IS TESTIFYING IN**
7 **SUPPORT OF ISSUES 2 AND 3 IN THIS CASE. WHAT ARE THOSE**
8 **ISSUES?**

9 A. Issues 2 and 3 appear in Order No. PSC-12-0031-PCO-TP at page 11. Those issues
10 are:

11 Issue 2: Is Express Phone permitted, under applicable laws,
12 to adopt the NewPhone Interconnection Agreement during the term
13 of its existing agreement with AT&T Florida?
14

15 Issue 3: Is Express Phone permitted under the terms of the
16 interconnection agreement with AT&T Florida to adopt the
17 NewPhone Interconnection Agreement?
18

19 **Q. DOES MR. EGAN ADDRESS EITHER ISSUE 2 OR 3 IN HIS DIRECT**
20 **TESTIMONY?**

21 A. To me, it does not appear that he does. He provides no information as to whether
22 Express Phone can adopt the NewPhone ICA during the term of an existing
23 agreement or whether Express Phone is permitted to do so under the prior agreement
24 it had with AT&T. Nor does it appear from his experience, as described in his
25 testimony, that he has any experience as to those areas.

1 **Q. WHAT IS THE SUBSTANCE OF MR. EGAN'S TESTIMONY?**

2 A. Mr. Egan attempts to raise matters that are not at issue here and that have no relation
3 or relevance to the issues in this docket. Essentially, he provides testimony regarding
4 his view of the billing disputes between Express Phone and AT&T.

5 **Q. ARE THOSE BILLING DISPUTES AT ISSUE IN THIS DOCKET?**

6 A. No. As I understand it, this docket addresses Express Phone's right pursuant to
7 federal law to adopt another carrier's interconnection agreement.

8 **Q. DO YOU AGREE WITH THE INFORMATION MR. EGAN HAS PROVIDED**
9 **IN HIS TESTIMONY?**

10 A. No. First, as noted above, the numerous billing disputes between Express Phone and
11 AT&T are not at issue in this docket and are not relevant to this Commission's
12 decision in this case. Further, such allegations were not raised when AT&T
13 attempted to reject Express Phone's adoption request on November 1, 2010 – rather,
14 AT&T is attempting to trump up after-the-fact excuses in violation of Express
15 Phone's rights.

16 As I discussed in my direct testimony and as Mr. Wood describes in his
17 rebuttal, AT&T has failed to act in good faith and has unilaterally ignored or rejected,
18 without any rationale, legitimate billing disputes Express Phone has raised.
19 Additionally, AT&T has consistently failed in its obligation to proceed in good faith
20 because not only has it not resolved the majority of the billing disputes it has with
21 Express Phone, it has provided no reason for failing to provide a resolution as to such
22 disputes. This appears to be an attempt to force Express Phone from the marketplace
23 using the vast resources of AT&T.

1 Nonetheless, whatever the status of these disputes, they have nothing to do
2 with Express Phone's ability, under federal law and regulations, to adopt another
3 carrier's interconnection agreement. Mr. Wood discusses these clear principles in his
4 direct and rebuttal testimony.

5 Finally, putting that aside, Express Phone cannot allow Mr. Egan's assertions
6 to remain unchallenged. Express Phone vehemently disagrees with Mr. Egan's
7 calculation of what he claims is owed from Express Phone to AT&T. In fact,
8 according to Express Phone's calculations, as of March 15, 2010, AT&T owed
9 Express Phone in excess of \$1.5 million. (Exhibit No. TMA-14). Mr. Egan has
10 failed to recognize or account for the monies AT&T owes Express Phone in any way.

11 **Q. MR. EGAN REFERENCES EXPRESS PHONE'S OCTOBER 10, 2010**
12 **ADOPTION NOTIFICATION AND AT&T'S RESPONSE AT PAGE 3 OF HIS**
13 **DIRECT TESTIMONY. HOW DID AT&T RESPOND TO EXPRESS**
14 **PHONE'S OCTOBER 10TH ADOPTION NOTIFICATION?**

15 **A.** AT&T's November 1, 2010 response is attached to my direct testimony as Exhibit
16 No. TMA-5. While Mr. Egan's testimony appears to infer otherwise, he fails to note
17 that there was NO mention at all in AT&T's November 2010 response to Express
18 Phone's adoption notice that AT&T believed any amounts were outstanding. Nor is
19 that provided as a reason, albeit not a legitimate one, for refusing to implement
20 Express Phone's adoption.

21 In fact, AT&T's sole reason for refusing to recognize our legitimate adoption
22 on October 20, 2010 was:

23 Our records indicate that Express Phone is currently operating
24 under an approved Agreement in the States of Florida and

1 Mississippi which have not expired and are not within the
2 timeframe to request a successor agreement. Therefore, pursuant
3 to the Effective Date, Term, and Termination provisions of the
4 General Terms and Conditions, AT&T denies Express Phone's
5 adoption [sic] requests.
6

7 In addition, Express Phone continued to try to negotiate with AT&T until
8 October 2010. During this time frame, AT&T not only acknowledged the disputed
9 amounts but agreed to base its new deposit request, which the parties were discussing
10 at that time, *only on undisputed* amounts. (Exhibit No. TMA-15). This indicates that
11 AT&T recognized that the amounts were in dispute and that the parties needed to
12 move forward to resolve the disputes. AT&T never followed through regarding
13 resolving our disputes and then radically changed course, and ultimately,
14 disconnected Express Phone. In addition, AT&T accepted payments from Express
15 Phone and made no effort to resolve any of the outstanding disputed amounts.

16 **Q. DO YOU HAVE ANY OTHER CONCERNS WITH MR. EGAN'S**
17 **TESTIMONY?**

18 **A.** Yes. Mr. Egan's one-sided recitation of the parties' billing dispute creates a
19 disingenuous circular argument that can only work in AT&T's favor. Despite the fact
20 that Express Phone adopted the NewPhone interconnection agreement on October 20,
21 2010, and that was the agreement in effect from that time forward, Mr. Egan insists
22 on discussing AT&T's one-sided billing issues which arose, and were not even raised,
23 until long after the October 20, 2010 adoption.

24 Such alleged claims cannot be used to defeat a legitimate adoption. Further,
25 AT&T cannot be permitted to profit from its failure to follow the requirements of the
26 Act and FCC regulations. It is AT&T, not Express Phone, who has continued to

1 delay recognition of Express Phone's adoption and who is making up after-the-fact
2 reasons to continue to delay, all to Express Phone's detriment.

3 **Q. WHEN WAS THE FIRST TIME THAT AT&T ALLEGED IT WAS DUE**
4 **MONEY?**

5 A. Initially, as I explain above, AT&T is wrong in its assertion that it is due anything,
6 and in fact, as of March 15, 2010, AT&T owed Express Phone over \$1.5 million.
7 That being said, AT&T made no payment request until February 23, 2011 – months
8 after Express Phone's October 20, 2010 adoption and AT&T's response, in which
9 AT&T never mentioned any past due amounts. At that time, the NewPhone
10 interconnection agreement was in effect and AT&T's alleged claims for payment of
11 amounts in dispute were simply frivolous. AT&T's actions demonstrate that AT&T
12 was simply acting in bad faith and attempting to remove a competitor from the market
13 and competitive choice from consumers.

14 **REBUTTAL TO WITNESS GREENLAW**

15 **Q. DOES MR. WOOD PROVIDE REBUTTAL TO MR. GREENLAW'S**
16 **TESTIMONY?**

17 A. Yes. However, there are a few points I would also like to address.

18 **Q. MR. GREENLAW ALSO CLAIMS THAT EXPRESS PHONE OWES AT&T**
19 **MONEY AND THEREFORE MAY NOT ADOPT THE NEWPHONE**
20 **AGREEMENT. WHAT IS YOUR RESPONSE?**

21 A. Mr. Wood addresses policy and legal flaws of this position in detail; however, as I
22 noted above, this has no relevance to Express Phone's adoption rights. Further,

1 Express Phone believes that AT&T owes it money and that AT&T has failed in its
2 responsibility to professionally resolve these disputes with Express Phone.

3 **Q. MR. GREENLAW CLAIMS THAT EXPRESS PHONE HAS NOT ACTED IN**
4 **GOOD FAITH. DO YOU AGREE?**

5 A. No. Express Phone has done its best to work with AT&T on the differences between
6 the parties. AT&T has responded by ignoring the clear adoption requirements and
7 ultimately ejecting Express Phone from the marketplace. Such actions are certainly
8 not indicative of good faith in my opinion.

9 **Q. MR. GREENLAW TESTIFIES THAT THE COMMISSION SHOULD**
10 **CONSIDER THE PUBLIC INTEREST IN RESOLVING THIS DISPUTE.**
11 **WHAT IS YOUR POSITION ON THAT?**

12 A. My position is that the Commission should enforce the law as described in detail in
13 Mr. Wood's direct and rebuttal testimony. Even if the law encompassed some sort of
14 "public interest" review¹ (which Express Phone does not believe it does), clearly the
15 public interest lies in ensuring that mammoth companies like AT&T treat their
16 customers fairly and according to the law, individually and as a group, and that
17 competition, especially for the underserved market that Express Phone serves, be
18 encouraged not squelched as AT&T has done.

19 **Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?**

20 A. Yes.
21
22

¹ I will leave it to counsel and Mr. Wood to discuss Order No. PSC-99-1930-PAA-TP.

1 BY MS. KAUFMAN:

2 Q. And, Mr. Armstrong, you then had two exhibits
3 to your rebuttal which have been numbered 25 and 26. Do
4 you have any changes or corrections to those exhibits?

5 A. No.

6 Q. I understand, Commissioners, that we are going
7 to be doing direct and rebuttal at the same time in this
8 case, so I will first ask, Mr. Armstrong, if you have
9 prepared a summary of your Direct Testimony?

10 A. I have.

11 Q. If you would please deliver it now.

12 A. Good morning, Mr. Chairman and Commissioners.
13 My name is Tom Armstrong and I am the President of
14 Express Phone Service, Inc. Express Phone Service has
15 done business in Florida since 1999, and I have been the
16 President of Express Phone Service during that time.

17 Express Phone is certificated as a CLEC and
18 designated as an ETC, eligible telecommunications
19 carrier, by this Commission. Express Phone has offered
20 qualified residential customers landline-based
21 telephone service using the Lifeline/Link-up programs
22 to serve low income residents of the State of Florida.
23 In its history Express Phone has served approximately
24 100,000 Floridians, and in my view it has been very
25 beneficial for those Floridians to have a choice in the

1 marketplace of Lifeline carriers.

2 The Telecom Act of 1996 was the first major
3 overhaul of telecom law in almost 62 years in our
4 country. The FCC played a tremendous role in creating
5 fair rules for this new era of competition. One of
6 those key areas from those rules was that AT&T or ILECs
7 cannot offer more favorable terms to one CLEC than it
8 does another. If AT&T does that either before or after
9 the fact, it doesn't matter which ICA comes first, it
10 is discriminatory.

11 The NewPhone ICA adopted by Express Phone on
12 October 20th, 2010, is clearly more favorable to CLECs.
13 It permits CLECs to withhold disputed amounts until
14 they are resolved. To require some CLECs to pay all
15 disputed amounts while at the same time allowing their
16 competitors and others not to pay those amounts at all
17 until resolved is clearly discriminatory in the
18 marketplace and cannot be permitted. This, however, is
19 exactly what AT&T has done.

20 On October 20th, 2010, Express Phone Service
21 sent AT&T notice of adoption of the ICA between AT&T
22 and NewPhone. That adoption notice is attached as
23 Exhibit 4 to my testimony. It contains all the
24 information necessary to effectuate the adoption. It
25 was not a request, it was a notice.

1 I would further note that Express Phone's
2 prior agreement with AT&T explicitly requires AT&T to
3 recognize the adoption of another CLEC's ICA. Despite
4 those provisions in the ICA, despite the federal law
5 regarding the adoption of ICAs, AT&T unilaterally
6 refused to recognize that adoption, in essence saying
7 the request was too early. Express Phone would have to
8 continue under its discriminatory agreement until the
9 window opened to negotiate a new agreement. No other
10 issues are raised in this first refusal. And as Mr.
11 Wood will discuss, this too early exception that AT&T
12 used to justify its refusal doesn't appear anywhere in
13 the adoption standards in federal law..

14 Express Phone continued to try to engage AT&T
15 regarding the adoption. AT&T continued to ignore the
16 adoption, continued to change its position, taking
17 excuses from a self-constructed laundry list and
18 raising issues that are not found anywhere in federal
19 law as I understand it. In my lay view, AT&T is simply
20 stonewalling Express in an attempt to avoid a
21 legitimate adoption. I outline in my testimony other
22 instances where AT&T has failed to act in good faith,
23 and this makes it very difficult for small carriers,
24 such as Express, to compete and do business in Florida.
25 AT&T's actions are also contrary to federal law, as Mr.

1 Wood will explain.

2 Express Phone asks this Commission to direct
3 AT&T to recognize Express Phone's adoption effective
4 October 20th, 2010, the date the notice was sent to
5 AT&T.

6 Thank you. This concludes my direct summary.
7

8 Q. Do you also have a summary of your rebuttal
9 testimony?

10 A. I do.

11 Q. And if you would give it at this time.

12 A. Thank you.

13 In my rebuttal, I address the testimony of
14 Mr. Egan and Mr. Greenlaw. While Mr. Egan says that
15 his testimony addresses whether Express Phone's
16 adoption of the NewPhone agreement was permissible
17 under applicable law during the term of its existing
18 agreement, Issue Number 2 in this case, and whether
19 Express Phone's adoption of the NewPhone agreement is
20 permitted under the terms of its agreement with AT&T,
21 Issue Number 3 in this case, he addresses neither of
22 these issues in his testimony. In fact, it appears
23 that Mr. Egan has no expertise in these areas. He
24 simply attempts to raise the billing dispute issue
25 between AT&T and Express Phone which is not at issue in

1 this case, and then alleges certain amounts that he
2 believes are due to AT&T.

3 It is clear that Express Phone does not agree
4 with Mr. Egan's calculations even if they were
5 relevant, which they are not. In fact, it is AT&T who
6 owes Express Phone money due to AT&T's failure to honor
7 its resale obligations. In sum, Mr. Egan's testimony
8 adds nothing to the issue this Commission must decide.

9 I would also like to mention that Express
10 Phone has diligently tried to work with AT&T, and AT&T
11 at different times gives Express Phone different
12 stories. For instance, when Express Phone was
13 negotiating a new deposit agreement, AT&T agreed not to
14 count billing disputes or disputed amounts in the
15 calculation of the amount required for deposit and
16 agreed to accept payment of only those undisputed
17 amounts. Additionally, despite including in that
18 deposit agreement a clause to agree to work on
19 resolving those disputed amounts, AT&T has never
20 followed through in trying to do so in whatever means.

21 Also briefly addressed in Mr. Greenlaw's
22 testimony, which is discussed in detail by Mr. Wood, I
23 mainly want to tell the Commission that in Express
24 Phone's view AT&T has failed to proceed in good faith
25 with Express by ignoring clear adoption requirements,

1 continually changing its position for not doing so, and
2 failing to treat competitors fairly as required.
3 AT&T's actions have damaged not only Express Phone, but
4 those underserved Floridians by removing one of their
5 choices from the marketplace.

6 And, thank you, that concludes my rebuttal.

7 **MS. KAUFMAN:** Thank you, Mr. Armstrong.

8 Mr. Armstrong is available for cross
9 examination.

10 **CHAIRMAN BRISE:** Okay. At this time
11 cross-examination, AT&T.

12 **MS. MONTGOMERY:** Thank you, Mr. Chairman.

13 **CROSS EXAMINATION**

14 **BY MS. MONTGOMERY:**

15 **Q.** Good morning, Mr. Armstrong. My name is
16 Suzanne Montgomery, and we met earlier this morning. I
17 have some questions for you.

18 The first is I believe you testified during
19 your summary earlier that on October 20th Express Phone
20 sent a notice of adoption to AT&T Florida and that it
21 was not a request for adoption. Did I understand that
22 summary correctly?

23 **A.** On October 20th, 2010, we sent notice of
24 adoption to AT&T, yes.

25 **Q.** Mr. Armstrong, do you have Exhibit TMA-4,

1 which is on the Composite Exhibit List as Exhibit 7 in
2 front of you?

3 A. I don't believe I do.

4 MS. KAUFMAN: If I might help out, Ms.
5 Montgomery, it is TMA-4 to your Direct Testimony.

6 THE WITNESS: I stand corrected, I do.

7 BY MS. MONTGOMERY:

8 Q. And is that the letter you were referring to
9 during your summary?

10 A. This is the letter that was sent or the notice
11 that was sent to AT&T.

12 Q. Okay. I apologize if I wasn't clear. Is this
13 the letter that you referred to during the summary of
14 your Direct Testimony?

15 A. Yes, ma'am.

16 Q. Thank you. The reference line of Exhibit
17 TMA-4, which is also Exhibit 7, that states request to
18 adopt interconnection agreement, does it not?

19 A. On TMA-4?

20 Q. Yes.

21 A. TMA-4, the subject line does say request.
22 However, this document is drafted by AT&T. This is not
23 a document of Express Phone. This is a form that is
24 dictated by AT&T that must be used.

25 Q. But it does say request, does it not, just so

1 we are clear on the record?

2 A. It does say request, and I would imagine
3 because AT&T wants to view it as a request. It serves
4 as a notice.

5 Q. And if you could also look at the last
6 sentence of the first paragraph, and that states AT&T
7 will reply in writing to this formal request, does it
8 not?

9 A. It does say that.

10 Q. Thank you, sir. Can you please turn to Page 2
11 of your Direct Testimony. At lines -- I'm sorry, are
12 you there?

13 A. I'm sorry?

14 Q. Are you on Page 2?

15 A. Yes, ma'am.

16 Q. At Lines 4 through 5 you were asked to state
17 your occupation and your employer, is that correct?

18 A. That is correct.

19 Q. Okay. And in your answer you identified that
20 you are the president of Express Phone Service, Inc., is
21 that correct?

22 A. Correct.

23 Q. You also hold a position with Digital Express,
24 Inc., is that correct?

25 A. That is correct.

1 Q. Okay. And that is not listed here?

2 A. No, ma'am.

3 Q. Digital Express also has an interconnection
4 agreement with AT&T, is that correct?

5 A. Digital Express adopted an agreement with
6 AT&T.

7 Q. Okay. And they adopted that agreement in June
8 of 2011, does that sound about right?

9 A. I can't tell you the exact date without
10 referring to a document.

11 Q. It was sometime last year, in 2011?

12 A. Correct.

13 Q. And Digital Express requested to adopt the
14 interconnection agreement between AT&T Florida and Image
15 Access, which does business under the name NewPhone, is
16 that right?

17 A. Correct.

18 Q. And AT&T consented to that request?

19 A. I'm sorry, could you repeat that?

20 Q. AT&T consented to that request?

21 A. Yes, ma'am.

22 Q. And that's the agreement that Express Phone is
23 seeking to adopt in this case?

24 A. Correct.

25 Q. The agreement that Express Phone had with AT&T

1 Florida -- and to make it easy, let's go in September of
2 2010 -- was initially signed and entered by the parties
3 in 2006, is that correct?

4 A. That is correct.

5 Q. Do you have a copy of that agreement in front
6 of you? I do not believe it's one of your exhibits.

7 MS. KAUFMAN: I'm sorry, are you referring to
8 the AT&T/Express Phone original agreement?

9 MS. MONTGOMERY: The 2006 agreement.

10 MS. KAUFMAN: It's a very voluminous document.

11 THE WITNESS: I don't have a copy of it.

12 MS. MONTGOMERY: Okay. And that's fine. And
13 we have a copy of Exhibit WEG-2, which is portions of
14 that agreement which identified as Exhibit 23 on Staff's
15 Composite List and we will hand out copies.

16 (Pause.)

17 BY MS. MONTGOMERY:

18 Q. And, Mr. Armstrong, I'll represent to you,
19 subject to check, that this is the document that's
20 attached to Mr. Greenlaw's testimony, Direct Testimony
21 as Exhibit 2. It has been identified as Exhibit 23.

22 Does this look like the 2006 agreement between
23 AT&T and Express Phone, or portions of it?

24 A. It looks like part of the interconnection
25 agreement.

1 Q. Okay. And can you please turn to -- it's Page
2 12 of 16 of the exhibit, which is actually Page 24 of
3 the contract. Are you there?

4 A. Yes, ma'am.

5 Q. And is that your signature on behalf of
6 Express Phone?

7 A. It is.

8 Q. Okay. There is no note stating that you were
9 signing it under protest is there?

10 A. I'm sorry, under what?

11 Q. Under protest. You didn't indicate any note
12 with your signature that you disagreed with the terms of
13 this contract, did you?

14 A. No, ma'am.

15 Q. And you didn't include any note that you
16 wanted to adopt a different agreement and AT&T refused
17 to allow you to do that?

18 A. At the time we couldn't have. We were not
19 aware there were other agreements.

20 Q. But you didn't ask for one and they didn't
21 tell you no, is that right?

22 A. We weren't given the opportunity to ask.

23 Q. In your capacity as President of Express Phone
24 and President of Digital Express, I assume you are
25 generally familiar with the process your attorney

1 described in her opening remarks by which a CLEC enters
2 an agreement with an ILEC, is that right?

3 A. You're actually asking about two different
4 roles, roles in each company or separate companies.

5 Q. I'm asking about the general process. If you
6 have some general familiarity with how a CLEC enters a
7 contract with a company, not any specific contract, but
8 the general process?

9 A. And I don't mean to dice your question up, Ms.
10 Montgomery, but are you talking about in 2012 or are you
11 talking about in 2006?

12 Q. I'm actually not talking about a specific
13 contract, but the general process.

14 MS. KAUFMAN: I'm going to object. I think
15 the witness is having a hard time understanding, and I
16 think the question is fairly vague.

17 BY MS. MONTGOMERY:

18 Q. Well, let me ask different question then.

19 A CLEC can obtain a contract by negotiation
20 with an ILEC, is that correct?

21 A. That is my understanding of the law, yes.

22 Q. Okay. They can obtain a contract by adopting
23 or opting into another contract that the ILEC already
24 has with a different CLEC?

25 A. I would disagree with your use of the word

1 obtain.

2 Q. But you would agree with me that there is a
3 process by which a CLEC can opt into the terms and
4 conditions of a contract that the ILEC has already
5 entered with another CLEC?

6 A. I would agree that there is a process for a
7 CLEC to opt into an existing agreement that AT&T or an
8 ILEC has with another CLEC, yes.

9 Q. And, for example, that is what Digital Express
10 did last year?

11 A. That is correct.

12 Q. Or a CLEC or an ILEC can ask the Commission to
13 arbitrate the terms of an agreement, is that right?

14 A. That is my understanding, yes, of one of the
15 processes.

16 Q. Okay. In 2006, when Express Phone entered the
17 agreement that portions are Exhibit 23 in front of you,
18 did you ask the Commission to arbitrate the terms of
19 that contract?

20 A. No, we did not, Ms. Montgomery. And as I
21 stated before, the reason is is that in 2006, AT&T
22 came -- we asked AT&T to become -- or we asked the
23 Commission, excuse me, to become a CLEC. Once we got
24 that, we said, AT&T, we want to do business. AT&T said
25 here it is. That's it.

1 Q. Okay. I'm confused. I believe you said in
2 your summary earlier that Express Phone has been in
3 business and providing service to Floridians since 1999?

4 A. Yes, ma'am.

5 Q. But you were just seeking approval from the
6 Commission in 2006?

7 A. I'm sorry. The CLEC certification, right, in
8 1999. Once we do that we asked for a standard
9 agreement, or we asked for an agreement. When this was
10 presented to Express Phone by AT&T, at the time
11 BellSouth, it was presented to me as the president as
12 here is our agreement. There was no discussion that
13 there was anything else available. There was no mention
14 of any other processes. In fact, it was very -- and
15 these are my words -- heavy-handed in the fact that you
16 have got your CLEC certification, you have been doing
17 business since 1999. Do you want to continue doing
18 business? Sign it.

