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Sent: Wednesday, April 04, 2012 4:43 PM
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Subject: Docket No. 110087-TP
Attachments: Express Phone Prehearing Statement 4.4.12.pdf

In accordance with the electronic filing procedures of the Florida Public Service Commission, the following filing is made:

a. The name, address, telephone number and email for the person responsible for the filing is:

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b. This filing is made in Docket No. 110087-TP.

c. The document is filed on behalf of Express Phone Service, Inc.

d. The total pages in the document are 8 pages.

e. The attached document is EXPRESS PHONE SERVICE, INC.'S PREHEARING STATEMENT.

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DOCUMENT NUMBER-DATE

02059 APR-4 2012

FPSC-COMMISSION CLERK

4/4/2012

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Notice of adoption of existing interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Image Access, Inc. d/b/a NewPhone, Inc. by Express Phone Service, Inc.

Docket No. 110087-TP

Filed: April 4, 2012

**EXPRESS PHONE SERVICE, INC.'S
PREHEARING STATEMENT**

Express Phone Service, Inc. (Express Phone), pursuant to Order No. PSC-12-0058-PCO-TP, files its Prehearing Statement.

A. APPEARANCES:

Vicki Gordon Kaufman
Keefe, Anchors, Gordon & Moyle, PA
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Tallahassee, FL 32301

Attorneys for Express Phone Service, Inc.

B. WITNESSES:

<u>Witness</u>	<u>Subject Matter</u>	<u>Issue No.</u>
<u>Direct</u>		
Don J. Wood	Actions of Express Phone and AT&T relating to the NewPhone adoption; application of federal statute and FCC rules related to adoption; effective date of adoption	1-4
Thomas M. Armstrong	Express Phone operations; Express Phone attempts to adopt the NewPhone ICA; AT&T's failure to recognize the adoption; effective date of adoption	1-4

DOCUMENT NUMBER-DATE

02059 APR -4 2012

FPSC-COMMISSION CLERK

Rebuttal

Don J. Wood	Application of federal statute and FCC rules related to adoption; effective date of adoption; AT&T failure to act in good faith; refutation of AT&T witness positions	1-4
Thomas M. Armstrong	Adoption of NewPhone ICA; AT&T's failure to act in good faith	1-4

All witnesses listed by other parties in this proceeding.

C. EXHIBITS:

<u>Exhibit</u>	<u>Witness</u>	<u>Description</u>
<u>Direct</u>		
DJW-1	Don J. Wood	Description of qualifications and list of previous testimony
TMA-1	Thomas M. Armstrong	Qualifications
TMA-2	Thomas M. Armstrong	Excerpt from Express Phone/ AT&T ICA, § 26
TMA-3	Thomas M. Armstrong	ICA between AT&T and Image Access d/b/a NewPhone
TMA-4	Thomas M. Armstrong	October 20, 2010, Express Phone adoption notice to AT&T
TMA-5	Thomas M. Armstrong	November 1, 2010 AT&T response
TMA-6	Thomas M. Armstrong	March 14, 2011 Express Phone notification to AT&T
TMA-7	Thomas M. Armstrong	March 25, 2011 AT&T response
TMA-8	Thomas M. Armstrong	March 28, 2011 correspondence from counsel for Express Phone to AT&T
TMA-9	Thomas M. Armstrong	April 6, 2011 AT&T response
TMA-10	Thomas M. Armstrong	Notice of Adoption
TMA-11	Thomas M. Armstrong	AT&T objection
TMA-12	Thomas M. Armstrong	April 4, 2011 Express Phone amended notice of adoption
TMA-13	Thomas M. Armstrong	Express Phone's ICA with AT&T, Paragraph 11 of the General Terms and Conditions

Rebuttal

TMA-14	Thomas M. Armstrong	Amounts Due to Express Phone from AT&T
TMA-15	Thomas M. Armstrong	September 24, 2010 Email from Reginald Greene to Mark Foster (confidential)

All exhibits listed or used by all other parties in this proceeding. Express Phone reserves the right to use cross-examination exhibits.

