

**Eric Fryson**

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**From:** WOODS, VICKIE (Legal) [vf1979@att.com]  
**Sent:** Wednesday, April 04, 2012 4:29 PM  
**To:** Filings@psc.state.fl.us  
**Subject:** 110087-TP AT&T Florida's Prehearing Statement

**Importance:** High

**Attachments:** Document.pdf



Document.pdf  
(3 MB)

- A. Vickie Woods  
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150 South Monroe Street  
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vf1979@att.com<mailto:vf1979@att.com>
- B. Docket No.: 110087-TP: Notice of the Adoption of existing interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunications, Inc. d/b/a AT& T Florida d/b/a AT&T Southeast and Image Access, Inc. d/b/a New Phone, Inc. by Express Phone Service, Inc.
- C. BellSouth Telecommunications, Inc. d/b/a AT&T Florida on behalf of Suzanne L. Montgomery
- D. 10 pages total (includes letter, certificate of service and pleading)
- E. BellSouth Telecommunications, LLC d/b/a AT&T Florida's Prehearing Statement.pdf

DOCUMENT NUMBER-DATE

02058 APR-4 2012

FPSC-COMMISSION CLERK



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General Attorney - Florida

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April 4, 2012

Ann Cole, Commission Clerk  
Office of the Commission Clerk  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

**Re: Docket No. 110087-TP: Notice of the Adoption of existing interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunications, Inc. d/b/a AT& T Florida d/b/a AT&T Southeast and Image Access, Inc. d/b/a New Phone, Inc. by Express Phone Service, Inc.**

Dear Ms. Cole:

Enclosed is BellSouth Telecommunications, LLC d/b/a AT&T Florida's Prehearing Statement, which we ask that you file in the captioned docket.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

  
Suzanne L. Montgomery

cc: All Parties of Record  
Gregory R. Follensbee

1020538

**CERTIFICATE OF SERVICE**  
**Docket No. 110087-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via

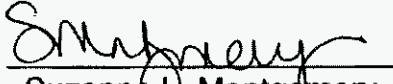
Electronic Mail and First Class U.S. Mail this 4th day of April, 2012 to the following:

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Atty. for Express Phone

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Suzanne L. Montgomery

**(+) Signed Protective Agreement**  
916796

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Notice of the Adoption of existing ) Docket No. 110087-TP  
interconnection, unbundling, resale, and )  
collocation agreement between BellSouth )  
Telecommunications, Inc. d/b/a AT& T )  
Florida d/b/a AT&T Southeast and Image )  
Access, Inc. d/b/a New Phone, Inc. by Express) )  
Phone Service, Inc. )  
\_\_\_\_\_ ) Filed: April 4, 2012

**AT&T FLORIDA'S PREHEARING STATEMENT**

BellSouth Telecommunications, LLC d/b/a AT&T Florida ("AT&T Florida"), hereby submits, in compliance with the *Order Establishing Procedure* (Order No.: PSC-12-0031-PCO-TP), issued January 19, 2012, and the *Order Modifying Order Establishing Procedure* (Order No.: PSC-12-0058-PCO-TP), issued February 10, 2012, its Prehearing Statement.

**A. Witnesses**

AT&T Florida proposes to call the following witnesses to offer direct and rebuttal testimony on the issues in this proceeding:

<u>Witness</u>	<u>Issues</u>
William E. Greenlaw (Direct and Rebuttal)	1, 2, 3 and 4
David J. Egan (Direct and Rebuttal)	2 and 3

AT&T Florida's witnesses present testimony relating both facts and policy considerations that support AT&T Florida's positions on the identified issues. AT&T Florida reserves the right to call additional witnesses, including witnesses to address or respond to inquiries from the Commission, to address issues not presently designated that may be designated by the Prehearing Officer at the Prehearing Conference to be held on April 16, 2012, and to address issues raised in any discovery response or testimony by witnesses for Express Phone Service, Inc. ("Express Phone") that has not yet been served or filed.