19 Q. And at that point Express Phone had been in
20 business for seven years?

21 A. Yes, ma'am.

22 Q. Okay. And if I did the math right, on your
23 resume, your amended resume where you added Digital
24 Express last week that company -- you have been involved
25 with that company since 1997, which in 2006 would have

1 been nine years?

2 **A.** Yes.

3 **Q.** Earlier today the Commission took official
4 recognition of the items in the docket from the adoption
5 of your contract in a memo, and I believe the parties
6 have it, but we'll get you a copy.

7 **MS. MONTGOMERY:** And, Mr. Chairman, this is
8 Docket Number -- I'm sorry I'm looking at the wrong
9 item -- 060714.

10 **CHAIRMAN BRISÉ:** Thank you.

11 **BY MS. MONTGOMERY:**

12 **Q.** Now, Mr. Armstrong, you are aware that when a
13 CLEC and an ILEC enter a contract, an interconnection
14 agreement, or a resale agreement it's submitted to the
15 Commission for approval?

16 **A.** Yes, ma'am.

17 **Q.** Okay. And your 2006 contract between Express
18 Phone and AT&T was submitted to the Commission for
19 approval, is that right?

20 **A.** Yes, ma'am.

21 **Q.** And I'll represent to you that the docket for
22 Exhibit 060714 are the docket entries associated with
23 that request for approval, and I believe you have been
24 handed a copy of that docket, those docket entries?
25 It's Page 2 of the stapled document.

1 A. Yes, ma'am.

2 Q. Okay. And let's look at those entries. The
3 first, at the bottom of the list -- these are in reverse
4 date order -- on November 2nd, 2006, AT&T, which was
5 then does business as BellSouth, filed a request for
6 approval of the resale agreement. Do you see that
7 there?

8 A. On November 2nd, 2006?

9 Q. That's right.

10 A. Yes, ma'am.

11 Q. Okay. And then on February 2nd, 2007, there
12 is a memo -- an entry or a memo from the Commission
13 advising that the agreement met certain criteria and had
14 gone into effect by operation of law. Do you see that
15 there?

16 A. Yes, ma'am.

17 Q. There is no docket entry by Express Phone
18 stating that AT&T or BellSouth at the time refused to
19 negotiate the terms of the agreement, is there?

20 A. There is no indication of -- can you rephrase
21 that? Or, I'm sorry, just restate it. I'm sorry.

22 Q. Sure, I will rephrase the question.

23 There's no docket entry here from a filing by
24 Express Phone, is there?

25 A. There is no what?

1 Q. Express Phone did not file anything in this
2 docket.

3 A. Express Phone wasn't given the opportunity, or
4 Express Phone was not afforded the information that
5 there was any opportunity to do so. In other words,
6 there was -- AT&T brought this document to Express Phone
7 and said here, this is what you have to sign. It is our
8 standard agreement. Sign it.

9 Q. Earlier this morning the Commission took
10 official recognition of documents in another docket
11 before the Commission, and we will hand out copies of
12 those to you. I believe everyone else has copies of
13 them.

14 MS. MONTGOMERY: And, Mr. Chairman, this is
15 from Docket Number 060319.

16 THE WITNESS: Which docket, 060319?

17 MS. MONTGOMERY: That's right.

18 THE WITNESS: Okay.

19 BY MS. MONTGOMERY:

20 Q. And have you been handed a copy of that
21 docket?

22 A. I do.

23 Q. Okay. And I'll represent to you, subject to
24 check, that this is the docket by which the agreement
25 between AT&T, which was then BellSouth, and Image Access

1 was approved by this Commission. And let's look at that
2 docket. Again, it's in reverse date order. The filing
3 for request for approval was filed on April 4th, 2006?

4 A. Correct.

5 Q. Okay. And you're aware that that's a public
6 filing, is that correct?

7 MS. KAUFMAN: Objection. Mr. Armstrong is not
8 a lawyer. I'm not sure by the use of public filing it's
9 clear what you mean.

10 MS. MONTGOMERY: Mr. Chairman, Mr. Armstrong
11 is the president of two certificated CLECs in the state
12 of Florida. I believe he has the sufficient knowledge
13 to describe the process by which this Commission
14 approves interconnection agreements.

15 MS. KAUFMAN: I don't disagree with that, but
16 that is not the question that Ms. Montgomery posed. She
17 asked him are you -- I believe you said are you aware
18 that this is a public document, and that has a pretty
19 specific meaning under Florida law.

20 MS. MONTGOMERY: And it's part and parcel of
21 the process by which an interconnection agreement is
22 approved by the Commission.

23 CHAIRMAN BRISÉ: I think I'll allow the
24 question.

25 THE WITNESS: Could you repeat the question,

1 please?

2 MS. MONTGOMERY: Sure.

3 BY MS. MONTGOMERY:

4 Q. Are you aware that this is a public document,
5 the document that was filed on April 4th, 2006?

6 A. I'm aware that in 2012 this document is
7 available on-line for public viewing. Now, in 2006 was
8 it available on-line, was it available to the public in
9 a general, reasonable, and available fashion? I don't
10 know. I can't speak for 2006, back then.

11 Q. Okay. And maybe that's a better question for
12 Mr. Wood. And let's just follow the dates and time on
13 this document. The next document is dated July 3rd, and
14 I'm just reading this note, and it just says that it was
15 a note by which the Commission was requesting that the
16 name of the CLEC be changed. Is that correct, is that
17 what it appears to be?

18 A. That's what it appears.

19 Q. Okay. And then the next entry on July 5th,
20 2006, is an entry of a memo from the Commission advising
21 that the agreement met certain criteria and had gone
22 into effect by operation of law. Do you see that docket
23 entry?

24 A. I see that entry.

25 Q. Okay. Do you still have Exhibit 23 in front

1 of you, the portions of your agreement with AT&T?

2 A. Which exhibit is it?

3 Q. Exhibit 23. It's the one we handed out to
4 you.

5 A. The docket 060714?

6 Q. No, no, the portions of the contract.

7 A. I do.

8 Q. Okay. Can you turn back to Page 12 of 16.

9 And you signed this on -- I think that is August 23rd,
10 2006, is that right?

11 MS. KAUFMAN: Objection, asked and answered.

12 MS. MONTGOMERY: I did not previously ask
13 about the date, Mr. Chairman.

14 CHAIRMAN BRISÉ: Okay. I'll allow it.

15 BY MS. MONTGOMERY:

16 Q. Mr. Armstrong, you signed this document on
17 August 23rd, 2006, is that correct?

18 A. Correct.

19 Q. Thank you. Express Phone's primary business
20 as a CLEC is to provide resold services, is that
21 correct?

22 A. Yes, ma'am.

23 Q. And as a reseller, Express Phone purchases
24 local exchange service from an ILEC and then -- at a
25 wholesale discount approved by the Commission and then

1 sells it to end users, is that right?

2 A. That's correct.

3 Q. And that would make the ILEC one of the
4 primary vendors of Express Phone for its business, is
5 that correct?

6 A. I wouldn't classify it as a primary vendor.
7 It is the sole vendor. If I want to sell in BellSouth's
8 territory -- or, excuse me, AT&T's territory, then AT&T
9 is the only one selling service there. So sole vendor.

10 Q. Okay. And that's fair. Then would it be fair
11 to say if AT&T is your sole vendor in its territory that
12 the contract between Express Phone and AT&T is one of
13 the most important contracts to the health of your
14 business?

15 A. As I stated before, not only important, but as
16 BellSouth presented it at the time, no choice. You
17 know, you have to sign this.

18 Q. But my question was is that one of the most
19 important contracts for your business?

20 A. Yes.

21 Q. You testified during your summary earlier that
22 AT&T owes Express Phone money due to its refusal to
23 honor the resale obligation. Is that what you testified
24 to?

25 A. Yes, ma'am.

1 Q. Now, what you're referring to is that Express
2 Phone has made claims and disputes to AT&T for
3 promotions, and AT&T has refused to honor all of those
4 requests, is that correct?

5 A. Over the course of its history, yes, Express
6 Phone has made monthly claims for tariffed promotional
7 items and promotional items that AT&T/BellSouth offers
8 its retail end users in the marketplace for competition.
9 By law, those promotions have to be offered to their
10 wholesale customers, and monthly those are submitted to
11 BellSouth/AT&T.

12 Q. But I just want to make sure the record is
13 clear, Express Phone has not provided services to AT&T
14 Florida, is that right?

15 A. I'm not sure I understand your question.

16 Q. For example, AT&T doesn't purchase local
17 exchange service from Express Phone, does it?

18 A. That is correct.

19 Q. AT&T doesn't buy collocation services from
20 Express Phone, does it?

21 A. No, they do not.

22 Q. So when you are referring to monies that you
23 claim are due, you are referring to promotions?

24 A. The majority of the monies due are promotions.

25 Q. And AT&T has granted some of those, is that

1 correct?

2 A. They have granted some, although a very small
3 amount and on a nontrackable basis, and that is my word.
4 There is no rhyme or reason to what they have approved,
5 disapproved.

6 Q. But my question, sir, is that AT&T has granted
7 some of those?

8 A. Approximately -- yes, a very small amount of
9 the total amount submitted.

10 Q. Has Express Phone ever filed a complaint with
11 the Commission seeking resolution of its disputes on
12 promotions?

13 A. We have.

14 Q. And that was Docket 110071?

15 A. Without something in front of me, I can't
16 quote you the docket number.

17 Q. You are aware that your counsel has
18 voluntarily dismissed that docket?

19 A. Yes, ma'am.

20 Q. And the dismissal was before there was a
21 decision from the Commission on whether those disputes
22 were valid?

23 A. It was, and it was based on specific reasons.
24 Those reasons being that we have two dockets going. We
25 have this docket, which numbers -- there are too many

1 numbers in the world anyway, we have a promotion docket,
2 we have an adoption docket, and they are both proceeding
3 before this Commission at the same time.

4 Q. Right. And the Commission had already denied
5 your motion to abate or stay the promotion case, is that
6 correct?

7 A. I believe the prehearing officer did make that
8 ruling. Again, I don't have that docket in front of me,
9 so --

10 Q. And other than that one case, Express Phone
11 has never filed a complaint at this Commission or
12 otherwise sought Commission ruling on the disputes that
13 it has submitted to AT&T?

14 A. No, ma'am, we have not prior to that.

15 Q. Okay. Is it a correct statement that Express
16 Phone has not paid its bills in full to AT&T?

17 A. No, ma'am, that is not a correct statement.

18 Q. Well, AT&T has sent bills to -- let me ask a
19 better question. Before the services were disconnected,
20 AT&T sent bills on a monthly basis to Express Phone,
21 correct?

22 A. Yes, ma'am.

23 Q. And in those bills, there was a specified
24 balance due each month?

25 A. The term specified amount due is not on the

1 bill anywhere. It does say balances.

2 Q. It has a balance stated on the bill, is that
3 right?

4 A. It is a billing statement, yes, ma'am.

5 Q. And Express Phone has not paid the full amount
6 on those billing statements, correct?

7 A. I would ask you to clarify what you mean by
8 full amount. There is numbers on the bill, all
9 700-and-something pages of it, and I don't believe any
10 of them are named full amount.

11 Q. So are you disputing that Express Phone has
12 not paid the full amount of its bills?

13 A. What I'm disputing, Ms. Montgomery, is your
14 term of full amount. There is nothing on the bill that
15 says full amount. What are you using -- what are you
16 claiming is a full amount?

17 MS. MONTGOMERY: Mr. Chairman, could we have
18 just one minute?

19 CHAIRMAN BRISÉ: Sure. We will take a
20 two-minute recess.

21 MS. MONTGOMERY: Thank you.

22 (Recess.)

23 MS. MONTGOMERY: Mr. Armstrong, we handed you
24 a document. It is a confidential document in a red
25 folder, and I will represent to you that this was taken

1 off of a CD that is identified in Mr. Egan's testimony
2 as DJE-4, which is on the Composite Exhibit List as
3 Exhibit 21.

4 And, Mr. Chairman, would it help for the
5 record to identify this with the exhibit number?

6 CHAIRMAN BRISÉ: Yes.

7 MS. MONTGOMERY: I think we are on 36.

8 CHAIRMAN BRISÉ: That would be correct, 36.

9 MS. MONTGOMERY: Thank you.

10 (Exhibit 36 marked for identification.)

11 BY MS. MONTGOMERY:

12 Q. And, Mr. Armstrong, I'll represent to you that
13 this is a bill that we took off of the CD that we
14 produced in discovery for Account Number 904Q926878878.
15 And subject to check, is that one of Express Phone's
16 accounts with AT&T?

17 A. Ms. Montgomery, I'd have no way of verifying
18 that without looking at my billing.

19 Q. And that's fair, we'll talk about that with
20 Mr. Egan later.

21 If you could turn to the third page of Exhibit
22 36.

23 A. Okay.

24 Q. And I will direct your attention -- it's to
25 the line at about a third of the way down, it's called

1 total amount due. Do you see that line?

2 A. I do.

3 Q. Okay. And then there is a number there?

4 A. Correct.

5 Q. And because this is a confidential exhibit, I
6 don't think that the number itself is relevant, so I
7 won't state it in the record. And is it correct that
8 Express Phone does not -- at certain times did not pay
9 the total amount due for account -- the account
10 represented on Exhibit 36?

11 A. The first question I will ask about the
12 exhibit is -- I see nothing on here that indicates this
13 is my bill. So, I mean, if you are asking a general
14 question about the billing statements I see, which look
15 nothing like this --

16 Q. Can you please turn to the second page of
17 Exhibit 36?

18 A. Sure. The second page?

19 Q. The second page of the exhibit.

20 A. Okay.

21 Q. And that states Express Phone Service, 1803
22 West Fairfield Drive, Pensacola?

23 A. Yes, ma'am, it does. It would have been
24 easier if you had asked me that instead of the Q account
25 number. I know my name.

1 Q. I apologize for that. And let's actually look
2 at the top of Page 3 of Exhibit 36. There is a line
3 that states total amount of last bill. Do you see that?

4 A. Yes, ma'am.

5 Q. And then there is a number there?

6 A. Yes, ma'am.

7 Q. Okay. And then the next line states payment
8 supplied through February 23. Do you see that?

9 A. Yes, ma'am.

10 Q. Okay. And then there's a number listed there
11 with a credit indicator, right?

12 A. The adjustments, yes, ma'am.

13 Q. No, the line before adjustments, which is
14 payments?

15 A. Oh, I'm sorry; yes, ma'am.

16 Q. And that number is less than the amount of the
17 total last bill, correct?

18 A. It is less, yes, ma'am.

19 Q. Okay. And then the next line -- and I'm glad
20 you pointed me to there, it says adjustments applied
21 through February 23rd. Do you see that, as well?

22 A. I do.

23 Q. Okay. And there is a number there, as well?

24 A. Correct.

25 Q. Okay. And that is a credit granted by AT&T,

1 correct?

2 A. Without looking at the supporting page in the
3 billing that supports the adjustments, I can't state
4 whether it's AT&T's or not.

5 Q. Okay. We will perhaps talk about that with
6 Mr. Egan. Now, if you add the payment and the
7 adjustment, that's less than the amount of the total
8 last bill, correct?

9 A. Yes, ma'am.

10 Q. Thank you. Now, isn't it correct that one of
11 the reasons that Express Phone is seeking to adopt the
12 contract between AT&T and Image Access, also known as
13 NewPhone, is because of the payment terms of that
14 contract?

15 A. As I have stated in my summary, the Image
16 Access ICA is more favorable, and, yes, Express Phone
17 adopted that agreement.

18 Q. And its more favorable, in your view, because
19 of the payment terms?

20 A. The agreement is many pages. The payment
21 terms is different.

22 Q. And the payment terms is one of the reasons
23 Express Phone would like that to be the controlling
24 agreement with its relationship with AT&T?

25 A. The terms for payment of amounts is the reason

1 Express Phone did adopt the NewPhone interconnection
2 agreement.

3 Q. Okay. Thank you.

4 MS. MONTGOMERY: We are going to hand out
5 another exhibit.

6 CHAIRMAN BRISÉ: Ms. Montgomery, as you do
7 that, what would be the title that you would give to the
8 last exhibit?

9 MS. MONTGOMERY: I would call it the
10 "February 2010 Bill for the 904 Account."

11 CHAIRMAN BRISÉ: Okay. Thank you.

12 MS. MONTGOMERY: And, Mr. Chairman, the
13 document that is being handed out is part of Exhibit 3,
14 which is AT&T's answers to staff's discovery. For ease
15 of reference, would it be helpful to give this its own
16 exhibit number?

17 CHAIRMAN BRISÉ: Yes, please.

18 MS. MONTGOMERY: And I believe that's Exhibit
19 37.

20 CHAIRMAN BRISÉ: That would be correct.

21 (Exhibit Number 37 marked for identification.)

22 BY MS. MONTGOMERY:

23 Q. Mr. Armstrong, do you have a copy of the new
24 exhibit in front of you?

25 A. Of my exhibits?

1 Q. The new exhibit that we just handed out?

2 A. The letter dated August 25, 2010?

3 Q. Correct, and that has been identified as
4 Exhibit 37. And this is a letter from the AT&T credit
5 and collections department to Express Phone. It is
6 actually directed to you, is that correct?

7 A. It is addressed to me.

8 Q. Okay. And this is a letter in which AT&T is
9 seeking an increased security deposit from Express
10 Phone?

11 A. Correct.

12 Q. And if you could look at the second paragraph
13 of Exhibit 37, and that states, "AT&T's records show
14 that Express Phone's accounts have a pass due balance in
15 excess of \$1 million, and that Express Phone's payment
16 patterns changed dramatically beginning in May of 2009.
17 Prior to that time, Express Phone made routine nearly
18 complete payments. Since then, Express Phone has made
19 minimal sporadic payments. Moreover, on August 10th,
20 2010, AT&T requested updated financial information and
21 credit profile from Express Phone and asked that it be
22 provided by August 20th, 2010. To date, AT&T has not
23 received the requested information."

24 Did I read that paragraph correctly?

25 A. Yes, ma'am.

1 Q. And I believe you talked about this some in
2 your summary. Express Phone retained counsel to
3 represent it in connection with the negotiations on this
4 deposit request, is that right?

5 A. I'm sorry, I didn't hear the whole question.

6 Q. Express Phone retained counsel to represent it
7 in connection with the negotiations on this deposit
8 request?

9 A. Express Phone utilizes services of counsel
10 that were -- they were not retained for this purpose.

11 Q. But counsel on your behalf began communicating
12 with AT&T in connection with this letter?

13 A. That is correct.

14 Q. And that was Mark Foster?

15 A. Mark Foster, correct.

16 Q. Okay. And he was authorized to receive
17 communications on your behalf and to make communications
18 on your behalf?

19 A. Correct.

20 MS. MONTGOMERY: Let's hand out another
21 exhibit.

22 CHAIRMAN BRISÉ: Ms. Armstrong (sic), what
23 would you give as a short title to Exhibit 37?

24 MS. MONTGOMERY: "August 2010 Deposit
25 Request."

1 **CHAIRMAN BRISÉ:** Okay. Thank you.

2 **MS. MONTGOMERY:** And, Mr. Chairman, the
3 document that we are handing out is also part of Exhibit
4 3, and we can designate it Exhibit 38.

5 **CHAIRMAN BRISÉ:** That's fine.

6 (Exhibit Number 38 marked for identification.)

7 **BY MS. MONTGOMERY:**

8 **Q.** Mr. Armstrong, I believe you have been handed
9 a copy of an e-mail that has now been identified as
10 Exhibit 38, and this is an e-mail from Reginald Greene
11 of AT&T to Mark Foster dated September 28th, 2010. Do
12 you see that?

13 **A.** Yes, ma'am.

14 **Q.** And, Mr. Foster was an outside attorney hired
15 by Express Phone, correct?

16 **A.** He was retained -- I mean, he was our counsel.

17 **Q.** Okay. If you could look at the second
18 paragraph on Exhibit 38, and the last few sentences at
19 the end of the second line beginning with the word with.
20 Do you see where I am?

21 **A.** You are in the second paragraph last few
22 sentences.

23 **Q.** Okay. And it states, "With regard to Express
24 Phone, their resale agreement does not allow for
25 disputed amounts to be withheld. See attached. I look

1 forward to our discussion later this afternoon." Do you
2 see where I have read?

3 A. Yes, ma'am.

4 Q. Okay. And then there is an attachment, and
5 that attachment is portions of the agreement between
6 AT&T and Express Phone?

7 A. Yes, ma'am.

8 Q. Okay. And then the text of the e-mail goes
9 on, and it states, "Note 1.4 payment responsibility.
10 Express Phone shall make payment to BellSouth for all
11 services billed, including disputed amounts. Express is
12 not paying and then disputing, they are withholding
13 payments that that agreement does not allow for." Is
14 that what it says?

15 A. I'm sorry, which section?

16 Q. The bottom of the e-mail, the last couple of
17 lines of the e-mail.

18 A. Okay. Underneath the attachment.

19 Q. Okay. And let me read that again. It says,
20 "Note 1.4 payment responsibility. Express Phone shall
21 make payment to BellSouth for all services billed,
22 including disputed amounts. Express is not paying and
23 then disputing, they are withholding payments that that
24 agreement does not allow for." Did I read that correct?

25 A. You read that correctly.

1 Q. Okay. Thank you, sir. If the Commission
2 agrees with you that Express Phone should be allowed to
3 adopt the contract between AT&T and Image Access, it's
4 your position that that should be effective
5 October 20th, 2010, is that correct?

6 A. The effective date of the adoption of that
7 agreement is October 20th, 2010.

8 Q. Okay. Can you -- I'm sorry, do you have a
9 copy of Exhibit TMA-10 in front of you? It was attached
10 to your Direct Testimony, and that's Composite Exhibit
11 13?

12 A. Did you say Number 10?

13 Q. Exactly. That's correct.

14 A. Yes, ma'am.

15 Q. And this is the document by which Express
16 Phone opened the docket that we are here for today,
17 correct?

18 A. I'm sorry, could you repeat that, please.

19 Q. This is the document that -- actually, that's
20 a bad question. This is the first filing that Express
21 Phone made with this Commission regarding its efforts to
22 obtain the Image Access contract, is that true?

23 **MS. KAUFMAN:** Excuse me, Ms. Montgomery. I
24 must have heard you wrong. Which exhibit are you
25 referring to?

1 MS. MONTGOMERY: TMA-10. It's Exhibit 13.

2 MS. KAUFMAN: Okay. Thank you. Can you
3 repeat your question, I'm sorry?

4 MS. MONTGOMERY: Sure.

5 BY MS. MONTGOMERY:

6 Q. Mr. Armstrong, this is the document that was
7 the first document that Express Phone filed to open the
8 docket that we are here for today, is that right?

9 A. Not being familiar with what these -- I mean,
10 this was prepared by Ms. Kaufman.

11 Q. On behalf of your company?

12 A. Correct.

13 Q. Okay. And let's look at the first sentence of
14 that letter. It states, "Express Phone, Inc., Express
15 Phone, hereby provides notice to the Florida Public
16 Service Commission that effective immediately Express
17 Phone has adopted in its entirety," and then it
18 identifies the contract, is that correct?

19 A. Are you asking me if that's what it says?

20 Q. Yes.

21 A. It does say that. And I do know that this was
22 filed in response to an inquiry or a statement by -- I
23 believe it was by staff. I don't believe it was by the
24 Commissioners themselves, but by staff in a discussion
25 that they said have you ever filed a notice with us, so

1 from my memory that -- this was filed.