D. STATEMENT OF BASIC POSITION:

On October 20, 2010, Express Phone sent notice to AT&T of its adoption of the NewPhone interconnection agreement (ICA); AT&T has refused to acknowledge this adoption. This case involves the straight-forward adoption of an ICA by Express Phone and AT&T's refusal to recognize that adoption.

Express Phone has, pursuant to the requirements of §252(i) and 47 CFR §51.809, adopted the NewPhone ICA, effective October 20, 2012. It made the proper notification of the adoption to AT&T. Despite this, AT&T has refused to recognize the adoption.

Section 47 U.S.C. §252(i) sets out the requirements for adoption of an ICA:

(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.

This federal statute requires AT&T to “make available *any* interconnection agreement” to “*any* other requesting telecommunications carrier.” While AT&T has attempted to contrive numerous additional restrictions on the federal adoption right – varying its roadblocks with each response to Express Phone – no restrictions on the timing of the adoption and no restrictions related to outstanding disputes appear in the law.

The Federal Communications Commission (FCC) has enacted a rule to implement the federal statute. 47 CFR §51.809 describes the only two instances where the adoption statute quoted above is inapplicable. Those are:

(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.

Neither of these exceptions has been raised by AT&T, nor could they have been, as they are inapplicable.

Instead, AT&T has claimed, at various times, different theories in support of its failure to follow the adoption requirements. AT&T has claimed that Express Phone's adoption was inappropriate because:

- Express Phone's adoption was too early because the window for negotiation of a new agreement had not opened;
- Express Phone's adoption was too late because the NewPhone ICA was in effect at the time Express Phone signed an ICA with AT&T;
- There are outstanding billing disputes between the parties;
- AT&T does not like the reason for Express Phone's adoption.

None of these "exceptions" appear in the law or may be applied to bar Express Phone's adoption of the NewPhone ICA.

As pointed out in Mr. Wood's testimony, the reason that underlies the adoption statute and rule is to prevent an incumbent, like AT&T, from discriminating as to its agreements with and among CLECs – just as AT&T has done in this case. When an ICA with more favorable terms is available, a CLEC is entitled to adopt it so as to prevent discrimination.

The FCC explained the purpose of the adoption requirement in its *Second Report and Order* (emphasis supplied):

We conclude that under an all-or-nothing rule, requesting carriers will be protected from discrimination, as intended by section 252(i). *Specifically, an incumbent LEC will not be able to reach a discriminatory agreement for interconnection, services, or network elements with a particular carrier without making that agreement in its entirety available to other requesting carriers.* If the agreement includes terms that materially benefit the preferred carrier, other requesting carriers will likely have an incentive to adopt that agreement to gain the benefit of the incumbent LEC's discriminatory bargain. Because these agreements will be available on the same terms and conditions to requesting carriers, the all-or-nothing rule should effectively deter incumbent LECs from engaging in such discrimination.

Finally, the effective date of Express Phone's adoption is October 20, 2010. As this Commission has already ruled in the *Nextel Order*: "When an interconnection agreement is available for adoption under 47 C.F.R. 51.809(a), the adoption is considered presumptively valid and effective upon receipt of the notice by the adoption [sic] party." AT&T should not be able to profit from its unwarranted delay in recognizing Express Phone's valid adoption.

E. STATEMENT OF ISSUES AND POSITIONS:

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?