**B. Exhibits**

William E. Greenlaw	WEG-1	Letter dated 11/1/2010 to M. Foster from Reed; Re: Express Phone Service, Inc.'s Section 252(i) adoption requests
	WEG-2	Portions of Express Phone's ICA
	WEG-3	Letter dated 3/25/2011 to M. Foster from Bockelman; Re: Express Phone Service, Inc.'s Section 252(i) adoption requests
	WEG-4	Portions of Digital Express ICA
	WEG-5	Alabama PSC Decision in the LifeConnex Docket
	WEG-6	KPSC LifeConnex Order
	WEG-7	NCUC Order Ruling on Dockets
	WEG-8	FPSC Request to Hold Dockets in Abeyance in Docket No. 110071-TP
	WEG-9	FPSC Order Denying Request for Abeyance in Docket No. 110071-TP
	WEG-10	Express Phone's Voluntary Dismissal Without Prejudice in Docket No. 110071-TP
	WEG-11	Express Phone's Application
David J. Egan	DEG-1	Revised Notice of Suspension and Termination
	DEG-2	CD containing Express Phone bills for Billing Account Number 305Q926878 ( <b>Confidential</b> )
	DEG-3	CD containing Express Phone bills for Billing Account Number 561Q926878 ( <b>Confidential</b> )
	DEG-4	CD containing Express Phone bills for Billing Account Number 904Q926878 ( <b>Confidential</b> )

Any exhibits sponsored by Express Phone's witnesses.

AT&T Florida's Responses to all Interrogatories, Requests for Admissions and Requests for Production issued by Express Phone.

Express Phone's Responses to all Interrogatories, Requests for Admissions and Requests for Production issued by AT&T Florida.

Transcripts of any depositions that may be taken in this proceeding.

AT&T Florida reserves the right to file exhibits relating to any discovery response or testimony that may be served or filed under the circumstances identified in Section "A" above.

AT&T Florida also reserves the right to introduce exhibits for cross-examination, impeachment,

or any other purpose authorized by the applicable Florida Rules of Civil Procedure, Florida Rules of Evidence and the Rules of the Commission.

**C. AT&T Florida's Statement of General Position**

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

**D. AT&T Florida's Position on the Issues**

**Issue 1: Is Express Phone's Notice of Adoption or AT&T Florida's denial of the adoption barred by the doctrines of equitable relief, including laches, estoppel and waiver?**

Position: Express Phone's Notice of Adoption is barred by the doctrines of equitable relief, including laches, estoppel and waiver. It is seeking to adopt the Image Access ICA, which was publicly filed with and approved by the Commission before Express Phone entered into its

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

current Commission-approved interconnection agreement with AT&T Florida. Express Phone had a full and fair opportunity to adopt the Image Access ICA in 2006 and, instead, voluntarily chose to enter into a different interconnection agreement. The interconnection agreement that Express Phone voluntarily entered into had a five year initial term, which ended on November 2, 2011, more than a year after Express Phone first sought to adopt the Image Access ICA. Express Phone cannot now simply abandon its Commission-approved interconnection agreement midstream to adopt a contract that it could have adopted earlier, but chose not to.

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

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

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

Express Phone has no right to either abandon a Commission - approved interconnection agreement with an unexpired term or to simply jump out of an unexpired Agreement in mid-stream. The Express Phone ICA became effective on November 3, 2006, and Section 2.1 of the General Terms and Conditions states that “[t]he initial term of this Agreement shall be five (5) years, beginning on the Effective Date. . . .” The ICA further states in Section 2.2 that