2 Q. Okay. And this is dated March 29th of 2011?

3 A. Correct.

4 MS. MONTGOMERY: Mr. Chairman, I have no
5 further questions for Mr. Armstrong.

6 CHAIRMAN BRISÉ: Thank you. If you would give
7 me a short title for Exhibit 38, which was the e-mail in
8 the other docket.

9 MS. MONTGOMERY: "September 2010 E-mail from
10 Reginald Greene to Mark Foster."

11 CHAIRMAN BRISÉ: Okay. Thank you.

12 All right. Staff?

13 MS. TAN: Staff has no questions for Mr.
14 Armstrong.

15 CHAIRMAN BRISÉ: Okay.

16 Commissioners, any questions? Commissioner
17 Graham.

18 COMMISSIONER GRAHAM: Thank you, Mr. Chairman.
19 Mr. Armstrong, how are you today?

20 THE WITNESS: Pretty good, Mr. Graham.

21 COMMISSIONER GRAHAM: The funds that AT&T says
22 that are due them, are all those funds in dispute?

23 THE WITNESS: I'm sorry, Mr. Graham, my
24 hearing is not the best. I left it somewhere on a
25 flight line.

1 **COMMISSIONER GRAHAM:** The funds that AT&T say
2 that are due them, are all those funds in dispute or
3 just a portion of those funds in dispute?

4 **THE WITNESS:** Are the entire amounts in
5 dispute, is that what you are asking me?

6 **COMMISSIONER GRAHAM:** Yes.

7 **THE WITNESS:** Yes, sir.

8 **COMMISSIONER GRAHAM:** The entire amount is in
9 dispute?

10 **THE WITNESS:** Yes, sir.

11 **COMMISSIONER GRAHAM:** Okay. That's all the
12 questions I have.

13 **CHAIRMAN BRISÉ:** I think I may have a couple
14 of questions. (Pause.)

15 Then again, I don't. Thank you.

16 Commissioner Graham has a question.

17 **COMMISSIONER GRAHAM:** I made another note.
18 You had said earlier when you signed the first contract,
19 I believe it was in 2006, that -- and the way I remember
20 you said it, they handed you the contract and said this
21 is the deal, sign it.

22 **THE WITNESS:** That is correct, Commissioner.

23 **COMMISSIONER GRAHAM:** Now, I guess the
24 question I have, whose burden is it to do the due
25 diligence to see if that's the only deal you can sign?

1 Is it AT&T's burden; is it your company's burden; is it
2 the Public Service Commission's burden?

3 **THE WITNESS:** Commissioner, I definitely don't
4 think it's the Commission's burden. The Commission has
5 their regulatory tasks that they perform, but I would
6 say AT&T has that burden. If they have knowingly
7 entered into an agreement with another CLEC and that
8 agreement is marked standard interconnection agreement
9 that has more favorable terms such as in this case where
10 that was entered, it was done, and then they came to
11 another CLEC with an agreement that says stand-alone --
12 not even standard, it's a stand-alone. They knew that
13 they -- if they know they have a discriminatory
14 agreement that this CLEC B expressed in this case is
15 fixing to sign that is discriminatory in rates, terms,
16 and conditions, just like it says in the law, then, yes,
17 I believe AT&T has the burden to say there are other
18 agreements.

19 They may not have to specifically identify
20 them, but they need to say there are other agreements
21 out there, you know, other than this one that we are
22 labeling stand-alone for Express Phone. I would also
23 agree with you that a CLEC according to its time and
24 resources if they have staff available they do have a
25 burden, but, again, for small CLECs that is a resource

1 management -- you know, we would love to have Ms.
2 Kaufman full-time, but can't afford it.

3 **COMMISSIONER GRAHAM:** Okay. Thank you, sir.
4 Thank you, Mr. Chair.

5 **CHAIRMAN BRISÉ:** You're welcome. I do have
6 one question.

7 Under the original ICA agreement was there any
8 modification of payment terms made by Express Phone
9 prior to the October 2010 letter?

10 **THE WITNESS:** Let me make sure I understand
11 the question, Mr. Chairman. Was there any modification
12 made to that agreement?

13 **CHAIRMAN BRISÉ:** Right, in terms of payment
14 terms.

15 **THE WITNESS:** There was no modification made
16 in writing, Mr. Chairman. There were good faith -- what
17 Express Phone believed to be good faith negotiations,
18 proceedings between the two parties in resolving or at
19 least identifying towards -- working towards resolving
20 those disputed amounts. Again, Express Phone believed
21 they were in good faith. That didn't turn out to be
22 true.

23 **CHAIRMAN BRISÉ:** All right. And to your
24 knowledge, when there are new agreements and then you
25 have lower rates that are made available to other

1 entities, is any of that public?

2 THE WITNESS: The rates that are contained in
3 other agreements, Mr. Chairman?

4 CHAIRMAN BRISÉ: Yes.

5 THE WITNESS: At this time they are available
6 readily publicly. Of course this is 2012, not 2006. I
7 don't know who can speak to 2006. I certainly can't.

8 CHAIRMAN BRISÉ: Okay. Thank you.

9 THE WITNESS: Yes, sir.

10 CHAIRMAN BRISÉ: Redirect.

11 MS. KAUFMAN: Thank you, Mr. Chairman.

12 I just have a few questions for you, Mr.
13 Armstrong.

14 REDIRECT EXAMINATION

15 BY MS. KAUFMAN:

16 Q. I'm going to try to start at the beginning
17 with some of Ms. Montgomery's questions. She asked you
18 about your Revised TMA-1, and asked you some questions
19 about Digital Express and why it wasn't listed
20 originally. Do you remember that?

21 A. I remember Ms. Montgomery's questions, yes,
22 ma'am.

23 Q. Why is it that you did not list Digital
24 Express on your resume when we first submitted it?

25 A. I'm not in the habit of preparing resumes. As

1 you can see from my resume, I basically have two things
2 I have done in my life. You know, the Marine Corps
3 doesn't require a resume. You know, can you shoot?
4 Yes. You're in. And then, you know, I became involved
5 with Express Phone.

6 When I prepared this resume, you know, it is
7 Express Phone Service. Express Phone Service. I
8 prepared the resume for Express Phone Service.

9 Q. Okay. Now, Ms. Montgomery asked you a series
10 of questions relying on these documents that the
11 Commission has taken official recognition of, 060319 and
12 060714. And let me ask you this question. At the time
13 that Express Phone entered into the original agreement
14 with AT&T, was Express Phone aware of the NewPhone
15 interconnection agreement?

16 A. Express Phone was not only not aware of it,
17 but as Ms. Montgomery pointed out the dates and as the
18 Commissioners themselves have asked about availability,
19 the dates were close together. I would almost contend
20 that if it was signed and approved and by operation of
21 law had gone into effect, even if it had been available
22 publicly, as I believe Ms. Montgomery used that term
23 on-line, was it available, was there enough time to get
24 it made available? So to answer your question, no, we
25 were not aware of it.

1 Q. Would you think it likely that AT&T was aware
2 of the NewPhone agreement at the time you entered into
3 your agreement?

4 **MS. MONTGOMERY:** Objection. This witness
5 lacks foundation to testify of what AT&T was aware of.

6 **MS. KAUFMAN:** I was simply asking him in his
7 dealings with AT&T if he thought that it would be likely
8 that they would be aware of it. It was their agreement.

9 **CHAIRMAN BRISÉ:** I think I'll allow the
10 question.

11 **MS. KAUFMAN:** Let me repeat the question so
12 the record is clear.

13 **BY MS. KAUFMAN:**

14 Q. Would it be your view that at the time you
15 entered into the Express Phone/AT&T agreement it was
16 likely that AT&T was aware of the NewPhone agreement?

17 A. That would be very likely since AT&T had
18 signed it prior to our agreement.

19 Q. Did AT&T make you aware of that agreement or
20 give you any indication that there was a different more
21 favorable agreement in existence?

22 A. Not only did not made us aware of any other
23 agreements available or make us aware of the
24 availability of the option to get other agreements.

25 Q. I think Ms. Montgomery asked you a series of

1 questions in regard to why you didn't file a complaint
2 at the Commission given the timing of these agreements.

3 Did you have any reason to think that the
4 agreement that AT&T gave you was not their standard
5 template agreement?

6 A. You're talking about the agreement presented
7 to us in 2006?

8 Q. Yes.

9 A. No, ma'am. In fact, it says on the bottom of
10 it -- in the footer it says stand-alone agreement, and
11 it was presented to us in that capacity. This is our
12 agreement.

13 Q. And was it your understanding that all CLECs
14 at that time that were using the standard agreement had
15 the agreement that was presented to you?

16 A. Correct. And I would note that in the
17 paperwork that Ms. Montgomery says, or the docket --
18 with the NewPhone docket, there's nothing I believe in
19 there that says this is a special agreement that
20 NewPhone has. So Express Phone would have been required
21 to at the time -- I believe in 2006 there was 141 CLECs.
22 I'm not sure if they all had interconnection agreements,
23 but Express Phone Service, again, would need to have the
24 resources to not only obtain all of those
25 interconnection agreements, but to read through each and

1 every one.

2 Q. Did you rely on AT&T's representation that
3 this was the standard CLEC agreement?

4 A. Yes, ma'am.

5 Q. Ms. Montgomery also asked you a series of
6 questions in regard to why you didn't come to the
7 Commission in regard to the disputed billing. Was there
8 any circumstance or course of conduct that influenced
9 your decision not to come to the Commission?

10 A. Through the years or in 2011 specifically time
11 frame, or --

12 Q. Yes. As this dispute began, what were your
13 interactions with AT&T that might have colored your
14 decision?

15 A. The decision not to come --

16 Q. Not to come and file a complaint, yes, sir.

17 A. Through the years -- for years Express Phone
18 Service paid their bill in full and submitted those
19 disputed amounts, those promotional claims to AT&T, and
20 for years paid those amounts in full. Paid the amounts
21 in full. At some point it became -- the numbers became
22 to the point where we began active talks, meeting with
23 AT&T personally, going to Atlanta to meet with AT&T.
24 And, again, we believed in good faith that we were
25 working towards the identification and the resolution of

1 those disputed amounts, promotional amounts. And,
2 again, that hasn't come to pass.

3 So to answer your question, the reason we did
4 not come to the Commission is as the interconnection
5 agreement says, both of them, is both parties agree to
6 work in good faith in the performance of these
7 provisions of this agreement. Express Phone was under
8 the belief -- mistakenly now we know -- that that was
9 happening. So when it finally became clear that it
10 wasn't going to happen, that is when we filed our
11 docket, our complaint.

12 Q. Did AT&T personally make representations to
13 you that they were going to work on these disputed
14 issues with you?

15 A. Yes, ma'am.

16 Q. Now, Ms. Montgomery asked you about -- it's
17 now Exhibit 37, but it is the August 25th, 2010, letter
18 from -- to you from Mr. Thaxton. Do you have that in
19 front of you?

20 A. Yes, ma'am.

21 Q. Okay. And am I correct that this letter had
22 to do with the question in regard to what the
23 appropriate deposit amount would be?

24 A. Could you repeat that question?

25 Q. Yes.

1 This correspondence that you received from
2 AT&T was related to discussions between the parties as
3 to what the appropriate deposit amount would be?

4 **A.** That is correct.

5 **Q.** Okay. And am I correct that ultimately
6 Express Phone came to agreement with AT&T as to the
7 deposit?

8 **A.** That is correct.

9 **Q.** And in the course of that agreement, what was
10 the deposit amount that was agreed to by AT&T based
11 upon? Was it based upon all amounts, or was it based
12 upon only undisputed amounts?

13 **A.** It was based on undisputed amounts.

14 **MS. KAUFMAN:** That's all I have. Thank you.

15 **CHAIRMAN BRISÉ:** Thank you very much.

16 Commissioners, anything further?

17 All right. Thank you very much. Thank you
18 for your testimony this morning.

19 **THE WITNESS:** Thank you, Mr. Chairman.

20 **CHAIRMAN BRISÉ:** At this time we are going to
21 make sure we have everything correct with our exhibits,
22 so at this time I think it would be appropriate for
23 Express Phone to go through the exhibits that you would
24 like to enter.

25 **MS. KAUFMAN:** Yes, Mr. Chairman. Express

1 Phone would move Exhibits 4 through 16. And Exhibit 4
2 is revised, as well as 25 and 26.

3 **CHAIRMAN BRISÉ:** All right. And AT&T?

4 **MS. MONTGOMERY:** We have no objections to
5 those exhibits, and we would also move the admission of
6 Exhibits 35 through 38.

7 (Exhibits 4 through 16; 25, 26; and 35 through
8 38 evidence.)

9 **CHAIRMAN BRISÉ:** Okay. Ms. Kaufman, do you
10 have any objection?

11 **MS. KAUFMAN:** I have no objection, Mr.
12 Chairman. Thank you.

13 **CHAIRMAN BRISÉ:** All right.
14 Staff?

15 **MS. TAN:** Staff is good.

16 **CHAIRMAN BRISÉ:** Okay. Thank you very much.

17 I think it would be appropriate at this time
18 to take our break for our court reporter. We will take
19 about a ten-minute break, and then we will reconvene at
20 11:20.

21 (Recess.)

22 **CHAIRMAN BRISÉ:** We are going to go ahead and
23 reconvene at this time.

24 Ms. Kaufman.

25 **MS. KAUFMAN:** Thank you, Mr. Chairman.

1 Express Phone would call Mr. Don Wood.

2 **CHAIRMAN BRISÉ:** Before you get started, just
3 some housekeeping things. We intend to go to lunch at
4 12:30, and we will probably take a 30-minute lunch, so
5 we will go from 12:30 to 1:00 for lunch. We plan to
6 reconvene at 1:00 and continue pressing on. Thank you.

7 **DON J. WOOD**

8 was called as a witness on behalf of Express Phone
9 Service, Inc., and having been duly sworn, testified as
10 follows:

11 **DIRECT EXAMINATION**

12 **BY MS. KAUFMAN:**

13 Q. Mr. Wood, you have been sworn, correct?

14 A. Yes, ma'am, I have.

15 Q. Okay. Would you state your name and business
16 address for the record, please?

17 A. Yes. My name is Don J. Wood. My business
18 address is 914 Stream, S-T-R-E-A-M, Valley Trail,
19 Alpharetta, A-L-P-H-A-R-A-E-T-T-A, Georgia.

20 Q. By whom are you employed and in what capacity?

21 A. I am a principal in the firm of Wood & Wood.

22 Q. What kind of activities does Wood & Wood
23 engage in?

24 A. We provide financial, economic, and regulatory
25 consulting services in technology-driven industries,

1 including telecommunications.

2 Q. On March 1, did you cause to be filed in this
3 case 21 pages of Direct Testimony?

4 A. Yes, ma'am.

5 Q. And do you have any changes or corrections to
6 your Direct Testimony?

7 A. I do have one correction, and it's on Page 17,
8 Footnote Number 2. There are some words that somehow
9 got dropped at the end of the sentence. The sentence
10 ends with FCC rules are and then just stops. I need to
11 insert the words "intended to prevent." So the sentence
12 reads, "This is exactly the kind of delay prohibited by
13 the Act in FCC rules, and the result has been exactly
14 the kind of discrimination that the Act and FCC rules
15 are intended to prevent."

16 Q. Do you have any other changes or corrections
17 to your Direct Testimony?

18 A. No, ma'am.

19 Q. If I asked you the questions in your Direct
20 Testimony today, would your answers be the same?

21 A. They would.

22 MS. KAUFMAN: Mr. Chairman, I would ask that
23 Mr. Wood's Direct Testimony be entered into the record
24 as though read.

25 CHAIRMAN BRISÉ: Okay. Move that into the

1 record.

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I. Introduction and Qualifications

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is Don J. Wood. I am a principal in the firm of Wood & Wood, an economic and financial consulting firm. My business address is 914 Stream Valley Trail, Alpharetta, Georgia 30022. I provide economic and regulatory analysis of telecommunications and related convergence industries with an emphasis on economic and regulatory policy, competitive market development, and cost-of-service issues.

Q. PLEASE DESCRIBE YOUR BACKGROUND AND EXPERIENCE.

A. I received a BBA in Finance with distinction from Emory University and an MBA with concentrations in Finance and Microeconomics from the College of William and Mary. My telecommunications experience includes employment at both a Regional Bell Operating Company ("RBOC") and an Interexchange Carrier ("IXC").

Specifically, I was employed in the local exchange industry by BellSouth Services, Inc. in its Pricing and Economics, Service Cost Division. My responsibilities included performing cost analyses of new and existing services, and preparing documentation for filings with state regulatory commissions and the Federal Communications Commission ("FCC").

I was employed in the interexchange industry by MCI Telecommunications Corporation, as Manager of Regulatory Analysis for the Southern Division. In this capacity, I was responsible for the development and implementation of regulatory policy for operations in the southern U. S. I then served as a Manager in MCI's Economic Analysis and Regulatory Affairs Organization, where I participated in the development of regulatory policy for national issues.

1 **Q. HAVE YOU PREVIOUSLY PRESENTED TESTIMONY BEFORE STATE**
2 **REGULATORS?**

3 A. Yes. I have testified on telecommunications issues before the regulatory
4 commissions of forty-three states, Puerto Rico, and the District of Columbia. I have
5 also presented testimony regarding telecommunications issues in state, federal, and
6 overseas courts, before alternative dispute resolution tribunals, and at the FCC. A
7 description of my qualifications and a list of my previous testimony are attached as
8 Exhibit No. DJW-1.

9 **Q. HAVE YOU PREVIOUSLY PROVIDED TESTIMONY REGARDING**
10 **INTERCONNECTION AGREEMENTS BETWEEN INCUMBENT LOCAL**
11 **EXCHANGE CARRIERS ("ILECS") AND COMPETITIVE LOCAL**
12 **EXCHANGE CARRIERS ("CLECS")?**

13 A. Yes. I have presented testimony regarding the rates, terms, and conditions of
14 Interconnection Agreements ("ICAs") in Alabama, California, Colorado, Georgia,
15 Kansas, Kentucky, Louisiana, Maryland, Mississippi, Montana, Nebraska, North
16 Carolina, Oregon, South Carolina, Tennessee, Texas, Washington, Wyoming, the
17 District of Columbia, Puerto Rico, and at the FCC. Here in Florida, I testified in
18 Docket Nos. 960846-TP, 960833-TP, 960847-TP, 960980-TP, 961230-TP, 971140-
19 TP, 990750-TP, 991605-TP, and 030137-TP concerning the rates, terms, and
20 conditions of ICAs between ILECs – including but not limited to AT&T – and
21 CLECs.

22 **II. Purpose and Summary of Testimony**

23 **Q. WHAT IS THE PURPOSE OF YOUR DIRECT TESTIMONY?**

1 A. The purpose of my testimony is to describe the actions of Express Phone Service, Inc.
2 ("Express Phone") and BellSouth Telecommunications, Inc. d/b/a AT&T Florida
3 ("AT&T"), and to compare those actions with the applicable sections of the
4 Telecommunications Act of 1996 ("the Act") and the applicable rules of the FCC.

5 It is my understanding that Express Phone attempted, on multiple occasions,
6 to adopt the ICA in effect between AT&T and Image Access d/b/a New Phone ("New
7 Phone"), but that AT&T has refused to honor that adoption.

8 I have been asked by Express Phone to review the circumstances of the
9 matter, to describe the sections of the Act and FCC rules related to the adoption of
10 ICAs by a CLEC, and to describe how the statute and FCC rules are applicable in this
11 situation.

12 **Q. IS EXPRESS PHONE PRESENTING THE DIRECT TESTIMONY OF ANY**
13 **OTHER WITNESSES IN THIS PROCEEDING?**

14 A. Yes. Express Phone is also presenting the Direct Testimony of Mr. Thomas
15 Armstrong. Mr. Armstrong will describe the services offered by Express Phone,
16 Express Phone's attempts to adopt an ICA in effect between AT&T and another
17 CLEC pursuant to §252(i) and 47 CFR §51.809, and AT&T's refusal to permit what,
18 in my experience, should have been a routine administrative change.

19 **Q. WHAT CONCLUSIONS HAVE YOU REACHED REGARDING THIS**
20 **MATTER?**

21 A. For the reasons set forth in the next section of my testimony, this is straight-forward
22 ICA adoption case based on actions that should never have generated any dispute
23 between the parties. Express Phone has, pursuant to the requirements of §252(i) and
24 47 CFR §51.809, adopted the New Phone ICA and has made the proper notification

1 of the adoption to AT&T. AT&T's refusal to honor this adoption notification is
2 unprecedented in my experience and appears to be directly at odds with the
3 requirements of the Act and FCC rules.

4 **Q. BASED ON YOUR REVIEW OF THE REQUIREMENTS AND FACTS OF**
5 **THE CASE, WHAT IS YOUR RECOMMENDATION TO THE**
6 **COMMISSION?**

7 A. It is my recommendation that the Commission enter an order finding Express Phone's
8 adoption of the New Phone ICA valid and effective on October 10, 2010 (the date on
9 which Express Phone notified AT&T of its intent to adopt this ICA).

10 **III. Provisions of the Act and FCC Rules**

11 **Q. ARE YOU FAMILIAR WITH THE REQUIREMENTS AND PROVISIONS OF**
12 **§§251 AND 252 OF THE ACT?**

13 A. Yes. §251 and §252 of the Act set forth the interconnection requirements for
14 different categories of carriers, the mechanisms by which rates, terms, and conditions
15 may be determined and memorialized in an ICA, and the ways in which a CLEC,
16 such as Express Phone, can establish an ICA with an ILEC, such as AT&T.

17 **Q. PLEASE DESCRIBE HOW A CLEC CAN ENTER INTO AN ICA WITH AN**
18 **ILEC.**

19 A. There are four ways in which a CLEC can enter into an ICA with an ILEC: (1) the
20 CLEC can negotiate an agreement with the ILEC, (2) if an agreement on all issues
21 cannot be reached through negotiation, the CLEC may arbitrate the disputed issues in
22 order to reach an agreement (in Florida, the Commission has the role of arbitrating
23 these issues), (3) the CLEC can adopt an ICA in effect between the ILEC and another

1 CLEC, or (4) an existing ICA between the CLEC and ILEC can be extended by
2 mutual agreement.

3 In my experience, direct negotiations between larger CLECs and ILECs have
4 been successful in resolving, some, but rarely all, of the issues in dispute between
5 carriers. For this reason, it is typical for a number of disputed issues between larger
6 carriers to proceed to arbitration before a final ICA can be put into place. This
7 arbitration process typically results in an extended period of discovery, voluminous
8 testimony, and a comprehensive evidentiary hearing. As a result, both the CLEC and
9 the ILEC devote significant time and resources to the process.

10 **Q. YOU STATED THAT IN YOUR EXPERIENCE, LARGER CLECS AND**
11 **ILECS OFTEN NEGOTIATE AND ARBITRATE ICAS. IS THIS ALSO THE**
12 **USUAL PROCESS FOR SMALLER CARRIERS?**

13 **A.** No. The negotiation and arbitration process is both time-consuming and resource-
14 intensive. Smaller CLECs, like Express Phone, rarely have the resources to engage in
15 this process, particularly if their opponent is a large and well-funded ILEC, such as
16 AT&T. It has been much more typical, particularly in the period of time after the
17 AT&T arbitrations with the larger CLECs were completed, for AT&T to present
18 smaller CLECs with a template agreement for their acceptance or rejection. While
19 more efficient, this abbreviated process makes the anti-discrimination provisions of
20 the Act and FCC rules even more important. The ability of a CLEC to adopt an
21 agreement between AT&T and another CLEC therefore becomes a critical safeguard
22 against discrimination among CLECs by AT&T.