EXPRESS PHONE: As an initial matter, Express Phone notes that it is not AT&T’s role to deny or approve Express Phone’s adoption request. However, AT&T’s refusal to honor such request is barred by the doctrines of equitable relief, including laches, estoppels and waiver. First, AT&T has not come to the Commission with clean hands because it acted in bad faith when it failed to offer the NewPhone ICA to Express Phone when Express Phone first sought to execute an ICA. Second, AT&T representatives advised Express Phone that AT&T would work with Express Phone to resolve billing disputes; after Express Phone relied on this representation, AT&T reversed its position. Though AT&T claims it may ignore Express Phone’s notice of adoption because there are billing disputes between the parties, AT&T took no action to resolve such disputes or to collect amounts it claims are owed until well after the NewPhone adoption was effective.

In contrast, Express Phone has timely and appropriately exercised its rights to adopt the NewPhone ICA, but has been met with resistance at every turn from AT&T.

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?

EXPRESS PHONE: Yes. 47 U.S.C. §252(i) requires AT&T to “make available *any* interconnection agreement” to “*any* other requesting telecommunications carrier.” The FCC rule implementing this statute provides two exceptions to the adoption requirement: 1) the costs of providing the ICA to the adopting party is greater than to the original party or 2) provision of the ICA to the adopting party is not technically feasible. Neither of these exceptions have any applicability in this instance and thus Express Phone is entitled to adopt the NewPhone ICA effective October 20, 2010.

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

EXPRESS PHONE: Yes. The terms of Express Phone’s prior ICA with AT&T, at paragraph 11, expressly provides that AT&T “shall make available to Express Phone any entire resale agreement filed and approved pursuant to 47 U.S.C. §252.” This language is consistent with the law on the subject and does not restrict in any way Express Phone’s ability to adopt the NewPhone ICA at any time during the term of Express Phone’s prior ICA with AT&T. To accept one of AT&T’s arguments – that Express Phone cannot adopt another ICA during the term of a current ICA – flies in the face of the antidiscrimination purposes of §252. Acceptance of AT&T’s view would allow an incumbent to discriminate against a CLEC during the entire term of an ICA.

Issue 4. If the NewPhone Interconnection Agreement is available for adoption by Express Phone, what is the effective date of the adoption?

EXPRESS PHONE: The effective date of the adoption is October 20, 2010, the date Express Phone notified AT&T of the adoption. As the Commission said in the *Nextel Order*, 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): “When an interconnection agreement is available for adoption under 47 C.F.R. 51.809(a), the adoption is considered presumptively valid and effective upon receipt of the notice by the adoption [sic] party.” Thus, October 20, 2010 is the effective date of the adoption.

F. STIPULATED ISSUES:

None at this time.

G. PENDING MOTIONS:

None at this time.

H. STATEMENT OF PARTY’S PENDING REQUESTS OR CLAIMS FOR CONFIDENTIALITY:

On March 29, 2012, Express Phone filed a Notice of Intent as to Exhibit No. TMA-15, attached to Mr. Armstrong’s rebuttal testimony. While Express Phone does not consider this document confidential, AT&T may.

I. OBJECTIONS TO QUALIFICATION OF WITNESSES AS AN EXPERT:

1. **Mr. Egan:** To the extent that AT&T seeks to have Mr. Egan render any expert opinions as to the requirements of, implementation of or purpose of 47 U.S.C. §252(i) and/or 47 CFR §51.809 or as to the content of, purpose of or interpretation of the former ICA between Express Phone and AT&T and/or the NewPhone ICA, Express Phone objects to his qualifications to render any such opinions.

2. **Mr. Greenlaw:** To the extent that AT&T seeks to have Mr. Greenlaw render any expert opinions as to the requirements of, implementation of or purpose of 47 U.S.C. §252(i) and/or 47 CFR §51.809, Express Phone objects to his qualifications to render any such opinions.

J. STATEMENT OF COMPLIANCE WITH ORDER ESTABLISHING PROCEDURE:

There are no requirements of the Order Establishing Procedure with which Express Phone cannot comply at this time.

s/ Vicki Gordon Kaufman _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Express Phone Service, Inc.'s Prehearing Statement has been furnished by Electronic Mail and U.S. Mail this 4th day of April, 2012, to the following:

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