negotiations for a new agreement shall commence “no earlier than two hundred seventy (270) days . . . prior to the expiration of the initial term of this Agreement . . . .” There is no authority under the Telecommunications Act of 1996 (the “Act”), FCC regulations, or court and commission precedent that allows Express Phone to unilaterally back out of the obligations under its existing ICA and, in turn, proclaim that it is adopting a different agreement in midstream. In fact, the precedent is to the contrary and supports AT&T Florida’s position. *See, e.g., Global NAPS, Inc. v. Verizon*, 396 F.3d 16 (1st Cir. 2005) (rejecting CLEC’s effort to adopt a different interconnection agreement after the state commission held an arbitration for a new agreement and the arbitrated agreement was not to the CLEC’s liking); *In re: Petition of Supra Telecomms. & Info. Sys. for generic proceeding to arbitrate rates, terms, and conditions of interconnection with BellSouth Telecomms., Inc., or, in the alternative, petition for arbitration of interconnection agreement*, Docket No. 980155-TP; Order No. PSC-98-0466-FOF-TP (March 31, 1998) (rejecting CLEC’s improper request for arbitration of a new interconnection agreement while the parties were operating under an existing agreement and holding that “[t]he Act does not authorize a state commission to alter terms within an approved negotiated agreement or to nullify an approved negotiated agreement”); Declaratory Ruling, *Petition of Pac-West Telecomm, Inc. for a Declaratory Ruling Respecting Its Rights to Interconnection with Verizon N.Y., Inc.*, Case No. 06-C-1042 (N.Y. Comm’n Feb. 27, 2007) (extending *Global NAPS* decision to negotiated interconnection agreements and rejecting CLEC’s argument that § 252(i) allowed it to void a negotiated contract to adopt another interconnection agreement).

Similarly, public interest is a critical factor in the analysis of whether the applicable law allows Express Phone to adopt the Image Access ICA. Allowing Express Phone to adopt a new



interconnection agreement while it is in breach of its existing ICA would not only be a violation of basic contract law, but would also be contrary to the public interest.

**Issue 3: Is Express Phone permitted under the terms of the interconnection agreement with AT&T Florida to adopt the New Phone Interconnection Agreement?**

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

**Issue 4: If the New Phone Interconnection Agreement is available for adoption by Express Phone, what is the effective date of the adoption?**

**Position:** For the reasons discussed in Issues 1, 2 and 3, the Image Access ICA is not available for adoption by Express Phone. Assuming, arguendo, however, that the Image Access ICA is available for adoption, the adoption should be effective some time after March 29, 2011, which is the date Express Phone filed its first Notice of Adoption with the Commission. Express Phone's October 20, 2010 and March 14, 2011 requests for adoption of the Image Access ICA were not sufficient to create a binding contract. Instead, letters such as those are intended to simply start the process by which AT&T Florida would then review the request for adoption and

the factors that could impact the request. To find that October 20, 2010 or March 14, 2011 is the effective date of the adopted ICA would be to find that AT&T Florida can be forced to be a party to a contract without its consent and deny AT&T Florida its right to evaluate the request subject to the provisions of 47 C.F.R. § 51.809. In its *Nextel Adoption Order*, Dockets Nos. 070368-TP and 070369-TP, Order No. PSC-08-0584-FOF-TP (Sept. 8, 2008), the Commission held that the effective date is the date the notice of adoption is filed with this Commission.

**E. Stipulations**

To date, the parties have not entered into any stipulations.

**F. Pending Motions**

There are no pending motions.

**G. AT&T Florida's Notice of Intent to Use Confidential Information at Hearing**

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

1. AT&T Florida's Response to Express Phone's First Request for Production of Documents, Nos. 1 and 6 filed under a Notice of Intent to Request Specified Confidential Classification on February 13, 2012 and a Request for Specified Confidential Classification on March 5, 2012.
2. AT&T Florida's Supplemental Response to Express Phone's First Request for Production of Documents, Nos. 2, 3, 7 and 8 filed under a Notice of Intent to Request Specified Confidential Classification on February 14, 2012 and a Request for Specified Confidential Classification on March 6, 2012.

3. AT&T Florida's Second Supplemental Response to Express Phone's First Request for Production of Documents No. 6, filed under a Notice of Intent to Request Specified Confidential Classification on February 22, 2012 and a Request for Specified Confidential Classification on March 6, 2012.

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

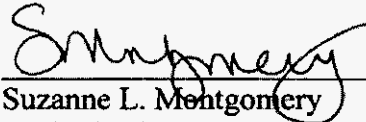
AT&T Florida reserves the right to use any such information at hearing, subject to appropriate measures to protect its confidentiality.

#### **H. Other Requirements**

AT&T Florida knows of no requirements set forth in any Prehearing Order with which it cannot comply.

Respectfully submitted this 4th day of April, 2012.

AT&T FLORIDA



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