23 The process of adopting an existing ICA is sometimes referred to in the
24 industry as "opting in" to an agreement. As explained in more detail later in my

1 testimony, the “opt in” provisions of the Act and FCC rules are an important
2 mechanism for preventing discrimination by an ILEC that may offer more favorable
3 terms to some CLECs than to others. In order to prevent disparate treatment that
4 would have adverse impact on competition among CLECs, CLECs have the
5 opportunity to “opt in” to a different ICA at any time. They may do so (1) as a means
6 of initiating an initial ICA with the ILEC, (2) while an ICA is in effect (in order to
7 receive rates, terms, or conditions being offered to a different CLEC), or (3) near the
8 time of the expiration of the existing agreement, in order to establish a new ICA with
9 the ILEC.

10 The dispute in this case is directly related to an attempt by a CLEC (Express
11 Phone) to adopt, pursuant to §252(i) of the Act, an existing ICA in effect between
12 AT&T and another CLEC (NewPhone).

13 **Q. ARE YOU FAMILIAR WITH THE RULES THAT THE FCC ADOPTED TO**
14 **IMPLEMENT THE PROVISIONS OF §§251 AND 252?**

15 A. Yes. 47 CFR §51 contains the FCC’s implementing regulations. Specifically,
16 §51.809 addresses the ability of a CLEC to adopt an ICA currently in effect between
17 an ILEC and another CLEC pursuant to §252(i). CLECs, especially smaller CLECs
18 like Express Phone, frequently use this process of adopting an existing agreement as
19 an efficient means of (1) contracting with an ILEC and (2) avoiding discrimination by
20 the ILEC that would result in a CLEC being placed at a competitive disadvantage *vis-*
21 *a-vis* other CLECs.

22 **Q. PLEASE PROVIDE AN OVERVIEW OF THE PURPOSE OF §§251 AND 252**
23 **OF THE ACT.**

1 A. §251 and §252 set forth the requirements for interconnection among
2 telecommunications carriers, and describe options for how ICAs can be developed
3 and implemented.

4 In addition to creating requirements for different classifications of carriers,
5 these sections create specific roles and responsibilities for the FCC and state
6 regulators. For example, §252 gives state regulators the authority and responsibility
7 to arbitrate and approve ICAs, but the rates, terms, and conditions of those
8 agreements must be consistent with the requirements of both the Act and the rules
9 adopted by the FCC in order to implement the requirements of the Act.

10 These sections of the Act also focus squarely on the need to promote the
11 development of competitive markets by limiting (and attempting to prevent)
12 discrimination among carriers that would prevent the operation of competitive market
13 forces (thereby harming the end user customers who benefit from the operation of
14 competitive markets). The Act addresses two possible forms of discrimination. First,
15 it seeks to limit the ability of ILECs to leverage their position as the incumbent
16 provider to gain a competitive advantage over CLECs generally. Second, and equally
17 importantly, it seeks to prevent actions by the ILEC that might provide a given CLEC
18 (or subset of CLECs) an artificial competitive advantage over other CLECs. It is this
19 second form of discrimination that is illustrated by the dispute in this case.

20 **Q. CAN YOU PROVIDE AN EXAMPLE OF HOW THE ACT SEEKS TO**
21 **PREVENT DISCRIMINATION BY THE ILEC AMONG DIFFERENT**
22 **CLECS?**

23 A. Yes. If a given CLEC is offered more favorable ICA terms by an ILEC than that
24 ILEC offers to other CLECs, the favored CLEC will have an advantage over the other

CLECs with which it competes. This artificial (and potentially significant) advantage would accrue to the favored CLEC regardless of the intent of the ILEC; in other words, an ILEC offering different ICA terms to different CLECs would cause competitive harm (and therefore consumer harm) even if it did not intend to do so.

Q. HOW DOES THE ACT ADDRESS THE ISSUE OF THE POTENTIAL FOR DISCRIMINATION AMONG CLECS BY AN ILEC?

A. §252(i) squarely addresses this issue by allowing CLECs to adopt the rates, terms, and conditions of any ICA that an ILEC has reached with another CLEC:

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

The “opt in” provision described in this language is both clear and broadly-defined: an ILEC must make *any* interconnection agreement available to *any* requesting telecommunications carrier. The language of §252(i), set forth in its entirety above, is notable for at least two reasons. First, it 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 limit a CLEC’s ability to “opt in” to an ICA to any period of time (either before, during, or subsequent to operation under a different ICA, for example), and does not require that the CLEC and ILEC have a history of undisputed operation pursuant to previous or existing ICAs.

Second, the language of the Act does not provide an opportunity for either an ILEC or a state regulator to place conditions on the ability of a CLEC to adopt an

1 existing ICA. There is no provision that would permit an ILEC to limit the ability of
2 a CLEC to adopt an existing ICA for any reason. The reason is clear: the purpose of
3 the "opt in" provision is to prevent an ILEC from discriminating among CLECs by
4 requiring the ILEC to recognize a CLEC's right to adopt the language of an ICA
5 entered into by the ILEC and another CLEC. Any ability to limit a given CLEC's
6 "opt in" rights would permit the ILEC to engage in exactly the kind of discrimination
7 that the Act explicitly seeks to prevent. Similarly, while the language of the Act sets
8 forth a number of specific responsibilities for state regulators, its language does not
9 provide an opportunity for state regulators to impose restrictions on the ability of a
10 CLEC to adopt an existing ICA.

11 **Q. HOW DID THE FCC IMPLEMENT §252(i) OF THE ACT?**

12 A. The FCC implemented §252(i) in a way that would provide the most protection
13 against discrimination. It initially adopted a rule (sometimes referred to in the
14 industry as the "pick and choose" rule) that would have allowed CLECs to adopt
15 individual provisions of one or more existing ICAs, and to combine those provisions
16 to form a new agreement. Subsequent to a court challenge and remand, the FCC
17 adopted the existing "opt in" rule, which allows CLECs to adopt existing ICAs but
18 requires them to adopt an agreement in its entirety.

19 The current language of 47 CFR §51.809, adopted in 2004, is as follows:

20 **§ 51.809 Availability of agreements to other**
21 **telecommunications carriers under section 252(i) of the Act.**

22 (a) An incumbent LEC shall make available without unreasonable
23 delay to any requesting telecommunications carrier any agreement
24 in its entirety to which the incumbent LEC is a party that is
25 approved by a state commission pursuant to section 252 of the Act,
26 upon the same rates, terms, and conditions as those provided in the
27 agreement. An incumbent LEC may not limit the availability of
28 any agreement only to those requesting carriers serving a

1 comparable class of subscribers or providing the same service (*i.e.*,
2 local, access, or interexchange) as the original party to the
3 agreement.
4

5 (b) The obligations of paragraph (a) of this section shall not apply
6 where the incumbent LEC proves to the state commission that:
7

8 (1) The costs of providing a particular agreement to the requesting
9 telecommunications carrier are greater than the costs of providing
10 it to the telecommunications carrier that originally negotiated the
11 agreement, or
12

13 (2) The provision of a particular agreement to the requesting
14 carrier is not technically feasible.
15

16 (c) Individual agreements shall remain available for use by
17 telecommunications carriers pursuant to this section for a
18 reasonable period of time after the approved agreement is available
19 for public inspection under section 252(h) of the Act. [69 FR
20 43771, July 22, 2004]
21

22 **Q. DOES THE LANGUAGE OF THE FCC RULE CREATE A CLEAR**
23 **OBLIGATION FOR AN ILEC TO RECOGNIZE A CLEC'S RIGHT TO**
24 **ADOPT AN EXISTING ICA?**

25 A. Yes. The language of §51.809(a), like the language of §252(i) of the Act, creates a
26 requirement that is both clear and broadly-defined. The rule contains several key
27 elements: an ILEC (1) "*shall* make available," (2) "to *any* requesting
28 telecommunications carrier," (3) "*any* agreement in its entirety to which the
29 incumbent LEC is a party that is approved by a state commission pursuant to section
30 252 of the Act." Consistent with the language of §252(i), §51.809 does not limit a
31 CLEC's ability to "opt in" to an ICA to any period of time (either before, during, or
32 subsequent to operation under a different ICA), and does not require that the CLEC
33 and ILEC have a history of undisputed operation pursuant to previous or existing
34 ICAs.

1 Also consistent with the language of §252(i), the language of §51.809 does
2 not provide an opportunity for either an ILEC or a state regulator to place conditions
3 on the ability of a CLEC to adopt an existing ICA.

4 **Q. DOES THE FCC PLACE ANY RESTRICTIONS ON THE ABILITY OF A**
5 **CLEC TO ADOPT AN EXISTING ICA?**

6 A. Yes. In §51.809(b), the FCC sets forth two, and only two, exceptions to the
7 requirement an ILEC must make available for adoption “any agreement” to “any
8 requesting telecommunications carrier,” and must do so without unreasonable delay.
9 Specifically, in order for the obligations set forth in §51.809(a) to *not* apply, an ILEC
10 must successfully prove to a state regulator that “the costs of providing a particular
11 agreement to the requesting telecommunications carrier are greater than the costs of
12 providing it to the telecommunications carrier that originally negotiated the
13 agreement,” or that “the provision of a particular agreement to the requesting carrier
14 is not technically feasible.”

15 **Q. IS IT POSSIBLE FOR EITHER OF THE FCC’S TWO EXCEPTIONS TO**
16 **APPLY IN THIS CASE?**

17 A. No. As Mr. Armstrong explains in his testimony, Express Phone is a reseller of
18 AT&T services. The wholesale service that was provided to Express Phone has
19 exactly the same cost (except for the avoided retail costs that AT&T need not incur
20 when selling at wholesale) and exactly the same technical characteristics as AT&T’s
21 corresponding retail service. As a result, the service *cannot* cost more to provide (it
22 costs AT&T the same amount as when sold to any reseller, and less than the cost
23 incurred by AT&T to sell the service at retail) and *cannot* be technically infeasible (as
24 the wholesale service is technically the same service that AT&T sells at retail). In the

1 end, there are no exceptions in the language of the Act and only two exceptions set
2 forth in the FCC rules, and neither of those exceptions applies in this case.

3 **Q. YOU STATED THAT A PRIMARY PURPOSE OF THE “OPT IN”**
4 **PROVISIONS OF THE ACT AND FCC RULES IS TO PREVENT**
5 **DISCRIMINATION. HAS THE FCC BEEN CLEAR ABOUT THIS INTENT?**

6 A. Yes. When adopting the current version of 47 CFR §51.809, the FCC concluded that
7 under its new rule,

8 *...requesting carriers will be protected from discrimination, as*
9 *intended by section 252(i).* Specifically, an incumbent LEC will
10 not be able to reach a discriminatory agreement for
11 interconnection, services, or network elements with a particular
12 carrier without making that agreement in its entirety available to
13 other requesting carriers. *If the agreement includes terms that*
14 *materially benefit the preferred carrier, other requesting carriers*
15 *will likely have an incentive to adopt that agreement to gain the*
16 *benefit of the incumbent LEC's discriminatory bargain.* Because
17 these agreements will be available on the same terms and
18 conditions to requesting carriers, the all-or-nothing rule should
19 effectively deter incumbent LECs from engaging in such
20 discrimination (emphasis added).¹
21

22 **Q. DOES THE LANGUAGE OF THE ACT ALSO SUPPORT A CONCLUSION**
23 **THAT CONGRESS SOUGHT TO PREVENT THIS SAME KIND OF**
24 **DISCRIMINATION?**

25 A. Yes. For example, §252(e) requires that “any interconnection agreement adopted by
26 negotiation or arbitration” must be submitted for approval to the state regulator.
27 §252(e)(2) then sets forth only three grounds for the rejection of an ICA by a state
28 regulator. The first of these grounds is a determination that “the agreement (or
29 portion thereof) discriminates against a telecommunications carrier not a party to the

¹ *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.

1 agreement.” The interest of Congress in preventing this kind of discrimination is
2 clear.

3 Of course, it may not be readily apparent that the language of a given ICA is
4 discriminatory at the time it is entered into, or the discrimination may not arise until a
5 subsequent ICA is entered into by the ILEC with language that would be more
6 favorable to the subsequent CLEC. In each of these cases, the primary safeguard is
7 the adoption or “opt in” provision contained in §252(i).

8 **Q. PLEASE SUMMARIZE YOUR UNDERSTANDING OF THE SECTIONS OF**
9 **THE ACT AND FCC RULES RELATED TO THE ADOPTION OF**
10 **INTERCONNECTION AGREEMENTS.**

11 A. §252(i) of the Act states that an ILEC, such as AT&T, must make any existing ICA
12 available for adoption by any requesting telecommunications carrier. The Act
13 contains no exceptions to this requirement, and contains no provision that would
14 allow AT&T to place conditions on the ability of a requesting carrier to opt into an
15 existing agreement. While the Act creates specific roles and responsibilities for state
16 regulators, it does not contain any provisions that would permit a state regulator to
17 place conditions on the adoption of ICAs.

18 47 CFR §51.809 likewise sets forth an unambiguous requirement, stating that
19 an ILEC, such as AT&T (1) “*shall* make available,” (2) “to *any* requesting
20 telecommunications carrier,” (3) “*any* agreement in its entirety to which the
21 incumbent LEC is a party that is approved by a state commission pursuant to section
22 252 of the Act.”

23 The FCC goes on in §51.809 to establish two explicit and limited exceptions
24 to this requirement, neither of which apply in this case. Like the language of the Act,

1 the language of the FCC rule contains no provision that would permit AT&T to
2 impose conditions on the ability of any telecommunications carrier to opt into an
3 existing agreement, and does not provide an option for a state regulator to place such
4 conditions.

5 The ability of a CLEC to adopt an existing ICA is a necessary safeguard that
6 limits the ability of an ILEC to discriminate among CLECs in a way that would
7 distort competitive markets and ultimately harm consumers. In order for this
8 safeguard to be effective, it must be applied in the unrestricted way described in both
9 the Act and FCC rules. A CLEC must be able to adopt an existing agreement without
10 conditions, and it must be able to do so at any time.

11 **Q. CAN YOU PROVIDE EXAMPLES OF HOW THE ADOPTION PROCESS**
12 **SET FORTH IN §252(i) OF THE ACT AND IN §51.809 OF THE FCC RULES**
13 **IS NECESSARY TO PREVENT DISCRIMINATION?**

14 A. Yes. As a simple example, assume that an ILEC enters into an ICA with CLEC A,
15 and that ICA sets a price for an essential network element at \$5.00 per month. The
16 same ILEC also enters into an ICA with CLEC B, but this ICA sets the price of the
17 same network element at \$4.00 per month. This scenario puts CLEC A at a
18 competitive disadvantage compared to CLEC B, even though CLEC A may be
19 operated just as efficiently and effectively as CLEC B. In order to prevent this kind
20 of discrimination from adversely impacting the marketplace (and therefore adversely
21 impacting consumers), §252(i) of the Act and §51.809 of the FCC rules permit CLEC
22 A to adopt the ICA reached between the ILEC and CLEC B, thereby allowing CLEC
23 A to avail itself of the lower rate for the network element. In the words of the FCC,
24 "If the agreement includes terms that materially benefit the preferred carrier, other

1 requesting carriers will likely have an incentive to adopt that agreement to gain the
2 benefit of the incumbent LEC's discriminatory bargain.”

3 It is important to recognize several aspects of this simple example. First,
4 while the discrimination may involve prices, other forms of discrimination can have
5 an equally important impact on the ability of a carrier to compete, and the Act and
6 FCC rules do not limit the kinds of discrimination addressed by the “opt in”
7 provisions. The more favorable terms offered to CLEC B by the ILEC could take
8 many forms: a more efficient service ordering mechanism, shorter provisioning
9 intervals, or more favorable dispute resolution mechanisms, for example. The ability
10 of CLEC A to adopt the ICA between the ILEC and CLEC B will result in
11 implementation of the FCC’s requirement so that “requesting carriers will be
12 protected from discrimination, as intended by section 252(i),” and will do so
13 regardless of the type of discrimination introduced by the ICA between the ILEC and
14 CLEC B.

15 Second, the ability of the “opt in” provision to prevent discrimination and to
16 avoid anticompetitive outcomes depends on the ability of a requesting carrier to adopt
17 an existing agreement “without unreasonable delay.” Most ICAs are executed with a
18 three to five year term. To continue the previous example, assume that the ICA
19 between the ILEC and CLEC A has a five year term. Without the ability to adopt the
20 CLEC B agreement without delay, CLEC A would have to endure a period of price
21 discrimination. If not permitted to opt into the CLEC B agreement until its own ICA
22 has expired (a restriction that appears nowhere in the Act or FCC rules, and in fact is
23 directly at odds with the FCC’s “without unreasonable delay” requirement), CLEC A
24 would be forced to endure fifty-nine months of price discrimination before receiving

1 the same price as CLEC B. Such delay is directly at odds with the stated objective of
2 protecting carriers from discrimination.²

3 Third, allowing the ILEC to impose conditions on a requesting carrier's ability
4 to adopt an existing ICA would be directly at odds with the anti-discrimination
5 objectives of the Act and would create perverse incentives for an ILEC to engage in
6 discriminatory behavior. For example, assume that the ILEC's ICA with CLEC A
7 contains a provision that requires CLEC A to pay all amounts billed to it by the ILEC,
8 even if CLEC A believes that it has been over-charged (and has notified the ILEC of
9 this fact). In contrast, the ICA between the ILEC and CLEC B permits CLEC B to
10 withhold payment for disputed charges. Allowing CLEC A to adopt, without
11 unreasonable delay, the ICA of CLEC B accomplishes two objectives: First, it places
12 CLEC A and CLEC B on an equal competitive footing. Without the ability of CLEC
13 A to adopt the CLEC B agreement, CLEC A will be at a distinct competitive
14 disadvantage because it will be paying the ILEC for any overcharges until the dispute
15 is resolved, while CLEC B will not.

16 Second, such an adoption would provide an important incentive for the ILEC
17 to bill only the correct amounts and to work to resolve any outstanding disputes. If
18 CLEC A were required to operate under its initial ICA (containing the more onerous
19 dispute provisions) for a full five years, the ILEC would have little incentive to
20 address the dispute and would actually have an incentive to intentionally overbill
21 CLEC A for the essential network element.

² In this case, it is my understanding that Express Phone notified AT&T of its adoption of the New Phone ICA on October 20, 2010, but that AT&T has not implemented the adoption. This is exactly the kind of delay prohibited by the Act and FCC rules, and the result has been exactly the kind of discrimination that the Act and FCC rules are

1 To be clear, even if applied as intended by Congress and the FCC, the “opt in”
2 provision would not prevent this kind of discrimination from occurring: the ILEC
3 would be able to enter into an ICA with CLEC B that contains more favorable rates,
4 terms, or condition than an ICA entered into by the ILEC and CLEC A. What §252(i)
5 of the Act and §51.809 of the FCC rules can do is prevent the discrimination from
6 continuing, by permitting CLEC A to adopt the ICA of CLEC B without delay.
7 Doing so, according to the FCC’s reasoning, addresses any unintentional
8 discrimination and removes the incentive for intentional discrimination: “because
9 these agreements will be available on the same terms and conditions to requesting
10 carriers, [§51.809] should effectively deter incumbent LECs from engaging in such
11 discrimination.”

12 **Q. YOU STATED THAT THE ACT AND FCC RULES PERMIT EXPRESS**
13 **PHONE TO ADOPT THE ICA BETWEEN AT&T AND NEW PHONE. ARE**
14 **THERE ANY PROVISIONS IN EXPRESS PHONE’S ICA WITH AT&T**
15 **THAT ADDRESS THE ADOPTION REQUIREMENT?**

16 **A.** Yes. The pre-October 20, 2010 Express Phone ICA with AT&T contains a provision
17 that directly addresses this point. Specifically, Paragraph 11 of the “General Terms
18 and Conditions” section of the ICA provides as follows:

19 **Adoption of Agreements**

20 Pursuant to 47 U.S.C. §252(i) and 47 C.F.R. § 51.809, BellSouth
21 shall make available to Express Phone any entire resale agreement
22 filed and approved pursuant to 47 U.S.C. §252. The adopted
23 agreement shall apply to the same states as the agreement that was
24 adopted, and the term of the adopted agreement shall expire on the
25 same date as set forth in the agreement that was adopted.
26

To be clear, Express Phone's right to adopt the AT&T/NewPhone ICA arises from §252(i) of the Act and 47 CFR §51.809, and is not dependent on this language. To the extent there is any doubt, however, the ICA in effect prior to October 20, 2010 – the date on which Express Phone adopted the AT&T/NewPhone ICA – explicitly states that AT&T *shall* make available to Express Phone *any* entire resale agreement, subject *only* to the adopted ICA having been filed with, and approved by, the state commission. There is no dispute that on the date of adoption, the NewPhone agreement (the ICA that Express Phone sought to adopt) was an ICA that fully met this “filed and approved” condition.

Q. WHAT IS THE EFFECTIVE DATE OF EXPRESS PHONE'S ADOPTION OF THE AT&T/NEW PHONE ICA?

A. Express Phone's adoption of the AT&T/NewPhone ICA is effective October 20, 2010, the date on which Express Phone notified AT&T of the adoption.

Q. WHAT IS THE BASIS FOR YOUR OPINION THAT THE ADOPTION DATE IS OCTOBER 20, 2010?

A. The Commission addressed the issue of the effective date of an ICA adoption in a recent case,³ which was affirmed by the federal court. In that case, AT&T argued that the adoption at issue should not become effective until 30 days after the final party executed the adoption contract. The Commission rejected AT&T's position and held:

³ *In re: Notice of adoption of existing interconnection agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P., by NPCR, Inc. d/b/a Nextel Partners*, Docket No. 070368-TP and *In re: Notice of adoption of existing interconnection agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P., by Nextel South Corp. and Nextel West Corp.*, Docket No. 070369-TP, Order No. PSC-08-0584-FOF-TP at 11, *affirmed*, *BellSouth Telecommunications, Inc. v. Florida Public Service Commission*, Case No. 4:09-cv-102/RS/WCS (April 19, 2010) (*Nextel Adoption Order*).

1 When an interconnection agreement is available for adoption under
2 47 C.F.R. 51.809(a), the adoption is considered presumptively
3 valid and effective upon receipt of the notice by the adoption
4 party.⁴
5

6 Consistent with this language, the adoption is effective upon AT&T's receipt
7 of Express Phone's notice on October 20, 2010. The Commission also commented
8 that "[t]he effective date should not be affected by the passage of time during
9 litigation of this issue...."⁵ That is, AT&T's continued refusal to recognize the
10 adoption does not delay the effective date.

11 **Q. DID AT&T APPEAL THE COMMISSION'S RULING TO FEDERAL**
12 **COURT?**

13 A. Yes. The federal court then affirmed the Commission's order, finding that:

14 ...FPSC's determination that backdating is allowed because "the
15 adoption is considered presumptively valid and effective upon
16 receipt of the notice by the adoption party" and that effective dates
17 are not affected by any filed objections is not contrary to federal
18 law.⁶
19

20 There can be no serious dispute that the adoption of the AT&T/New Phone
21 ICA by Express Phone was effective on October 20, 2010.

22 **Q. ONCE AN ILEC IS NOTIFIED OF AN ICA ADOPTION, IS ANY ACTION BY**
23 **THE STATE REGULATOR REQUIRED BEFORE THE ADOPTED**
24 **AGREEMENT BECOMES EFFECTIVE?**

25 A. No. As the Commission corrected noted, "the adoption is considered presumptively
26 valid and effective upon receipt of the notice" by the ILEC. No delay beyond the
27 date of "notice" is either necessary or appropriate.

⁴ *Id.* at 11.

⁵ *Id.*

⁶ *BellSouth Telecommunications, Inc. v. Florida Public Service Commission*, Case No. 4:09-cv-102/RS/WCS (April 19, 2010).

1 Q. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?

2 A. Yes.

3

1 BY MS. KAUFMAN:

2 Q. And, Mr. Wood, you had one exhibit, DJW-1,
3 correct?

4 A. Yes, ma'am.

5 Q. Do you have any changes or corrections to that
6 exhibit?

7 A. I do not.

8 Q. Did you also cause to be filed 31 pages of
9 Rebuttal Testimony in this case?

10 A. Yes, ma'am.

11 Q. Do you have any changes or corrections to that
12 testimony?

13 A. I do also have one correction to the Rebuttal
14 Testimony. It is Page 16, Line 16. The fifth word in
15 is ICA, that should have been the word interaction. So
16 I need to strike ICA, insert the word interaction so
17 that the sentence reads, "Second, Mr. Greenlaw's
18 interpretation of 252(i) and 51.809 would create a
19 scenario in which the interaction between an ILEC and a
20 CLEC would be governed by two, and potentially more than
21 two, ICAs with conflicting language."

22 Q. And with that correction, if I asked you the
23 questions in your rebuttal testimony today, would your
24 answers be the same?

25 A. Yes, ma'am, they would.

1 **MS. KAUFMAN:** Mr. Chairman, I would ask that
2 Mr. Wood's rebuttal testimony be entered into the record
3 as though read.

4 **CHAIRMAN BRISÉ:** Thank you. So entered.
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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

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

11 It remains my recommendation that the Commission enter an order finding
12 Express Phone’s adoption of the NewPhone ICA valid and effective on October 10,
13 2010 (the date on which Express Phone notified AT&T of its adoption of this ICA).
14 This notice of adoption is fully acknowledged in the testimony of Mr. Greenlaw² and
15 Mr. Egan.³
16

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?"

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

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

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

18 A. No. Such a dispute could only impact the adoption of an ICA by a Competitive Local
19 Exchange Company (CLEC) if the relevant sections of the Act and FCC rules
20 contained a restriction on the ability of a CLEC to adopt an existing ICA based on the
21 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.

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

10 Similarly, the FCC’s rule (47 CFR §51.809) implementing §252(i), like the
 11 language of the Act, creates a requirement that is both clear and broadly-defined. The
 12 rule clearly states that an ILEC (1) “*shall* make available,” (2) “to *any* requesting
 13 telecommunications carrier,” (3) “*any* agreement in its entirety to which the
 14 incumbent LEC is a party that is approved by a state commission pursuant to section
 15 252 of the Act.” Also consistent with the language of §252(i), §51.809 does not limit
 16 a CLEC’s ability to “opt in” to an ICA⁵ and does not require that the CLEC and ILEC
 17 have a history of undisputed operation pursuant to previous or existing ICAs.

18 **Q. DOES MR. EGAN CITE TO ANY LANGUAGE IN THE ACT OR FCC**
 19 **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.

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

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

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

17 A. No. Mr. Egan makes no reference to any such language in the AT&T-Express Phone
18 ICA in his testimony,⁶ even though one of the stated purposes of his testimony is to
19 address Issue 3: "Is Express Phone permitted under the terms of the interconnection
20 agreement with AT&T Florida to adopt the NewPhone Interconnection Agreement?"
21 The reason for this omission is also clear: the language of the AT&T-Express Phone
22 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.

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

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

9 A. No. Other than a description of AT&T’s version of the billing dispute – a subject that
10 is well beyond the scope of this proceeding – Mr. Egan’s testimony is limited to a
11 description of the dates on which Express Phone provided notice of adoption and the
12 dates on which AT&T responded. For each of these facts, Mr. Egan does not claim to
13 have personal knowledge but instead relies on the testimony of Mr. Greenlaw⁷ as the
14 basis for his testimony.

15 In the end, Mr. Egan provides no expert testimony regarding Issues 2 and 3,
16 and provides no independent fact testimony on any issue relevant to this case. He
17 instead relies directly on the testimony of Mr. Greenlaw as the basis for any facts
18 relevant to the issues at hand, and offers no conclusions responsive to any of the four
19 issues set forth in Order No. PSC-12-0031-PCO-TP.
20

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.

1 **IV. RESPONSE TO THE DIRECT TESTIMONY OF WILLIAM GREENLAW**

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

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

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

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

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

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

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

5 **Q. DOES MR. GREENLAW ADDRESS §51.809 OF THE FCC’S RULES?**

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

13 **Q. DOES MR. GREENLAW OFFER ANY OTHER SUPPORT FOR HIS**
14 **CONCLUSIONS, OTHER THAN HAVING BEEN “ADVISED” AS TO WHAT**
15 **HIS CONCLUSIONS SHOULD BE?**

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

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

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

3 A. Yes. At page 9, he refers to Section 11 of the General Terms and Conditions section
4 of the AT&T-Express Phone ICA, which states in part that AT&T "*shall* make
5 available to Express Phone *any* entire resale agreement filed and approved pursuant to
6 47 U.S.C. Section 252" (emphasis added).

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

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

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

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

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

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

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

17 For example, throughout his testimony⁸ Mr. Greenlaw refers to Express
18 Phone’s efforts to “unilaterally” adopt the AT&T-NewPhone ICA, and to AT&T’s
19 “willingness” to allow Express Phone to adopt the ICA.

20 A basic familiarity with the requirements of the Act and FCC rules would
21 cause Mr. Greenlaw to realize that the decision by a CLEC (such as Express Phone)
22 to “opt in” to an ICA is expected to be a “unilateral” act. As described in detail in my
23 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.

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

5 an incumbent LEC will not be able to reach a
6 discriminatory agreement for interconnection, services,
7 or network elements with a particular carrier without
8 making that agreement in its entirety available to other
9 requesting carriers. If the agreement includes terms that
10 materially benefit the preferred carrier, other requesting
11 carriers will likely have an incentive to adopt that
12 agreement to gain the benefit of the incumbent LEC's
13 discriminatory bargain.⁹

14
15 In order for this safeguard to be effective (and ultimately for it to have any meaning at
16 all), CLECs must be able to unilaterally “adopt that agreement to gain the benefit of
17 the incumbent LEC's discriminatory bargain.” Conversely, a provision that permitted
18 a CLEC to “opt in” to an agreement only at the discretion of the ILEC would be
19 meaningless: the ILEC could enter into a discriminatory agreement and then simply
20 refuse efforts by other CLECs to adopt the discriminatory agreement. Of course, the
21 language of both the Act (§252(i)) and FCC rules (§51.809) directly addresses the
22 rights of CLECs to adopt an ICA, and makes no reference whatsoever to a process in
23 which the ILEC may decide to continue discriminating by somehow rejecting the
24 CLEC's adoption.

25 Similarly, Mr. Greenlaw makes several references in his testimony to what
26 AT&T is “willing” to allow Express Phone to do regarding its rights of adoption as
27 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.

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

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

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

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

15 whether a telecommunications carrier may adopt an entire,
 16 effective interconnection agreement is determined by whether a
 17 genuine exception to the above provision exists. The rule
 18 which implements §252(i), 47 CFR §51.809, *describes the only*
 19 *two instances where an incumbent LEC may deny a requesting*
 20 *carrier the right to adopt an entire effective agreement ...*
 21 *unless an incumbent LEC can demonstrate that its costs will be*
 22 *greater to provide the agreement to the new carrier(s), or the*
 23 *agreement is not technically feasible to provide to the new*
 24 *carrier(s), the incumbent LEC may not restrict the carrier’s*
 25 *right to adopt.*¹²
 26

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.*

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

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

18 **Q. IN HIS TESTIMONY, MR. GREENLAW REFERS TO LIMITATIONS ON**
19 **EXPRESS PHONE’S ABILITY TO “OPT OUT” OF ITS PREVIOUS ICA. DO**
20 **YOU AGREE WITH HIS TESTIMONY?**

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

¹³ *Id.*

¹⁴ *Id.*, p. 8.

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

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

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

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

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

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

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

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

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

21 Mr. Greenlaw's testimony completely misses the point. Express Phone was
22 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁷ See Exhibit WEG-1.

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

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

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

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

19 But at page 4 of his Direct Testimony, Mr. Greenlaw argues as follows:
20 "although it could have done so, we have no record of any request by Express Phone
21 to adopt the [NewPhone] ICA in 2006, or, for that matter, at any time before October
22 2010." Mr. Greenlaw cannot have it both ways. At some points in his testimony, he
23 states that AT&T failed to recognize Express Phone's adoption of the NewPhone ICA

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

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

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

¹⁸ Direct Testimony of William Greenlaw, p. 6.

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

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

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

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

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

6 Contrary to Mr. Greenlaw’s unsupported assertion, the public interest would
7 be served by the implementation of the antidiscrimination safeguard set forth in
8 §252(i) and §51.809. While the merits of the collections dispute will be decided in
9 another case, it is undisputed that AT&T has in place discriminatory dispute
10 resolution provisions and has continued to discriminate against Express Phone –
11 placing it at a competitive disadvantage – since October 20, 2010. The public interest
12 would have been served if AT&T had made the NewPhone ICA available without
13 unreasonable delay. Since AT&T chose not to meet its obligations at that time, the
14 best that the Commission can do is to enter an order finding that Express Phone’s
15 adoption of the NewPhone ICA was valid and effective on October 20, 2010.

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

21 A. Yes.

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

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

11 As noted above, we denied HLMC a certificate because HLMC failed
 12 to complete its application and failed to establish that it had the
 13 technical, financial or managerial capability to operate a
 14 telecommunications company. Because HLMC has failed to obtain a
 15 Certificate of Public Convenience and Necessity pursuant to Section
 16 364.337, Florida Statutes, HLMC cannot provide telecommunications
 17 services in Florida, and therefore, does not meet the statutory
 18 definition of a "telecommunications carrier" under Section 47 USC
 19 153 (44), nor can it operate as an interexchange carrier in Florida.
 20 Although Section 252(i) of the Act mandates that BellSouth make
 21 available its interconnection agreement with AT&T to any requesting
 22 telecommunications carrier," *we do not believe BellSouth is obligated*
 23 *to provide such an agreement to HLMC because it is not currently a*
 24 *"telecommunications carrier"* (emphasis added).¹⁹
 25

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

28 A. Yes.

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

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

1 A. Yes.

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

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

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

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

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

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

3 First, he argues (incorrectly) that the ICA cannot be effective on the date that
4 the CLEC notifies the ILEC of the adoption, because such letters of notification "are
5 intended to simply start the process by which AT&T Florida would then review the
6 request for adoption and the factors that could impact the request." As explained
7 previously in my testimony, Mr. Greenlaw is just wrong about this. §252(i) and
8 §51.809 create a safeguard against discrimination by an ILEC by providing an
9 opportunity for a CLEC to "opt in" to any ICA, as long as the ICA being adopted has
10 been approved by a state commission pursuant to section 252 of the Act. There is no
11 "review process" for AT&T to consider whether it is willing to agree to the adoption;
12 AT&T must permit any such adoption of any agreement by any telecommunications
13 carrier. Similarly, there are no "factors that could impact the request" except for the
14 two factors explicitly set forth in §51.809 (neither of which can apply in the case of a
15 reseller such as Express Phone), and AT&T does not have the option of creating
16 additional "factors" or qualifications. Pursuant to the Act and FCC rules, AT&T's
17 only role is to make the adopted agreement available to the adopting CLEC.

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

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

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

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

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

1 decision” to mean, a review of the actual language of the *Nextel Order* reveals no
2 support for Mr. Greenlaw’s argument.

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

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

16 Unfortunately, Mr. Greenlaw does not cite any actual language from Order
17 No. PSC-08-0584-FOF-TP to support his claim. A review of the actual language
18 supports a different conclusion: “when an interconnection agreement is available for
19 adoption under 47 CFR 51.809(a), the adoption is considered presumptively valid and
20 effective upon receipt of the notice by the adoption [sic] party.”²⁰ Here, the AT&T-
21 NewPhone ICA was “available for adoption under 47 CFR 51.809(a)” on October 20,
22 2010, and Express Phone’s adoption was presumptively valid on that date.

²⁰ *Nextel Order*, p. 11.

1 Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

2 A. Yes.

1 BY MS. KAUFMAN:

2 Q. And, Mr. Wood, you do not have any exhibits to
3 the Rebuttal Testimony, correct?

4 A. That's right.

5 Q. Mr. Wood, have you prepared a summary of your
6 Direct and your Rebuttal Testimony?

7 A. Yes, I prepared a summary that covers both the
8 Direct and the Rebuttal.

9 Q. Okay. If you would present that to the
10 Commission.

11 A. Yes. Good morning. This case involves a
12 straightforward adoption of an interconnection
13 agreement, something that should have been handled by
14 AT&T as a routine administrative matter that really
15 should never have gotten to you.

16 In order to do business, a CLEC such as
17 Express Phone must enter into a contract called an
18 interconnection agreement with an ILEC, such as AT&T.
19 Now this is not an ordinary commercial contract. It's
20 a very specific type of contract. It's an animal that
21 was created by the 1996 Telecommunications Act and it
22 has characteristics as a result that are different from
23 a typical commercial contract. The Congress and the
24 FCC realized that parties would not be coming together
25 on a level playing field, and Sections 251 and 252 of

1 the Act create some specific requirements and
2 restrictions for an incumbent LEC, such as AT&T, then
3 BellSouth that don't apply equally on both sides of the
4 contract. And they also created some safeguards
5 because of that unlevel playing field. All of those
6 things distinguish this from your typical commercial
7 contract entered into voluntarily by two parties.

8 I have been involved in over 100 of these
9 agreements over about 20 states, and consistently what
10 happens is this: For the very largest CLECs, what AT&T
11 was before the merger with BellSouth, for example, they
12 will negotiate some of the issues and they will end up
13 coming to the Commission to arbitrate some of the
14 issues, and that is exactly what happened here in
15 Florida. But for the vast majority of CLECs who are
16 much smaller than those very large, they can't engage
17 in this time and resource-intensive process, so instead
18 they enter into what is called the standard or a
19 template agreement with AT&T. And when they are doing
20 that, they certainly expect AT&T to act in good faith.
21 And for a contract that is presented to them as a
22 standard agreement, they expect that to be consistent,
23 and the terms of that contract to be consistent with
24 what AT&T has agreed to with other CLECs.

25 But the potential for discrimination still

1 exists. A CLEC can enter into an interconnection
2 agreement and then AT&T could start offering other
3 CLECs a better deal, or instead of presenting a CLEC
4 with what is actually a standard agreement, AT&T could
5 give them an agreement that has discriminatory terms in
6 it that are worse than what it has offered to other
7 CLECs. To address this potential for discrimination
8 and hopefully to take away the incentive for AT&T to
9 engage in it in the first place, the Act and the FCC
10 rules create an important safeguard. And that is the
11 ability of a CLEC, if and when it discovers a
12 discriminatory provision, to opt into the
13 interconnection agreement of the carrier that has been
14 offered better terms by AT&T.

15 Now, in an ideal world, all CLECs would have
16 the resources to go and check several hundred
17 interconnection agreements before it enters into an
18 agreement. And in an ideal world AT&T would act in
19 good faith and when they present a contract that is
20 labeled standard offering it is, in fact, consistent
21 with what they are offering other CLECs. But no matter
22 how the parties get into a discriminatory contract, the
23 Act creates a very specific safeguard to allow a CLEC
24 to opt into a different interconnection agreement to
25 avoid that discrimination. And when it adopted its

1 rules, the FCC stated that the purpose was exactly
2 that. They said an incumbent LEC will not be able to
3 reach a discriminatory agreement for interconnection
4 with a particular carrier without making that agreement
5 in its entirety available to other requesting carriers.
6 If the agreement includes terms that materially benefit
7 the preferred carrier, other requesting carriers will
8 likely have an incentive to adopt that agreement and to
9 gain the benefit of the incumbent LEC's discriminatory
10 bargain. That is what is supposed to be available to a
11 CLEC at any time regardless of how they got into the
12 discriminatory agreement in order to avoid the
13 discrimination.

14 And, really, here is how it is supposed to
15 work. Suppose you are a CLEC. You entered into an
16 interconnection agreement with AT&T to buy a particular
17 element for \$5 a month. But at some time after you
18 enter into that agreement, you find out that AT&T has
19 started offering the same agreement to other CLECs for
20 \$4 a month. The safeguard allows you to opt into that
21 other agreement, pay \$4 for the element, and end the
22 discrimination.

23 Now, AT&T in their testimony, and mostly from
24 Mr. Greenlaw's testimony, takes a different view that
25 once you sign, once AT&T starts to discriminate, you,

1 the CLEC, have just got to accept that discrimination
2 for the remainder of the term of the interconnection
3 agreement, up to five years. But there is absolutely
4 nothing in the Act of the FCC rules that supports this.

5 In fact, Mr. Greenlaw doesn't offer anything
6 in his testimony, he just says he has been advised that
7 it's okay. And throughout their testimony AT&T keeps
8 referring to this idea of some sanctity of a commercial
9 contract. But an interconnection agreement, like I
10 said, is not a typical commercial contract. It is
11 something that was created by the Act, by the Telecom
12 Act. It is something that recognizes explicitly that
13 the parties coming together in this contract are not on
14 equal footing. One has substantial market power over
15 the other, and it as a result creates requirements and
16 restrictions on the ILEC, and it also creates the
17 specific safeguard to allow a CLEC to avoid
18 discrimination.

19 Now, AT&T also claims that it matters which
20 interconnection came first. But when you think it
21 through, that really doesn't work either. Suppose
22 again you are a CLEC and you ask AT&T for the standard
23 agreement, the template agreement. You ask for the
24 same deal that other CLECs are getting. They provide
25 you with an agreement that shows a \$5 a month rate.

1 You sign up, but then you find out that when they
2 provided you that as the template agreement, they had
3 actually been providing a better deal to another
4 carrier for several months. Once you become aware of
5 that discrimination, you, as a CLEC, can avail yourself
6 of the safeguard to opt into the other agreement and
7 end the discrimination.

8 Now, discrimination can take the form of
9 rates like it does in these examples, but it can also
10 take the form of terms and conditions. And in this
11 case the discrimination is in the form of the language
12 of the terms which relate to dispute resolution. Now,
13 AT&T presented Express Phone with an interconnection
14 agreement it characterized as the standard agreement,
15 and the terms in that agreement related to dispute
16 resolution clearly benefit AT&T compared to the CLEC.
17 But when AT&T presented that agreement to Mr. Armstrong
18 as the standard agreement, it knew full well that just
19 a few months earlier it had offered very different
20 terms to another CLEC in a different interconnection
21 agreement, terms that were much more balanced in their
22 treatment of AT&T and the CLEC, and terms that really
23 created incentives for the CLEC and AT&T to work
24 together to resolve the disputes, terms that are
25 missing in the agreement that they put before Mr.

1 Armstrong.

2 Now, Express Phone later found out about the
3 discrimination, availed itself of the safeguard, and
4 that should be and almost always is in my experience a
5 very straightforward process. The CLEC notifies AT&T
6 of the adoption, and that adoption is, in effect, on
7 the date of the notification.

8 That should have been the end of the story.
9 But for reasons that AT&T is struggling to consistently
10 explain, it has continued the discrimination past that
11 notification date and is refusing to acknowledge -- it
12 is pretending essentially that the adoption never
13 happened.

14 You know, the dispute resolution in the
15 adopted interconnection agreement that Express Phone
16 adopted in October of 2010 is different, it's more
17 balanced than the one in the original Express Phone
18 interconnection agreement. The discriminatory terms
19 here are important because there has been a dispute and
20 it needed to go to resolution. AT&T devotes much of
21 their testimony not to the issues really in the case,
22 but to the amount of money that they claim Express
23 Phone owes AT&T. And I understand from Mr. Armstrong
24 Express Phone is equally convinced that it doesn't owe
25 AT&T this amount, but the merits of that dispute are

1 really not what are at issue here.

2 Instead there are two questions. Number one,
3 whether pursuant to the language of the Act and the FCC
4 rules Express Phone can avoid the impact of AT&T's
5 discrimination by opting into the NewPhone or sometimes
6 called the Image Access interconnection agreement.
7 And, number two, on what date is that opt-in effective.
8 The answers are based on the undisputed facts. Number
9 one, yes, they can do so. And, number two,
10 October 20th, 2010, which is the date that AT&T admits
11 that it received the required notification from Express
12 Phone of the adoption.

13 That concludes my summary.

14 **CHAIRMAN BRISÉ:** Thank you.

15 **MS. KAUFMAN:** Thank you, Mr. Wood.

16 Mr. Wood is available for cross-examination.

17 **CHAIRMAN BRISÉ:** All right.

18 AT&T, Ms. Montgomery.

19 **MS. MONTGOMERY:** Thank you, Mr. Chairman.

20 **CROSS EXAMINATION**

21 **BY MS. MONTGOMERY:**

22 **Q.** Good morning, Mr. Wood. My name is Suzanne
23 Montgomery. We met earlier this morning. How are you?

24 **A.** Good. Good morning, Ms. Montgomery.

25 **Q.** I'd like to start off where you ended your

1 summary, and that is if the Commission agrees with
2 Express Phone that they should be allowed to adopt the
3 Image Access agreement, that in your view that is
4 effective October 20th, 2010, is that correct?

5 A. Yes, ma'am.

6 Q. On October 20th, 2010, nothing had been filed
7 with the Commission that notified the Commission that
8 that was the contract that Express Phone believed it was
9 operating under, is that correct?

10 A. That's my understanding, yes.

11 Q. And these Commissioners had no information to
12 indicate that that was the contract that Express Phone
13 believed was the operating contract?

14 A. They didn't, but AT&T did.

15 Q. But the Commissioners did not?

16 A. The Commissioners did not. The distinction
17 here between a negotiated agreement that goes to the
18 Commission for approval and an opt-in and the reason
19 that the notice is different to the Commission is that
20 in order to opt into an agreement, that agreement
21 already has to have been approved by the Commission
22 originally when it was originally filed.

23 In the case of the NewPhone or Image Access
24 interconnection agreement, that agreement had already
25 been filed with the Commission, approved by the

1 Commission, and notice had already been given to the
2 Commission of that interconnection agreement. So when
3 it came time for the opt-in by Express Phone, what they
4 needed to do was notify AT&T that they were, in fact,
5 opting into that agreement, which is what they did on
6 October 20.

7 Q. And thank you for that lengthy explanation.
8 My question was very simple.

9 On October 20th, 2010, these five
10 Commissioners sitting before us today had no knowledge
11 that Express Phone believed that the contract between
12 AT&T and Image Access was the controlling terms and
13 conditions for Express Phone and AT&T?

14 A. They wouldn't have known about that yet,
15 that's right.

16 Q. Thank you. And part of the basis for your
17 opinion on October 20th being the critical date is the
18 Commission's decision in the Nextel adoption case, is
19 that correct?

20 A. That's part of it. Certainly their decision
21 there was consistent with that, yes.

22 Q. Okay. And in that decision, the Commission
23 found that the adoption was effective on the date that
24 the docket was opened by which Nextel was seeking to
25 adopt the contract between AT&T and Sprint, is that

1 right?

2 **A.** The language actually is that the adoption is
3 considered presumptively valid and effective upon
4 receipt of the notice by the adoption party, which was
5 AT&T.

6 **Q.** Correct. And the date that was selected,
7 June 8th, 2007, was the date that docket was opened, is
8 that correct?

9 **A.** I don't recall when the docket was opened.

10 **MS. MONTGOMERY:** Okay. Let's hand out a
11 document. I believe we are on Exhibit 39.

12 **CHAIRMAN BRISÉ:** 39. If you could give us a
13 short title.

14 **MS. MONTGOMERY:** It's the Final Order in
15 Docket Number 070368.

16 **CHAIRMAN BRISÉ:** We just need to refer to the
17 docket number. We don't need to take that up.

18 **MS. MONTGOMERY:** Okay. Thank you, Mr.
19 Chairman.

20 **MS. KAUFMAN:** I'm sorry, are we giving this an
21 exhibit number?

22 **CHAIRMAN BRISÉ:** No.

23 **MS. KAUFMAN:** Okay. Thank you. I didn't want
24 to get out of order.

25 **MS. MONTGOMERY:** And thank you for that

1 clarification.

2 **BY MS. MONTGOMERY:**

3 Q. Mr. Wood, you have now been handed a copy of
4 the decision in Docket Number 070368. Do you have that
5 in front of you?

6 A. Yes, ma'am, I do.

7 Q. Okay. And if you look at the very first
8 sentence it states, "On June 8th, 2007, NPCR, Inc. d/b/a
9 Nextel Partners, Nextel South Corp, and Nextel West
10 Corp, collectively Nextel, filed its notice of adoption
11 of existing interconnection agreement with BellSouth,"
12 and then it goes on to identify the agreement. Is that
13 correct?

14 A. Yes, ma'am.

15 Q. And if you turn to Page 12 of that decision,
16 the first paragraph of the conclusion, and the last
17 sentence, and there it says, "We further find that the
18 adoption is effective as of June 8th, 2007." Is that
19 correct, is that what it says?

20 A. Oh, yes, I'm sorry. Also the same language is
21 in an ordering paragraph, yes.

22 Q. And are you aware that Nextel submitted a
23 letter to AT&T in advance of opening this docket
24 requesting to adopt the contract between AT&T and
25 Sprint?

1 **A.** I'm not aware of what correspondence might
2 have gone back and forth or why there would have been
3 anything denominated as a request rather than a
4 notification.

5 **MS. MONTGOMERY:** Okay. And let's hand out
6 another document.

7 **CHAIRMAN BRISÉ:** So this would be Exhibit 39.
8 A short title?

9 **MS. MONTGOMERY:** May 27 Letter from
10 Sprint/Nextel to AT&T.

11 **CHAIRMAN BRISÉ:** Okay.

12 (Exhibit Number 39 marked for identification.)

13 **MS. KAUFMAN:** Mr. Chairman, before Ms.
14 Montgomery begins her questions, we're going to object
15 to this correspondence. It doesn't even relate to
16 Express Phone, let alone to Mr. Wood. I don't know if
17 he has ever seen it before and he certainly can't, I
18 don't think, testify in regard to its contents.

19 **MS. MONTGOMERY:** And, Mr. Chairman, if I could
20 clarify where I obtained this document. This document
21 is attached as Exhibit B to AT&T's motion to dismiss in
22 Docket Number 070368. It's not being offered for the
23 truth, it's being offered merely to establish its
24 existence.

25 **MS. KAUFMAN:** Well, again, this wasn't even on

1 their official recognition request. And if it's not
2 being offered for the truth, I'm not really
3 understanding what its purpose is. And I know Mr. Wood
4 -- well, I don't want to speak for him, but I believe he
5 is not familiar with it.

6 **CHAIRMAN BRISÉ:** All right, thank you.

7 Ms. Cibula.

8 **MS. CIBULA:** I would probably let AT&T ask the
9 questions of the witness in regard to the document and
10 see whether he can answer those questions, and then
11 based on that we can determine whether or not it should
12 be admitted into the record.

13 **CHAIRMAN BRISÉ:** That sounds reasonable to me.

14 **MS. MONTGOMERY:** Thank you, Mr. Chairman.

15 **BY MS. MONTGOMERY:**

16 Q. Mr. Wood, you have been handed a document that
17 has now been labeled Exhibit 39. Do you have that in
18 front of you?

19 A. Yes, I do.

20 Q. Okay. And this I will represent to you is a
21 document that was attached as Exhibit B to a motion to
22 dismiss that AT&T filed in Docket Number 070368. And to
23 clarify the record, AT&T lost that motion.

24 **MS. KAUFMAN:** I'm sorry to interrupt. Could I
25 just clarify, could you just tell us what docket that

1 was, what title?

2 MS. MONTGOMERY: It was the docket that led to
3 the order that we just discussed.

4 MS. KAUFMAN: Okay.

5 BY MS. MONTGOMERY:

6 Q. And, Mr. Wood, this is a letter dated May
7 18th, 2007. Do you see that?

8 A. I do.

9 Q. Okay. And it's a letter with the letterhead
10 for Sprint/Nextel?

11 A. Yes, it is.

12 Q. Okay. And it's a letter directed to various
13 individuals in the AT&T wholesale organization?

14 A. It appears to be.

15 Q. Okay. And the first sentence states, "The
16 purpose of this letter is to notify BellSouth
17 Telecommunications, Inc., d/b/a AT&T Southeast/AT&T,
18 that NPCR, Inc., d/b/a Nextel Partners, is exercising
19 its right to adopt the interconnection agreement," and
20 then it goes on to identify the agreement?

21 A. Right. In that right it is clearly not a
22 request, it is a notice of adoption to exercise the
23 right to adopt.

24 Q. And I would agree with you that that is what
25 this letter purports to try to do. Thank you, Mr. Wood.

1 Mr. Wood, are you aware that a few weeks ago
2 staff sent a set of discovery requests to Express Phone?

3 A. I am aware because I know some of those
4 questions were directed to my testimony.

5 Q. And those are the ones that I would like to
6 talk about.

7 MS. MONTGOMERY: And Express Phone's answers,
8 Mr. Chairman, are Exhibit 2, which was admitted earlier
9 this morning.

10 CHAIRMAN BRISÉ: Sure.

11 BY MS. MONTGOMERY:

12 Q. Interrogatory 7 asked whether you had
13 previously offered testimony related to adoptions based
14 on Section 252(i) of the Act. Do you recall that
15 interrogatory?

16 A. Yes, I have it.

17 Q. And did you assist Express Phone in answering
18 that interrogatory?

19 A. I did prepare the response to that
20 interrogatory.

21 Q. Okay. And in your answer to exhibit, I'm
22 sorry, to Interrogatory 7, you identified a series of
23 Commission cases around the country in which you gave
24 testimony, is that right?

25 A. I did. I noted that I had been involved in

1 FCC ex parte meetings related specifically to -- when
2 the FCC was deliberating on remand how it was going to
3 change 51.809, the opt-in rule. And then I said to the
4 best of my recollection adoptions were addressed in
5 these following cases which are -- I guess the shorthand
6 is typically what we call the BellSouth SGAT cases,
7 S-G-A-T, statement of generally available terms when
8 BellSouth was seeking, pursuant to Section 271 the
9 authority to begin providing long distance services
10 again, or interstate long distance services.

11 Q. And thank you, you went where I was headed.
12 The bulk of these cases dealt with BellSouth's efforts
13 for 271 approval to provide long distance, is that
14 correct?

15 A. That's right, which made it especially
16 important that you have that statement of generally
17 available terms, which is, in effect, a standard
18 offering. And it also made it very important that you
19 had the opt-in provision, because without those
20 safeguards you were allowing AT&T to operate as an ILEC
21 that controlled the local market and to also begin to
22 offer long distance services where it would leverage
23 that market power, that local market power into long
24 distance. So part of what was discussed in many of
25 these cases is the importance of, number one, AT&T's

1 standard offering and, number two, the safeguards like
2 the opt-in provision to avoid AT&T leveraging market
3 power into long distance.

4 Q. But the primary focus of your testimony in
5 those cases was the state of competition in the local
6 market and whether that competition was robust enough
7 that BellSouth should be allowed to enter the long
8 distance market, is that correct?

9 A. Well, that was certainly a relevant issue,
10 because to the extent there was effective competition,
11 that would diminish BellSouth's ability to leverage.
12 But the FCC's decision -- this Commission's decision on
13 making a recommendation under 271 to the FCC and the
14 FCC's decision to grant then BellSouth's request to
15 offer interstate long distance services was based on a
16 combination of factors that would affect BellSouth's
17 ability to leverage its market power.

18 One of those was the state of competition in
19 the local market. The other was the statutory
20 safeguards in 251 and 252 including but not limited to
21 the safeguard we are talking about in this case, which
22 was the opt-in provision.

23 Q. Now, I did notice in your testimony that you
24 identified in response to Interrogatory Number 2 -- I'm
25 sorry, Number 7, was a case out of Montana, and that

1 case was -- it concerned Ronan Telephone Company and
2 Verizon Wireless?

3 A. It did.

4 Q. Okay. And that case concerned the
5 negotiations between a rural LEC and Verizon Wireless, a
6 wireless carrier, is that correct?

7 A. That's right. And there is -- I'm trying to
8 remember this testimony. There is a Montana statute
9 that also came into play that created a different set of
10 safeguards in addition to what's required under the
11 federal requirements. And I confess to you I don't
12 remember all of the state statute as we sit here,
13 because it has been a few years since I did this.

14 Q. But it would be fair to say that a portion of
15 that testimony discussed the negotiation process for
16 entering an interconnection agreement via the
17 negotiation path?

18 A. Yes, that is certainly one of the paths.

19 Q. Okay. And actually let's talk about that path
20 briefly. A CLEC, such as Express Phone, and an ILEC,
21 such as AT&T, can enter into an interconnection
22 agreement via negotiation, is that correct?

23 A. That is one of the avenues available under the
24 Act. Now whether it is a practical avenue for both
25 parties is a separate question.

1 Q. And if one of the parties thinks it would be
2 helpful, Section 252 provides a mechanism by which the
3 parties can seek mediation of the terms in an informal
4 manner through the Commission, is that right?

5 A. You will have to refresh my memory on
6 mediation versus arbitration. I simply don't recall. I
7 know that there is a window of time for negotiation and
8 then a notice period to the Commission after which the
9 Commission can begin to arbitrate.

10 Q. Okay. And that's fair. And then a party, if
11 they are not able to reach an agreement with the other
12 party, either side can ask the Commission to arbitrate
13 the agreement?

14 A. That's right. And that obviously happened --
15 that happened here in Florida, and we called it
16 colloquially the mega arbitration. And part of the
17 reason we called it that, it was a very large case that
18 went on for a very long time and consumed a very large
19 amount of resources. And that is obviously an avenue
20 that is practically available to large CLECs like then
21 AT&T prior to the merger, not practically available to
22 most CLECs that are much smaller. And not just here in
23 Florida, but in other states, the path that other CLECs
24 have taken is the adoption of an existing agreement or
25 what AT&T presents to them as the standard or template

1 agreement.

2 Q. And one of the reasons why, in your view,
3 negotiation isn't always practicable or practical is
4 that it can be time-consuming and resource intensive, is
5 that correct?

6 A. It is.

7 Q. I actually happen to have a copy of your
8 Montana testimony here. Let's take a look at that.

9 A. All right.

10 MS. MONTGOMERY: Mr. Chairman, I believe we
11 are on Exhibit 40.

12 CHAIRMAN BRISÉ: That will be correct.

13 (Exhibit Number 40 marked for identification.)

14 BY MS. MONTGOMERY:

15 Q. Mr. Wood, you now have a copy of Exhibit 40 in
16 front of you?

17 A. I do.

18 Q. And is this a copy of the testimony that you
19 presented on behalf of Verizon Wireless to the Montana
20 Public Service Commission in 2007?

21 A. It has been about five years, but it appears
22 to be.

23 Q. Okay. And in that case, you were testifying
24 on behalf of Verizon Wireless, is that correct?

25 A. That is correct.

1 Q. Okay. Can you please turn to Page 6? And I
2 will direct your attention to the second question in
3 which you were asked would the process of negotiating in
4 good faith create an undue economic burden for RTC and
5 HSTC? Now, RTC and HSTC, are those rural LECs that
6 operate in the state of Montana?

7 A. They are.

8 Q. Okay. And then your answer begins, "This
9 seems highly unlikely for several reasons. "First, my
10 experience suggests that this need not be the case. I
11 have participated in well over 50 interconnection
12 agreement negotiations, and while some of those
13 negotiations -- particularly, those with a large number
14 (sometimes one hundred or more) of outstanding issues
15 have certainly been resource-intensive, those with a
16 limited number of issues have not been. In this case,
17 the list of outstanding issues would be quite short.
18 The parties appear to be in agreement regarding the type
19 of interconnection and the location of the point of
20 interconnection."

21 Did I read that portion of your testimony
22 correctly?

23 A. I believe so.

24 Q. Okay. Thank you, Mr. Wood.

25 Now, it's your position, is it not, that under

1 252(i), a CLEC has the right at any time to adopt an
2 interconnection agreement that is existing between the
3 ILEC and another CLEC, is that right?

4 A. My only caveat would be to the any time
5 requirement is that the agreement that is being adopted
6 has to be in effect at that time.

7 Q. Okay. And thank you for that clarification.

8 And it's also your position that that adoption
9 is effective as of the time that the CLEC makes that
10 notice, to use your term, to the ILEC, right?

11 A. Well, I'm not sure notice is my term. But,
12 yes, when the CLEC provides proper notice to the ILEC
13 that they are adopting or opting into a different
14 agreement, that is when the clock starts on that new
15 agreement.

16 Q. Okay. Mr. Wood, are you familiar with the
17 Global NAPS case out of Massachusetts?

18 A. Not offhand without a little more reference
19 than that.

20 MS. MONTGOMERY: Let's hand out another
21 exhibit. And, Mr. Chairman, this is one of the cases
22 which the Commission took official notice of this
23 morning. Would it be helpful to identify this with an
24 exhibit number?

25 CHAIRMAN BRISÉ: Yes, it would.

1 **MS. MONTGOMERY:** I believe we are on Exhibit
2 41.

3 (Exhibit Number 41 marked for identification.)

4 **CHAIRMAN BRISÉ:** Thank you. A short title?

5 **MS. MONTGOMERY:** Massachusetts Global NAPS
6 case.

7 **CHAIRMAN BRISÉ:** That will work.

8 **BY MS. MONTGOMERY:**

9 **Q.** And, Mr. Wood, have you now been handed a copy
10 of Exhibit 41?

11 **A.** Yes, I have.

12 **Q.** And this appears to be a copy of the decision
13 of the Massachusetts Department of Telecommunications
14 and Energy in the case of Petition of Global NAPS, Inc.
15 pursuant to Section 252(b) of the Telecommunications Act
16 for arbitration with Verizon New England, does it not?

17 **A.** It's hard to tell from the first page. Order
18 on Verizon New England, Inc., d/b/a Verizon
19 Massachusetts' motion for approval of final arbitration
20 agreement, or in the alternative, for clarification is
21 the title.

22 **Q.** And I will just ask you to assume for purposes
23 of my question that this is a decision issued by the
24 Massachusetts Commission. Are you comfortable with that
25 assumption, just for purposes of these questions?

1 **A.** For purposes of the discussion, if you
2 represent to me that that is what this is, I will accept
3 your representation.

4 **Q.** Okay. Thank you, sir.

5 Can you please turn to Page 8 of the decision,
6 the last paragraph. And I will read this and tell me if
7 I am reading it correctly.

8 **MS. KAUFMAN:** Excuse me, Commissioners. I'm
9 going to object to Ms. Montgomery reading paragraphs
10 from a decision into the record. It speaks for itself.
11 I don't know that Mr. Wood has had the opportunity or is
12 familiar with this entire case and how it may or may not
13 be relevant, so we would object.

14 **CHAIRMAN BRISÉ:** Okay.

15 **MS. MONTGOMERY:** Mr. Chairman, I will say it
16 is relevant. Reading the decision and reading this
17 portion of the decision it becomes clear that the
18 opinion being proffered by Mr. Wood today has been
19 rejected by the Massachusetts Commission, and I think it
20 is very important that this information be presented in
21 the record.

22 **MS. KAUFMAN:** Mr. Chairman, I would object to
23 Ms. Montgomery's characterization of this case, and I
24 would also note that I don't know that Mr. Wood has any
25 familiarity with it whatsoever, and I think it is

1 improper cross-examination.

2 **CHAIRMAN BRISÉ:** Okay. Ms. Cibula.

3 **MS. CIBULA:** I think Ms. Montgomery should ask
4 the witness questions and not read the paragraphs into
5 the record, but if she has questions she could ask the
6 witness.

7 **MS. MONTGOMERY:** I will rephrase my question,
8 Mr. Chairman.

9 **BY MS. MONTGOMERY:**

10 **Q.** Mr. Wood, I'll direct your attention to the
11 last paragraph on Page 8. Can you please read that, and
12 then tell the Commission if that agrees or disagrees
13 with your position?

14 **MS. KAUFMAN:** Again, I'm going to object, Mr.
15 Chairman. She is taking one paragraph out of this order
16 in isolation. I have no idea if Mr. Wood has any
17 familiarity with the situation, and I would suggest and
18 be happy to explain to you why this case is not the same
19 as the issues that you are dealing with today. I think
20 if AT&T wants to argue this case in their brief, they
21 are perfectly -- they can do that, but I don't think it
22 is appropriate to question Mr. Wood about it.

23 **MS. MONTGOMERY:** Mr. Chairman, Mr. Wood is
24 offering a legal opinion, an interpretation of the
25 Telecommunications Act and a very specific section of

1 it. This decision is one of the few reported decisions
2 discussing that section. I'm just trying to determine
3 if he is familiar with this decision and if it's
4 consistent or inconsistent with the opinion he has
5 offered to you today.

6 **CHAIRMAN BRISÉ:** Thank you. I'll allow the
7 latitude. You can read it to yourself and then answer
8 the questions.

9 **THE WITNESS:** Okay. I have reviewed it.

10 **BY MS. MONTGOMERY:**

11 **Q.** And is the finding of the Massachusetts
12 Commission consistent or inconsistent with the opinion
13 you have offered this Commission?

14 **A.** I guess the answer is probably neither,
15 because it's dealing with a completely different
16 situation, factual situation than we have here. What
17 this section, if you look at it in its entirety, is
18 addressing is apparently the situation in which Global
19 NAPS negotiated and then sought arbitration from the
20 Massachusetts Commission of an agreement. So they went
21 through the entire arbitration process, got an order
22 from the Commission, it appears, and then decided after
23 receiving what's referred to on Page 9 as the final
24 arbitration order, it decided to then opt into a
25 different agreement and to avoid that order.

1 What we have here in this case is something
2 fundamentally different. Express Phone has not gone to
3 the Commission for arbitration. Express Phone has not
4 consumed the Commission's time and resources for
5 arbitration of an agreement and received an order and
6 then decided to somehow evade that order by opting into
7 a different agreement.

8 Express Phone didn't follow that path, use
9 the Commission's resources at all, apparently, compared
10 to what happened in Massachusetts. What Express Phone
11 has done is it became aware of a discriminatory
12 provision in an existing agreement that it had entered
13 into, and to avoid that discrimination opted into a
14 different agreement.

15 There is no consumption of the Commission's
16 resources in this case, or there shouldn't have been,
17 because the notice on October 20 should have resulted
18 in the adoption on AT&T's part. The decision here
19 appears to be based on something fundamentally
20 different where a CLEC had gone -- used the
21 Commission's resources for arbitration for apparently a
22 substantial and lengthy arbitration, received an order,
23 and then rather than adopt an agreement based on that
24 order sought to do something else. But that's
25 completely different than this case.

1 Q. And what Express Phone did is they signed a
2 contract that was presented to them by AT&T, found
3 another contract that they liked better, and asked to
4 adopt that contract, is that correct?

5 A. Not quite. They signed a contract presented
6 to them by AT&T as their standard template agreement.
7 In fact, the footnotes on what was presented to them
8 strongly suggest that that is what it is. What Express
9 Phone found out subsequent to that is that it wasn't an
10 agreement that represented AT&T's offerings to other
11 CLECs, that AT&T had offered substantially different and
12 much more favorable terms to a different CLEC. That is
13 exactly the discrimination that the FCC in its order
14 described as being the purpose of 51.809 in order to
15 prevent that discrimination.

16 So, yes, Express Phone liked the Image Access
17 or NewPhone language better, because it was the
18 nondiscriminatory language compared to the
19 discriminatory language that AT&T had originally put in
20 front of -- and misleadingly put in front of Express
21 Phone as the standard agreement.

22 Q. Are you aware that this Commission and three
23 other state commissions have enforced the payment term
24 language that appears in the Express Phone agreement in
25 other cases?

1 A. I would have no idea whether that is true or
2 not true.

3 Q. Okay. And I believe that will be dealt with
4 by counsel in briefs.

5 Are you familiar with the Pac-West case out of
6 the New York Commission?

7 A. I don't believe so.

8 Q. We will hand you a copy, sir.

9 A. All right.

10 MS. MONTGOMERY: Mr. Chairman, I believe we
11 are on Exhibit 42, and this could be short-cited as the
12 New York Pac-West Decision.

13 CHAIRMAN BRISÉ: Okay.

14 (Exhibit 42 marked for identification.)

15 THE WITNESS: I have reviewed it.

16 MS. MONTGOMERY: Thank you, Mr. Wood.

17 THE WITNESS: I don't believe I had seen it
18 before, though.

19 BY MS. MONTGOMERY:

20 Q. Is the New York Commission's decision in the
21 Pac-West case consistent or inconsistent with the
22 testimony you have offered this morning?

23 A. I think my answer would be, again, really
24 neither, because it is based on different factual
25 circumstances. And, in fact, throughout this decision

1 the Department of Public Service in New York, to the
2 extent that that would be binding on this Commission
3 somehow, which I can't see how, actually refers to the
4 Massachusetts case we were just talking about. And it
5 seems to be that the basis for this decision is based on
6 the Massachusetts case, which was based on the fact set
7 of a CLEC having sought arbitration from the Commission
8 and then seeking a different agreement because it didn't
9 like the order from the Commission, which is factually
10 different fundamentally than this case with Express
11 Phone.

12 Q. But the New York case was not an arbitration.
13 Pac-West signed the contract that Verizon presented to
14 them.

15 A. Well, I mean, I'm not sure if that is a
16 question or argument. I have scanned the 10 or 12
17 pages. What I see are repeated references to the
18 Massachusetts Department of Transportation and Energy
19 matter in which the DTE rejected an argument similar to
20 Pac-West's in this proceedings, and then the discussion
21 of that Massachusetts decision based on an arbitrated
22 decision by a commission, and that's different than this
23 case.

24 Q. Okay. And, Mr. Wood, can you please turn to
25 Page 3, the first sentence of the first full paragraph.

1 And in that sentence Pac-West or, I'm sorry, the
2 Commission writes that Pac-West signed the Verizon
3 template agreement. Is that correct?

4 A. I think that's a citation of the petition of
5 Pac-West. This is a section on -- it's not Commission
6 decision, it's just a restatement of the parties
7 positions it looks like.

8 Q. Correct. And that's a recitation of the facts
9 of this New York case as opposed to the Massachusetts
10 Global NAPS case, correct?

11 A. Well, I don't know what it is. It's a section
12 entitled parties positions that appears to be a summary
13 of positions and then followed by a lot of reliance on
14 the Massachusetts case.

15 Q. Okay. Well, I believe that document will
16 speak for itself, and the Commission has taken official
17 recognition, and let's move on.

18 I would like to assume, Mr. Wood, that the
19 Commission agrees with Express Phone that it can adopt
20 the Image Access/NewPhone agreement but makes it
21 effective today, May 3rd. And let's assume that three
22 weeks from now Express Phone and AT&T are involved in
23 discussions over a security deposit, and AT&T asks
24 Express Phone for an increased security deposit under
25 that agreement as it is permitted to do.

1 Could Express Phone at that point find another
2 agreement that AT&T has entered with a different CLEC
3 that has different security deposit language and submit
4 a notice of adoption to adopt that contract?

5 **A.** I'm sorry, Ms. Montgomery, that was probably
6 the ultimate compound question. We have to unravel the
7 pieces of this. I think you started with an assumption
8 that the Commission would decide that the adoption would
9 be effective today, which I don't think is even a
10 possible hypothetical. Because the Commission -- the
11 agreement that Express Phone entered into, I believe,
12 may have already expired, which means your predicate
13 couldn't hold.

14 **Q.** Well, I would just like you to assume for
15 purposes of my question that that is the ruling the
16 Commission makes today, that that is the agreement, that
17 that agreement becomes effective today for purpose of my
18 question. Can you make that assumption? Whether it's
19 possible or not, I'm not asking you that question.

20 **A.** Okay. So Express Phone has opted into an
21 expired agreement. I'm not sure what you're asking me
22 to assume, Ms. Montgomery, because I don't think that
23 can happen.

24 **Q.** And I agree with you, but I'd like for you to
25 assume for purposes of my question that that is what

1 happens today. Can --

2 MS. KAUFMAN: Excuse me, I have to interpose
3 an objection to basing a hypothetical on something that
4 both people seem to agree could not possibly happen.

5 MS. MONTGOMERY: Okay.

6 BY MS. MONTGOMERY:

7 Q. Mr. Wood, I would like you to assume that
8 there is an interconnection agreement that is effective
9 today in the State of Florida with payment terms that
10 are the same as the Image Access agreement. Can you
11 make that assumption?

12 A. Sure.

13 Q. Okay. And Express Phone sends a letter to
14 AT&T today saying that a notice of adoption adopting
15 that interconnection agreement, can you make that
16 assumption?

17 A. Yes.

18 Q. Okay. Let's fast-forward three weeks.
19 Express Phone decides for whatever reason they want a
20 different interconnection agreement. Can they three
21 weeks from now send AT&T another letter entitled notice
22 of adoption and pick another interconnection agreement?

23 A. They would be required to adopt any of these
24 agreements in their entirety. They would not be able to
25 pick and choose provisions, because that rule has

1 changed under the FCC; 51.809 is now an all or nothing
2 rule. But subject to choosing it all or nothing, yes,
3 they could opt into a new agreement if they discovered
4 that there was an additional element of discrimination
5 beyond the terms that they have discovered already,
6 could they use this safeguard to avoid that type of
7 discrimination, as well? Yes, they could.

8 Q. Okay. And then three weeks after that they
9 can do the same thing again, is that your opinion?

10 A. Could they? Yes. Is this a likely scenario,
11 not at all. But, I mean, is it a permitted --
12 essentially what we're saying is does Express Phone or
13 any CLEC have to uncover all of the elements and sources
14 of discrimination all at once, or once they use the
15 opt-in provision and they discover a different type of
16 discrimination, can they avail themselves of that
17 safeguard again, and I think the answer is the latter.

18 They don't have to discover all possible
19 sources of discrimination at one time. It's likely
20 that, as in this case, the source of discrimination
21 that is particularly important to them that they are
22 likely to need to adopt a new agreement for is
23 something that is going to cause them to operate under
24 that new agreement for some time. But unless AT&T has
25 embedded in what it handed Express Phone as the

1 standard or template agreement, unless AT&T has
2 embedded other types of discrimination beyond the one
3 we are here to talk about, then your scenario just
4 wouldn't happen. There would be no reason for it to
5 happen.

6 Q. Mr. Wood, my question is simple. Can Express
7 Phone submit to AT&T a notice of adoption every three
8 weeks ad infinitum and change its contract?

9 A. If it is adopting in their entirety a
10 different interconnection agreement, then it has the
11 ability to do that.

12 Q. Okay; thank you.

13 A. As a practical matter, there would be no
14 reason to expect that to happen.

15 MS. MONTGOMERY: Thank you, sir. You answered
16 my questions. I have no further questions.

17 CHAIRMAN BRISÉ: All right. Thank you.
18 Staff.

19 CROSS EXAMINATION

20 BY MS. TAN:

21 Q. Good afternoon, Mr. Wood.

22 A. Good afternoon.

23 Q. In your opinion, is an interconnection
24 agreement a binding contract between the parties
25 executing the interconnection agreement?

1 **A.** Well, it is a binding contract, but it is a
2 specific form of contract created by the Act that has a
3 different set of responsibilities for one category of
4 party versus the other category of party. In other
5 words, under the Act ILECs are treated differently than
6 CLECs even though they are both signing this contract we
7 call the interconnection agreement.

8 **Q.** Okay. And prior to this docketed matter, have
9 you provided consulting services to Express Phone?

10 **A.** I have not.

11 **Q.** And in your role as a telecommunications
12 consultant, would you advise Express Phone to withhold
13 payments of disputed amounts under their existing
14 interconnection agreement?

15 **MS. KAUFMAN:** I'm going to object, because I
16 think that assumes a fact not in evidence. That's what
17 we are here about, what is the existing interconnection
18 agreement. And our position is it is the one that was
19 adopted, the NewPhone agreement.

20 **MS. TAN:** We withdraw the question.

21 **CHAIRMAN BRISÉ:** Okay.

22 **MS. TAN:** And we have no further questions.

23 **CHAIRMAN BRISÉ:** All right, no further
24 questions.

25 Commissioner Balbis.

1 **COMMISSIONER BALBIS:** Thank you, Mr. Chairman.
2 And thank you, Mr. Wood. I have two questions
3 for you.

4 **THE WITNESS:** Yes, sir.

5 **COMMISSIONER BALBIS:** You made an analogy
6 about the rates, whether a \$4 or \$5 rate for service.
7 So in your example, if a company chooses to enter into
8 an interconnection agreement for the lower rate, the \$4
9 rate --

10 **THE WITNESS:** Right.

11 **COMMISSIONER BALBIS:** And so on a
12 going-forward basis, then, once they enter into that
13 agreement they would be paying the \$4 rate, correct?

14 **THE WITNESS:** That's right.

15 **COMMISSIONER BALBIS:** And you're not stating
16 that that should be retroactively applied, correct?

17 **THE WITNESS:** I'm not stating that in this
18 example that rate change would be retroactively applied,
19 I'm not.

20 **COMMISSIONER BALBIS:** Okay. And in my other
21 question, the original contract or interconnection
22 agreement that's listed, the two sections, 2.1 and 2.2,
23 that have -- well, 2.2 has terms of no earlier than 270
24 days and no later than 180 days prior to the expiration
25 of the initial term of this agreement they shall

1 commence negotiations.

2 **THE WITNESS:** Right.

3 **COMMISSIONER BALBIS:** But your position is
4 that the law states that at any time they can adopt
5 another interconnection agreement, correct?

6 **THE WITNESS:** Well, there's two things that
7 are going on. Anytime someone, a CLEC enters into an
8 interconnection agreement with BellSouth or another
9 ILEC, it is not indefinite, it has got a term. Usually
10 it is either three years or five years. And the parties
11 know going in that either in that window leading up to
12 the expiration, either in three years or five years,
13 they are going to have to begin the process of
14 negotiating and arbitrating a new agreement. That is in
15 order to reach an agreement to replace the existing
16 agreement.

17 Separate and apart from that -- and that's
18 largely a 251 requirement. Separate and apart from that
19 is the 252 safeguard that recognizes that when a CLEC
20 comes to the table with an ILEC, when David meets
21 Goliath, that they are not on equal footing. One has
22 substantial market power and other advantages that the
23 other does not have. And Congress and the FCC were both
24 interested in putting in a specific safeguard to deal
25 with the possibility that an ILEC could discriminate in

1 favor of its own operations versus all CLECs, or it
2 could discriminate in favor of one CLEC versus another.

3 And in order to prevent that type of
4 discrimination, they put in this provision that says if
5 a CLEC has entered into an agreement, however they
6 entered into the agreement, and they find that there is
7 discrimination or discrimination begins after the
8 agreement was entered into that they have a remedy to
9 opt into the other agreement to avoid the
10 discrimination. But that is not tied to the renewal
11 timeline from Section 251. This is a safeguard from
12 Section 252 that's fundamentally different.

13 I would agree that, you know, Express Phone
14 can't say, well, we would like to renegotiate our new
15 agreement. If it had discovered no discrimination, then
16 it would be subject -- its ability to negotiate or
17 request arbitration would be subject to those 251
18 timelines. But in this case they discovered
19 discrimination, therefore they are able to avail
20 themselves not of 251, but of 252, which has the
21 safeguard and the opt-in provision.

22 Now it doesn't work perfectly because the
23 opt-in is -- the agreement they opt into under 252 is
24 limited to the duration of that original agreement,
25 which will often expire before their agreement would

1 have, so it puts them in the position of now having to
2 renegotiate a new agreement sooner than they would have,
3 which is advantageous to the ILEC, not the CLEC. But it
4 does let the CLEC go in and opt into that new agreement,
5 if that agreement is in effect and has been approved by
6 the Commission, which in this case the agreement they
7 opted into was in effect and had been approved by you
8 already.

9 COMMISSIONER BALBIS: Okay, thank you. And
10 one final question. Since I didn't actually ask a
11 question, I still have one left.

12 THE WITNESS: Yes, sir.

13 COMMISSIONER BALBIS: Back to your example on
14 the \$4 to \$5 rate example, and you admitted that in that
15 case it's not to be retroactively applied. But taking
16 that to this situation, if -- or by your testimony that
17 the October 20th, 2010, notification is when the
18 effective date of the new interconnection agreement
19 should be, correct?

20 THE WITNESS: Yes.

21 COMMISSIONER BALBIS: Okay. So prior to that,
22 it's your testimony that they were bound by the previous
23 interconnection agreement.

24 THE WITNESS: Yes, they were operating under
25 that previous agreement.

1 **COMMISSIONER BALBIS:** And that agreement
2 stated that any disputed amount should be paid, is that
3 correct?

4 **THE WITNESS:** That's right.

5 **COMMISSIONER BALBIS:** So you are not -- your
6 position isn't that, or is it, I don't know, that after
7 October 20th, 2010, all of the past disputed amounts
8 should now not be paid, because isn't that against your
9 retroactive --

10 **THE WITNESS:** Right, and there are two parts
11 to that answer. One is I am not as versed as Mr.
12 Armstrong certainly with the history of the dispute
13 resolution. I know -- you know, it wasn't simply a
14 case, as I understand it, of Express Phone not paying
15 the disputed amounts. There were active discussions
16 with AT&T going on that, at least as I understand, Mr.
17 Armstrong thought was going to lead to a resolution.
18 And that is part of what impacted the pay/not pay at
19 different times decision.

20 I also understand there is language in the
21 Image Access agreement that suggests that that agreement
22 then controls any dispute currently between the parties
23 that might affect this, too. But I haven't specifically
24 addressed that issue, and certainly have not addressed
25 what Mr. Armstrong described, I know, in terms of his

1 interconnection with AT&T when operating under the old
2 agreement about expecting that they were going to
3 resolve that dispute. I know they were actively
4 engaged, and they did not reach a resolution when he
5 thought they would.

6 COMMISSIONER BALBIS: Okay, thank you. I have
7 nothing further.

8 CHAIRMAN BRISÉ: Commissioner Graham.

9 COMMISSIONER GRAHAM: Mr. Wood, how are you
10 today?

11 THE WITNESS: Good. Thank you, sir.

12 COMMISSIONER GRAHAM: With my limited legal
13 knowledge, let me speak to -- as being an engineer, so
14 some of this stuff may I be kind of blurry to you.

15 THE WITNESS: That's okay. I started that
16 way. I started building power plants, so I can talk
17 engineering with you.

18 COMMISSIONER GRAHAM: My understanding of the
19 position of Express Phone is based on the Florida
20 Statute -- or not the Florida Statute, the federal
21 statute, that if they see a better deal out there, they
22 should be able to opt into that deal at any time. Is
23 that pretty much what the position is?

24 THE WITNESS: Well, that's right. Because if
25 there is a better deal out there in the form of an

1 interconnection agreement, that means, by definition,
2 that AT&T had discriminated against Express Phone in the
3 interconnection agreement that they have with them.
4 That they offered them a standard agreement as
5 representing what AT&T was -- the deal AT&T had with
6 other carriers, and as it turned out that wasn't the
7 deal that AT&T had with other carriers. They had
8 entered into a better deal with other carriers.

9 **COMMISSIONER GRAHAM:** Now, does it have to a
10 be discrimination? Does someone have to prove the fact
11 that there was a discrimination out there, or can you
12 just opt into another deal?

13 **THE WITNESS:** I think the way that 252 is
14 written, they have the opportunity to -- I mean, the
15 purpose of it is to prevent discrimination, but the
16 opportunity under 252(i) and 51.809 is for them to opt
17 into the different agreement.

18 **COMMISSIONER GRAHAM:** All right. Now this is
19 the part I guess I don't understand. The Mass decision
20 that they were talking about earlier with the
21 arbitration --

22 **THE WITNESS:** Yes.

23 **COMMISSIONER GRAHAM:** -- assuming that the
24 arbitration order is not discriminatory because a fair
25 board listened to the arguments and made a

1 determination, even though they could find a better
2 deal, should they be able to go take that better deal or
3 because they went through arbitration and by law that
4 should be fair and non-biased, they no longer have that
5 right? Is that based on what that decision was, or the
6 way you understand that decision?

7 **THE WITNESS:** Well, the way I understand that
8 decision is that the parties went to the Commission in
9 Massachusetts, much like the parties came to this
10 Commission several years ago in Florida, had a very
11 large, very expensive, very protracted mega-arbitration.
12 I don't remember in the last hearing how many witnesses
13 we had, but it wasn't three or four, it was 30 or 40.

14 The Commission reached a decision. And part
15 of what the Commission has to do under Section 251 is
16 to, when it adopts any decision, whether it is its own
17 arbitration decision or whether it's accepting a
18 negotiated agreement, it has to reach a determination
19 that that is nondiscriminatory with regard to the
20 parties to the agreement.

21 So as I understand what happened in
22 Massachusetts, the Commission went through the time, the
23 resources, the effort to reach a decision, and then one
24 of the parties, rather than adopt the agreement that
25 resulted from that order, sought to do something

1 different.

2 **COMMISSIONER GRAHAM:** Well, I guess my problem
3 is my read of your words of something being
4 discriminatory is if you can find a better deal, then
5 the deal you're in is discriminatory towards you. And
6 that is why I am trying to see how the arbitration is
7 any different than switching from one deal to the other.
8 I guess that's what I'm still not understanding.

9 **THE WITNESS:** Well, and I am not versed in the
10 Massachusetts and New York decisions enough to tell you
11 everything that went into the Massachusetts Commission's
12 decision, other than looking at this language that
13 suggests that they were, I guess, the legal term is
14 peeved, and maybe rightly so, that the parties had gone
15 through this entire process and then when the Commission
16 issued an order they decided to do something different.
17 I don't know all the elements that went into that
18 decision, you know, beyond being peeved.

19 **COMMISSIONER GRAHAM:** Well, based on the
20 federal statute, and you tell me, because all I know is
21 what I read, it's silent to if you are -- it is silent
22 to the fact that you have to be in good standing or
23 silent to the fact that there is an arbitration order
24 out there. It doesn't speak to either one.

25 **THE WITNESS:** It is. It is.

1 **COMMISSIONER GRAHAM:** Okay. All right. It's
2 a little clearer. That's all the questions, sir.

3 **CHAIRMAN BRISÉ:** Okay. Thank you. I think I
4 have two sort of follow-up questions to what
5 Commissioner Graham began to go down the path of. Who
6 has the responsibility of identifying the
7 discrimination? Is it -- yeah, I'll leave it there.

8 **THE WITNESS:** Well, I mean, like I said,
9 ideally going in a CLEC would have the ability to review
10 all other agreements, you know, 200 agreements times
11 five or 600 pages per agreement. And ideally, if AT&T
12 presented someone with an agreement that it not only
13 characterized as a standard agreement, but actually has
14 a footer that suggests it is a standard discriminatory
15 agreement, then it would, in fact, be that, the same
16 deal it is offering to other carriers.

17 I would say that both have some responsibility
18 at that stage. A CLEC would have some responsibility to
19 investigate, AT&T certainly has some responsibility not
20 to knowingly discriminate at that point. You know,
21 having just reached a better deal with somebody else,
22 turn around to this CLEC and say here is the standard
23 deal that everybody is getting. I think both parties
24 up-front could have and maybe should have done something
25 different. But however they got into the discriminatory

1 contract, the safeguard in 252 provides a specific
2 avenue for getting out of that discrimination,
3 regardless of how they got in, and that is ultimately
4 what's going on here.

5 And that's what -- I mean, this is not -- this
6 type of opt-in is not particularly unusual. The reason
7 it seems unusual is because it's not usually
8 controversial. I mean, this is normally a very
9 administrative process. It's a notice, the ILEC takes
10 notice, they make the adjustments accordingly in the
11 billing relationship -- the business relationship
12 between the parties, and the parties move forward under
13 that agreement. But certainly however they got into the
14 discriminatory contract, once the CLEC identifies the
15 discrimination and seeks the remedy, then they can opt
16 into another agreement to avoid that discrimination.

17 **CHAIRMAN BRISÉ:** Okay. A follow-up to that.
18 As the discrimination issue is being dealt with, or the
19 opt-in, in the interim are companies or carriers
20 required to live by the current contract or current
21 agreement until the opt-in is finalized?

22 **THE WITNESS:** Well, there shouldn't be an
23 interim, because the statute doesn't provide for one,
24 and your decision in the Nextel case doesn't create one,
25 either. You know, there is no deadman's land between

1 notice of adoption and finalization of adoption. That
2 notice is the date on which the parties then begin
3 moving forward under the nondiscriminatory new
4 relationship/business relationship. And, in fact, there
5 is some very clear language in several court decisions
6 that say that the ILEC can't benefit from regulatory
7 delay. In other words, if there is a long dispute,
8 ultimately they have got to go back and make the
9 decision retroactively to the date of modification.
10 That seems to be very clear. So really there is no
11 interim deadman's land in there.

12 **CHAIRMAN BRISÉ:** Okay. That is one
13 clarification that I wanted to see if you could make.

14 **THE WITNESS:** Yes, sir.

15 **CHAIRMAN BRISÉ:** Are there any further
16 questions by Commissioners?

17 It is 12:35. Ms. Kaufman, I'm going to give
18 you the option of redirecting after lunch.

19 **MS. KAUFMAN:** That would be fine,
20 Commissioner.

21 **CHAIRMAN BRISÉ:** Okay. So we are looking at
22 1:05 reconvening. So at this time we will recess for
23 lunch.

24 (Lunch recess.)
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STATE OF FLORIDA)

: CERTIFICATE OF REPORTER

COUNTY OF LEON)

I, JANE FAUROT, RPR, Chief, Hearing Reporter
Services Section, FPSC Division of Commission Clerk, do
hereby certify that the foregoing proceeding was heard
at the time and place herein stated.

IT IS FURTHER CERTIFIED that I
stenographically reported the said proceedings; that
the same has been transcribed under my direct
supervision; and that this transcript constitutes a
true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative,
employee, attorney or counsel of any of the parties,
nor am I a relative or employee of any of the parties'
attorney or counsel connected with the action, nor am I
financially interested in the action.

DATED THIS 14th day of May, 2012.



JANE FAUROT, RPR
Official FPSC Hearings Reporter
(850) 413-6732

47 USC § 252. Procedures for negotiation, arbitration, and approval of agreements

(i) Availability to other telecommunications carriers

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

Express Phone for opening statement
Parties/Staff Handout
event date 5/3/12
Docket No. 110087

47 CFR § 51.809 Availability of agreements to other telecommunications carriers under section 252(i) of the Act.

(a) An incumbent LEC shall make available without unreasonable delay 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 section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any agreement only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.

(b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:

(1) The costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or

(2) The provision of a particular agreement to the requesting carrier is not technically feasible.

(c) Individual agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(h) of the Act.

State of Florida



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-M-E-M-O-R-A-N-D-U-M- COMMISSION
CLERK

DATE: July 5, 2006
TO: Docket File
FROM: Jeff Bates (Division of Competitive Markets and Enforcement) *JB*
Felicia West (Office of the General Counsel) *FBW* *SAS*
RE: Docket No. 060319-TP - Request for approval of interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunications, Inc. and Image Access, Inc. d/b/a NewPhone, Inc.

By letter received April 4, 2006, BellSouth Telecommunications, Inc. filed a request for approval of the interconnection, unbundling, resale, and collocation agreement with Image Access, Inc. d/b/a NewPhone, Inc. Under the requirements of 47 U.S.C. § 252(e), negotiated agreements must be submitted to the state commission for approval. Section 252(e)(4) requires the state to reject or approve the agreement within 90 days after submission or it shall be deemed approved. The statutory deadline for the Commission to take action on this matter was July 3, 2006.

Staff reviewed the agreement in this Docket on June 29, 2006. The agreement met the criteria outlined in Section 2.07.C.5.d of the Administrative Procedures Manual. Therefore, it has gone into effect by operation of law in accordance with Section 252(e)(4) of the Telecommunications Act of 1996. Accordingly, with this Memorandum, the docket is hereby closed.)

ok to close 7/05/06 hwr

CC: Division of the Commission Clerk and Administrative Services (H. Wang)

6+7 Substitutes for motion Discussion
AT+T
Parties/Staff
event date 5/3/12
Docket No. 110087
Handout

DOCUMENT NUMBER-DATE

05933 JUL -5 8

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Docket 060319

Request for approval of interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunications, Inc. and Image Access, Inc. d/b/a NewPhone, Inc.

- [Document Filings Index](#)
- [Events List](#)
- [Utilities](#)
- [Parties of Record and Interested Parties](#)
- [Staff Assigned](#)

WARNING: THIS TIME SCHEDULE IS TENTATIVE AND SUBJECT TO REVISION

Time Schedule (CASR) for Docket 060319

Description	Previous Due Date	Due Date	Completed Date
Statutory Deadline	none	07/03/2006	07/03/2006
Memo to Docket File	none	07/05/2006	07/05/2006
Close Docket	none	07/06/2006	07/05/2006

Utilities Involved in Docket 060319**Utility Companies (2)**

BellSouth Telecommunications, Inc. (TL720)

Image Access, Inc. d/b/a NewPhone (TX254)

Select Company

Parties of Record and Interested Parties in Docket 060319**Parties of Record (2)****BellSouth Telecommunications, Inc. (agr)**

Jerry Hendrix
c/o Ms. Nancy S. Sims
150 South Monroe Street, Suite 400
Tallahassee, FL 32303-1556
Phone: 850-577-5555
FAX: 222-8640
Email: nancy.sims@bellsouth.com

NewPhone, Inc.

Mr. Jim R. Dry
5555 Hilton Avenue, Suite 605
Baton Rouge, LA 70808-2565
Phone: (225) 214-4412
FAX: (225) 214-4111
Email: jimdry@razorline.com

Interested Persons (0)**Staff Assigned to Docket 060319****PSC Staff****Division of Regulatory Compliance**

Thomas Bates

Office of the General Counsel

Felicia West

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Document Detail for Docket Number: 060319 (4 documents)

<u>Document</u>	<u>Order</u>	<u>Date filed</u>	<u>Description</u>	<u>Files</u>
08916-06		9/27/2006	CASRs and Correspondence for closed docket.	<ul style="list-style-type: none"> • *08916-06.PDF (161.29KB)
05933-06		7/5/2006	CMP/Bates; GCL/West - Memo dated 7/5/06 to docket file advising agreement met APM criteria and has gone into effect by operation of law; docket closed by XCM.	<ul style="list-style-type: none"> • *05933-06.PDF (66.42KB)
05905-06		7/3/2006	CMP/Bates - Note dated 7/3/06 to CCA/Menasco requesting CLEC name in its entirety as it appears in MCD "Image Access, Inc. d/b/a NewPhone, Inc." [CCA note: No change made in title.]	<ul style="list-style-type: none"> • *05905-06.PDF (35.11KB)
03022-06		4/4/2006	BellSouth Telecommunications, Inc. [BellSouth] (Hendrix) - Request for approval of IURC agreement with Image Access, Inc. d/b/a NewPhone, Inc.	<ul style="list-style-type: none"> • *03022-06.PDF (27070.26KB)



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CLERK

DATE: February 2, 2007

TO: Docket File

FROM: Jeff Bates (Division of Competitive Markets and Enforcement) *JB*
Victor McKay (Office of the General Counsel) *VS/m PKW* *SAB*

RE: Docket No. 060714-TP - Request for approval of resale agreement between BellSouth Telecommunications, Inc. and Express Phone Service, Inc.

By letter received November 2, 2006, BellSouth Telecommunications, Inc. filed a request for approval of the resale agreement with Express Phone Service, Inc. Under the requirements of 47 U.S.C. § 252(e), negotiated agreements must be submitted to the state commission for approval. Section 252(e)(4) requires the state to reject or approve the agreement within 90 days after submission or it shall be deemed approved. The statutory deadline for the Commission to take action on this matter was January 31, 2007.

Staff reviewed the agreement in this Docket on January 22, 2007. The agreement met the criteria outlined in Section 2.07.C.5.d of the Administrative Procedures Manual. Therefore, it has gone into effect by operation of law in accordance with Section 252(e)(4) of the Telecommunications Act of 1996. Accordingly, with this Memorandum, the docket is hereby closed.

OK to close 2/02/07 HWS

CC: Division of the Commission Clerk and Administrative Services (H. Wang)

CMP _____
COM _____
CTR _____
ECR _____
GCL _____
OPC _____
RCA _____
SCR _____
SGA _____
SEC _____
OTH _____

DOCUMENT NUMBER DATE

01167 FEB-26

TPSC-COMMISSION CLERK

This information displays the latest update to records on file with the Office of Commission Clerk and is refreshed at 30 minute intervals from 7:30 am to 9:00 pm every weekday.

Docket 060714 -- Request for approval of resale agreement between BellSouth Telecommunications, Inc. and Express Phone Service, Inc.

Document Filings Index

WARNING: THIS TIME SCHEDULE IS TENTATIVE AND SUBJECT TO REVISION

Time Schedule (CASR) for Docket 060714

Description	Previous Due Date	Due Date	Completed Date
Statutory Deadline	none	01/31/2007	01/31/2007
Memo to Docket File	none	02/02/2007	02/02/2007
Close Docket	none	02/05/2007	02/02/2007

Utilities Involved in Docket 060714

Utility Companies (2)	Select Company
Express Phone Service, Inc. (TX481)	<input type="button" value="Select"/>
BellSouth Telecommunications, Inc. (TL720)	<input type="button" value="Select"/>

Parties of Record and Interested Parties in Docket 060714

Parties of Record (2)	Interested Persons (0)
BellSouth Telecommunications, Inc. (agr) Jerry Hendrix c/o Ms. Nancy S. Sims 150 South Monroe Street, Suite 400 Tallahassee, FL 32303-1556 Phone: 850-577-5555 FAX: 222-8640 Email: nancy.sims@bellsouth.com	
Express Phone Service Mr. Tom Armstrong 1020 North 9th Avenue Pensacola, FL 32501-3234 Phone: (850) 444-9673 FAX: (850) 444-9674 Email: tom@dei.gccoxmail.com	

Staff Assigned to Docket 060714

PSC Staff
Division of Regulatory Compliance
Thomas Bates
Office of the General Counsel
Victor McKay

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Document Detail for Docket Number: 060714 (3 documents)

<u>Document</u>	<u>Order</u>	<u>Date filed</u>	<u>Description</u>	<u>Files</u>
04250-07		5/24/2007	CASRs and correspondence for closed docket.	<ul style="list-style-type: none"> • *04250-07.PDF (150.55KB)
01167-07		2/2/2007	CMP/Bates; GCL/McKay - Memo dated 2/2/07 to docket file advising agreement met APM criteria and has gone into effect by operation of law; docket closed by XCM.	<ul style="list-style-type: none"> • *01167-07.PDF (65.97KB)
10149-06		11/2/2006	BellSouth Telecommunications, Inc. (Hendrix) - Request for approval of resale agreement with Express Phone Service, Inc.	<ul style="list-style-type: none"> • *10149-06.PDF (4717.68KB)

BELLSOUTH® / CLEC Agreement

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AT&T
Parties/Staff
event date 5/3/12
Docket No. 11 00 87

Note: This page is not part of the actual signed contract/amendment, but is present for record keeping purposes only.

Resale Agreement

Between

BellSouth Telecommunications, Inc.

And

Express Phone Service, Inc.

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General Terms and Conditions
Page 1

**AGREEMENT
GENERAL TERMS AND CONDITIONS**

THIS AGREEMENT is made by and between BellSouth Telecommunications, Inc., (BellSouth), a Georgia corporation, and Express Phone Service, Inc. (Express Phone), a Florida corporation, and shall be effective on the Effective Date, as defined herein. This Agreement may refer to either BellSouth or Express Phone or both as a "Party" or "Parties."

WITNESSETH

WHEREAS, BellSouth is a local exchange telecommunications company authorized to provide Telecommunications Services (as defined below) in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee; and

WHEREAS, Express Phone is or seeks to become a CLEC authorized to provide telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee; and

WHEREAS, pursuant to Sections 251 and 252 of the Act; Express Phone wishes to purchase certain services from BellSouth; and

NOW THEREFORE, in consideration of the mutual agreements contained herein, BellSouth and Express Phone agree as follows:

Definitions

Affiliate is defined as a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or equivalent thereof) of more than ten percent (10%).

Commission is defined as the appropriate regulatory agency in each state of BellSouth's nine-state region (Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee).

Competitive Local Exchange Carrier (CLEC) means a telephone company certificated by the Commission to provide local exchange service within BellSouth's franchised area.

Effective Date is defined as the date that the Agreement is effective for purposes of rates, terms and conditions and shall be thirty (30) days after the date of the last signature executing the Agreement. Future amendments for rate changes will also be effective thirty (30) days after the date of the last signature executing the amendment.

General Terms and Conditions
Page 2

FCC means the Federal Communications Commission.

Telecommunications means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

Telecommunications Service means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

Telecommunications Act of 1996 (Act) means Public Law 104-104 of the United States Congress effective February 8, 1996. The Act amended the Communications Act of 1934 (47 U.S.C. Section 1 et. seq.).

1. CLEC Certification

- 1.1 Express Phone agrees to provide BellSouth in writing Express Phone's CLEC certification from the Commission for all states covered by this Agreement except Kentucky prior to BellSouth filing this Agreement with the appropriate Commission for approval. Additionally, Express Phone shall provide to BellSouth an effective certification to do business issued by the secretary of state or equivalent authority in each state covered by this Agreement.
- 1.2 To the extent Express Phone is not certified as a CLEC in each state covered by this Agreement as of the execution hereof, Express Phone may not purchase services hereunder in that state. Express Phone will notify BellSouth in writing and provide CLEC certification from the Commission when it becomes certified to operate in, as well as an effective certification to do business issued by the secretary of state or equivalent authority for, any other state covered by this Agreement. Upon receipt thereof, BellSouth will file this Agreement in that state, and Express Phone may purchase services pursuant to this Agreement in that state, subject to establishing appropriate accounts in the additional state as described in Attachment 3.
- 1.3 Should Express Phone's certification in any state be rescinded or otherwise terminated, BellSouth may, at its election, suspend or terminate this Agreement immediately and all monies owed on all outstanding invoices for services provided in that state shall become due, or BellSouth may refuse to provide services hereunder in that state until certification is reinstated in that state, provided such notification is made prior to expiration of the term of this Agreement. Express Phone shall provide an effective certification to do business issued by the secretary of state or equivalent authority in each state covered by this Agreement.

2. Term of the Agreement

General Terms and Conditions

Page 3

- 2.1 The initial term of this Agreement shall be five (5) years, beginning on the Effective Date and shall apply to the BellSouth territory in the state(s) of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee. Notwithstanding any prior agreement of the Parties, the rates, terms and conditions of this Agreement shall not be applied retroactively prior to the Effective Date.
- 2.2 The Parties agree that by no earlier than two hundred seventy (270) days and no later than one hundred and eighty (180) days prior to the expiration of the initial term of this Agreement, they shall commence negotiations for a new agreement to be effective beginning on the expiration date of this Agreement (Subsequent Agreement). If as of the expiration of the initial term of this Agreement, a Subsequent Agreement has not been executed by the Parties, then except as set forth in Sections 2.3.1 and 2.3.2 below, this Agreement shall continue on a month-to-month basis while a Subsequent Agreement is being negotiated. The Parties' rights and obligations with respect to this Agreement after expiration of the initial term shall be as set forth in Section 2.3 below.
- 2.3 If, within one hundred and thirty-five (135) days of commencing the negotiation referred to in Section 2.2 above, the Parties are unable to negotiate new terms, conditions and prices for a Subsequent Agreement, either Party may petition the Commission to establish appropriate rates, terms and conditions for the Subsequent Agreement pursuant to 47 U.S.C. § 252.
- 2.3.1 Express Phone may request termination of this Agreement only if it is no longer purchasing services pursuant to this Agreement. Except as set forth in Section 2.3.2 below, notwithstanding the foregoing, in the event that as of the date of expiration of the initial term of this Agreement and conversion of this Agreement to a month-to-month term, the Parties have not entered into a Subsequent Agreement and no arbitration proceeding has been filed in accordance with Section 2.3 above, then BellSouth may terminate this Agreement upon sixty (60) days notice to Express Phone. In the event that BellSouth terminates this Agreement as provided above, BellSouth shall continue to offer services to Express Phone pursuant to the rates, terms and conditions set forth in BellSouth's then current standard interconnection agreement. In the event that BellSouth's standard interconnection agreement becomes effective between the Parties, the Parties may continue to negotiate a Subsequent Agreement.
- 2.3.2 Notwithstanding Section 2.2 above, in the event that as of the expiration of the initial term of this Agreement the Parties have not entered into a Subsequent Agreement and no arbitration proceeding has been filed in accordance with Section 2.3 above and BellSouth is not providing any services under this Agreement as of the date of expiration of the initial term of this Agreement, then this Agreement shall not continue on a month-to-month basis but shall be deemed terminated as of the expiration date hereof.

General Terms and Conditions
Page 4

- 2.4 If, at any time during the term of this Agreement, BellSouth is unable to contact Express Phone pursuant to the Notices provision hereof or any other contact information provided by Express Phone under this Agreement, and there are no active services being provisioned under this Agreement, then BellSouth may, at its discretion, terminate this Agreement, without any liability whatsoever, upon sending of notification to Express Phone pursuant to the Notices section hereof.
- 2.5 In addition to as otherwise set forth in this Agreement, BellSouth reserves the right to suspend access to ordering systems, refuse to process additional or pending applications for service, or terminate service in the event of prohibited, unlawful or improper use of BellSouth's facilities or service, abuse of BellSouth's facilities or any other material breach of this Agreement, and all monies owed on all outstanding invoices shall become due. In such event, Express Phone is solely responsible for notifying its customers of any discontinuance of service.
3. **Parity**
- When Express Phone purchases, Telecommunications Services from BellSouth pursuant to Attachment 1 of this Agreement for the purposes of resale to customers, such services shall be equal in quality, subject to the same conditions, and provided within the same provisioning time intervals that BellSouth provides to its Affiliates, subsidiaries and customers.
- 4 **Court Ordered Requests for Call Detail Records and Other Subscriber Information**
- 4.1 Subpoenas Directed to BellSouth. Where BellSouth provides resold services for Express Phone, or, if applicable under this Agreement, switching, BellSouth shall respond to subpoenas and court ordered requests delivered directly to BellSouth for the purpose of providing call detail records when the targeted telephone numbers belong to Express Phone customers. Billing for such requests will be generated by BellSouth and directed to the law enforcement agency initiating the request. BellSouth shall maintain such information for Express Phone customers for the same length of time it maintains such information for its own customers.
- 4.2 Subpoenas Directed to Express Phone. Where BellSouth is providing resold services to Express Phone, or, if applicable under this Agreement, switching, then Express Phone agrees that in those cases where Express Phone receives subpoenas or court ordered requests regarding targeted telephone numbers belonging to Express Phone customers, and where Express Phone does not have the requested information, Express Phone will advise the law enforcement agency initiating the request to redirect the subpoena or court ordered request to BellSouth for handling in accordance with Section 4.1 above.
- 4.3 In all other instances, where either Party receives a request for information involving the other Party's customer, the Party receiving the request will advise the law enforcement agency initiating the request to redirect such request to the other Party.

General Terms and Conditions
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In the event performance of this Agreement, or any obligation hereunder, is either directly or indirectly prevented, restricted, or interfered with by reason of fire, flood, earthquake or like acts of God, wars, revolution, civil commotion, explosion, acts of public enemy, embargo, acts of the government in its sovereign capacity, labor difficulties, including without limitation, strikes, slowdowns, picketing, or boycotts, unavailability of equipment from vendor, changes requested by Express Phone, or any other circumstances beyond the reasonable control and without the fault or negligence of the Party affected, the Party affected shall be excused from such performance on a day-to-day basis to the extent of such prevention, restriction, or interference (and the other Party shall likewise be excused from performance of its obligations on a day-to-day basis until the delay, restriction or interference has ceased); provided, however, that the Party so affected shall use diligent efforts to avoid or remove such causes of non-performance and both Parties shall proceed whenever such causes are removed or cease. The Party affected shall provide notice of the Force Majeure event within a reasonable period of time following such an event.

11 Adoption of Agreements

Pursuant to 47 U.S.C. § 252(i) and 47 C.F.R. § 51.809, BellSouth shall make available to Express Phone any entire resale agreement filed and approved pursuant to 47 U.S.C. § 252. The adopted agreement shall apply to the same states as the agreement that was adopted, and the term of the adopted agreement shall expire on the same date as set forth in the agreement that was adopted.

12 Modification of Agreement

12.1 If Express Phone changes its name or makes changes to its company structure or identity due to a merger, acquisition, transfer or any other reason, it is the responsibility of Express Phone to notify BellSouth of said change, request that an amendment to this Agreement, if necessary, be executed to reflect said change and notify the Commission of such modification of company structure in accordance with the state rules governing such modification in company structure if applicable. Additionally, Express Phone shall provide BellSouth with any necessary supporting documentation, which may include, but is not limited to, a credit application, Application for Master Account, proof of authority to provide telecommunications services, the appropriate Operating Company Number (OCN) for each state as assigned by National Exchange Carrier Association (NECA), Carrier Identification Code (CIC), Access Customer Name and Abbreviation (ACNA), BellSouth's blanket form letter of authority (LOA), Misdirected Number form and a tax exemption certificate.

12.2 No modification, amendment, supplement to, or waiver of the Agreement or any of its provisions shall be effective and binding upon the Parties unless it is made in writing and duly signed by the Parties.

12.3 In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of Express

General Terms and Conditions
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Phone or BellSouth to perform any material terms of this Agreement, Express Phone or BellSouth may, on thirty (30) days' written notice, require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within forty-five (45) days after such notice, and either Party elects to pursue resolution of such amendment such Party shall pursue the dispute resolution process set forth in Section 8 above.

13 Legal Rights

Execution of this Agreement by either Party does not confirm or imply that the executing Party agrees with any decision(s) issued pursuant to the Telecommunications Act of 1996 and the consequences of those decisions on specific language in this Agreement. Neither Party waives its rights to appeal or otherwise challenge any such decision(s) and each Party reserves all of its rights to pursue any and all legal and/or equitable remedies, including appeals of any such decision(s).

14 Indivisibility

Subject to Section 15 below, the Parties intend that this Agreement be indivisible and nonseverable, and each of the Parties acknowledges that it has assented to all of the covenants and promises in this Agreement as a single whole and that all of such covenants and promises, taken as a whole, constitute the essence of the contract. The Parties further acknowledge that this Agreement is intended to constitute a single transaction and that the obligations of the Parties under this Agreement are interdependent.

15 Severability

If any provision of this Agreement, or part thereof, shall be held invalid or unenforceable in any respect, the remainder of the Agreement or provision shall not be affected thereby, provided that the Parties shall negotiate in good faith to reformulate such invalid provision, or part thereof, or related provision, to reflect as closely as possible the original intent of the parties, consistent with applicable law, and to effectuate such portions thereof as may be valid without defeating the intent of such provision. In the event the Parties are unable to mutually negotiate such replacement language, either Party may elect to pursue the dispute resolution process set forth in Section 8 above.

16 Non-Waivers

A failure or delay of either Party to enforce any of the provisions hereof, to exercise any option which is herein provided, or to require performance of any of the provisions hereof shall in no way be construed to be a waiver of such provisions or options, and each Party, notwithstanding such failure, shall have the right thereafter to insist upon the performance of any and all of the provisions of this Agreement.

17 Governing Law

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Page 17

such time as Express Phone is duly certified as a local exchange carrier in such state, except as otherwise required by a Commission.

24 Compliance with Law

The Parties have negotiated their respective rights and obligations pursuant to substantive Federal and State Telecommunications law and this Agreement is intended to memorialize the Parties' mutual agreement with respect to each Party's rights and obligations under the Act and applicable FCC and Commission orders, rules and regulations. Nothing contained herein, nor any reference to applicable rules and orders, is intended to expand on the Parties' rights and obligations as set forth herein. To the extent the provisions of this Agreement differ from the provisions of any Federal or State Telecommunications statute, rule or order in effect as of the execution of this Agreement, this Agreement shall control. Each Party shall comply at its own expense with all other laws of general applicability.

25 Necessary Approvals

Each Party shall be responsible for obtaining and keeping in effect all approvals from, and rights granted by, governmental authorities, building and property owners, other carriers, and any other persons that may be required in connection with the performance of its obligations under this Agreement. Each Party shall reasonably cooperate with the other Party in obtaining and maintaining any required approvals and rights for which such Party is responsible.

26 Good Faith Performance

Each Party shall act in good faith in its performance under this Agreement and, in each case in which a Party's consent or agreement is required or requested hereunder, such Party shall not unreasonably withhold or delay such consent or agreement.

27. Rates

27.1 Express Phone shall pay the charges set forth in this Agreement. In the event that BellSouth is unable to bill the applicable rate or no rate is established or included in this Agreement for any services provided pursuant to this Agreement, BellSouth reserves the right to back bill Express Phone for such rate or for the difference between the rate actually billed and the rate that should have been billed pursuant to this Agreement; provided, however, that subject to Express Phone's agreement to the limitation regarding billing disputes as described in Section 2.2 of Attachment 3 hereof, BellSouth shall not back bill any amounts for services rendered more than twelve (12) months prior to the date that the charges or additional charges for such services are actually billed. Notwithstanding the foregoing, both Parties recognize that situations may exist which could necessitate back billing beyond twelve (12) months. These exceptions are:

- Charges connected with jointly provided services whereby meet point billing guidelines require either Party to rely on records provided by a third party and such records have not been provided in a timely manner;

Resale Agreement
General Terms and Conditions
Signature Page

IN WITNESS WHEREOF, the Parties have executed this Agreement the day and year written below.

BellSouth Telecommunications, Inc.

By: Kristen E. Shore

Name: Kristen E. Shore

Title: Director

Date: 8/14/06

Express Phone Service, Inc.

By: Thomas M. Armstrong

Name: THOMAS M. ARMSTRONG

Title: PRESIDENT

Date: 8/23/06

Attachment 3
Page 1

Attachment 3

Billing

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comply with the foregoing, BellSouth shall thereafter be authorized to draw down the full amount of such letter of credit and utilize the cash proceeds as security for Express Phone accounts(s). If Express Phone provides a security deposit or additional security deposit in the form of a surety bond as required herein, Express Phone shall renew the surety bond or provide BellSouth with evidence that Express Phone has obtained a suitable replacement for the surety bond at least seven (7) days prior to the cancellation date of the surety bond. If Express Phone fails to comply with the foregoing, BellSouth shall thereafter be authorized to take action on the surety bond and utilize the cash proceeds as security for Express Phone's account(s). If the credit rating of any bonding company that has provided Express Phone with a surety bond provided as security hereunder has fallen below B, BellSouth will provide written notice to Express Phone that Express Phone must provide a replacement bond or other suitable security within fifteen (15) days of BellSouth's written notice. If Express Phone fails to comply with the foregoing, BellSouth shall thereafter be authorized to take action on the surety bond and utilize the cash proceeds as security for Express Phone's account(s). Notwithstanding anything contained in this Agreement to the contrary, BellSouth shall be authorized to draw down the full amount of any letter of credit or take action on any surety bond provided by Express Phone as security hereunder if Express Phone defaults on its account(s) or otherwise fails to make any payment or payments required under this Agreement in the manner and within the time, as required herein.

- 1.4 Payment Responsibility. Payment of all charges will be the responsibility of Express Phone. Express Phone shall pay invoices by utilizing wire transfer services or automatic clearing house services. Express Phone shall make payment to BellSouth for all services billed including disputed amounts. BellSouth will not become involved in billing disputes that may arise between Express Phone and Express Phone's customer.
- 1.4.1 Payment Due. Payment for services provided by BellSouth, including disputed charges, is due on or before the next bill date. Information required to apply payments must accompany the payment. The information must notify BellSouth of Billing Account Numbers (BAN) paid; invoices paid and the amount to be applied to each BAN and invoice (Remittance Information). Payment is considered to have been made when the payment and Remittance Information are received by BellSouth. If the Remittance Information is not received with payment, BellSouth will be unable to apply amounts paid to Express Phone's accounts. In such event, BellSouth shall hold such funds until the Remittance Information is received. If BellSouth does not receive the Remittance Information by the payment due date for any account(s), late payment charges shall apply.
- 1.4.1.1 Due Dates. If the payment due date falls on a Sunday or on a holiday that is observed on a Monday, the payment due date shall be the first non-holiday day following such Sunday or holiday. If the payment due date falls on a Saturday or on a holiday which is observed on Tuesday, Wednesday, Thursday, or Friday, the

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payment due date shall be the last non-holiday day preceding such Saturday or holiday. If payment is not received by the payment due date, a late payment charge, as set forth in Section 1.4.1.2, below, shall apply.

- 1.4.1.2 Late Payment. If any portion of the payment is not received by BellSouth on or before the payment due date as set forth above, or if any portion of the payment is received by BellSouth in funds that are not immediately available to BellSouth, then a late payment and/or interest charge shall be due to BellSouth. The late payment and/or interest charge shall apply to the portion of the payment not received and shall be assessed as set forth in Section A2 of BellSouth's GSST, Section B2 of the Private Line Service Tariff or Section E2 of the BellSouth intrastate Access Services Tariff, or pursuant to the applicable state law as determined by BellSouth. In addition to any applicable late payment and/or interest charges, Express Phone may be charged a fee for all returned checks at the rate set forth in Section A2 of BellSouth's GSST or pursuant to the applicable state law.
- 1.5 Discontinuing Service to Express Phone. The procedures for discontinuing service to Express Phone are as follows:
- 1.5.1 In order of severity, Suspend/Suspension, Discontinue/Discontinuance and Terminate/Termination are defined as follows for the purposes of this Attachment:
- 1.5.1.1 Suspend/Suspension is the temporary restriction of the billed Party's access to the ordering systems and/or access to the billed Party's ability to initiate PIC-related changes. In addition, during Suspension, pending orders may not be completed and orders for new service or changes to existing services may not be accepted.
- 1.5.1.2 Discontinue/Discontinuance is the denial of service by the billing Party to the billed Party that will result in the disruption and discontinuation of service to the billed Party's customers. Additionally, at the time of Discontinuance, BellSouth will remove any Local Service Freezes in place on the billed Party's customers.
- 1.5.1.3 Terminate/Termination is the disconnection of service by the billing Party to the billed Party.
- 1.5.2 BellSouth reserves the right to Suspend, Discontinue or Terminate service in the event of prohibited, unlawful or improper use of BellSouth facilities or service, abuse of BellSouth facilities, or any other violation or noncompliance by Express Phone of the rules and regulations of BellSouth's tariffs.
- 1.5.3 Suspension. If payment of amounts due as described herein is not received by the bill date in the month after the original bill date, or fifteen (15) days from the date of a deposit request in the case of security deposits, BellSouth will provide written notice to Express Phone that services will be Suspended if payment of such amounts, and all other amounts that become past due before Suspension, is not received by wire transfer, automatic clearing house or cashier's check in the