Eric Fryson

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Sent: Friday, June 01, 2012 11:59 AM
To: Filings@psc.state.fl.us
Subject: 110087-TP AT&T Florida's Post-Hearing Brief

Attachments: EAST-#1036538-v1-110087-TP_Express_Phone_(Filed)_Brief.PDF

EAST-#103653
l-110087-TP_E›

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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, LLC d/b/a AT&T Florida on behalf of Suzanne L. Montgomery

D. 27 pages total (includes letter, certificate of service and pleading)

E. BellSouth Telecommunications, LLC d/b/a AT&T Florida's Post-Hearing Brief

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June 1, 2012

Ann Cole, Commission Clerk
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Florida Public Service Commission
2540 Shumard Oak Boulevard
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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 Post-Hearing Brief, 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

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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 1st day of June, 2012 to the following:

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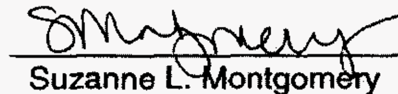
Suzanne L. Montgomery

(+) Signed Protective Agreement
916796

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Notice of the Adoption of existing 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.	)	Docket No. 110087-TP
	)	Filed: June 1, 2012

AT&T FLORIDA'S POST-HEARING BRIEF

Express Phone Service, Inc. ("Express Phone") does not (and cannot) dispute that it contractually agreed to pay its bills to AT&T Florida in full – including disputed amounts. Express Phone does not (and cannot) dispute that it breached its contract by refusing to pay AT&T Florida more than $1.3 million. Rather than honoring its contract and paying those amounts until the disputes are resolved, Express Phone has purported to "adopt" another contract, and it claims that this "adoption" not only allows it to withhold disputed amounts on a going-forward basis, but also that the "adoption" relieves it of its obligations to pay disputed amounts under its original contract.

In other words, under the guise of an "adoption" request under 47 U.S.C. § 252(i), Express Phone wants the Commission to retroactively relieve it of its obligation to pay for services that AT&T Florida rendered it under its existing interconnection agreement, to replace that interconnection agreement on both a retroactive and prospective basis, and to retroactively and prospectively re-write and reset Express Phone's duties and obligations under its existing interconnection agreement. Section 252(i) simply does not grant Express Phone the power to unilaterally terminate its interconnection agreement and replace it with one it thinks is better. The Commission should rule on all issues in this docket in favor of AT&T Florida.

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I. Statement of the Case

In 2006, Express Phone and AT&T Florida entered into an interconnection agreement that had an initial term of five years, through November 2011 (the "Express Phone ICA"). *See* Exhibit 23. Although many other ICAs (including the Image Access ICA[1] it now wants to adopt) were available for adoption at the time, Express Phone made no effort to identify or assess these ICAs, and it did not attempt to adopt any of them. *See* Tr. at 62:5-18. Moreover, Express Phone did not ask the Commission to mediate or arbitrate any aspect of the ICA it signed. *See* Tr. at 61:16-20, 65:1-5. Instead, Express Phone signed the ICA voluntarily, *see* Tr. at 59:1-22, and the Commission approved it pursuant to 47 U.S.C. § 252(e) on January 31, 2007. *See generally* Docket No. 060714-TP.

The Express Phone ICA requires Express Phone to pay all charges billed, including disputed amounts, on or before the next bill date. *See* Exhibit 23, Attach. 3 §§ 1.4, 1.4.1. Notwithstanding these contract terms, in 2009 Express Phone began breaching it by short-paying its bills. *See* Exhibits 19-21, 37. As a result of this non-payment breach, in August 2010, AT&T Florida sought an increased security deposit from Express Phone. *See* Exhibit 37. During the negotiations for that security deposit, in September 2010 AT&T Florida's counsel reminded Express Phone of its contractual obligation to pay its bills in full and that Express Phone was not meeting that obligation. *See* Exhibit 38; Tr. at 81:23-82:25.

Less than six weeks later, on October 20, 2010, Express Phone sent a letter to AT&T Florida "request[ing]" to adopt the Image Access ICA. Exhibit 7. Express Phone has conceded that the primary reason it made this request was because the Image Access ICA has different

[1] The Image Access ICA was filed with the Commission on April 4, 2006 and approved by the Commission on July 5, 2006 through Docket No. 060319-TP. 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 testimony of William Greenlaw.

payment terms that would allow Express Phone to withhold disputed amounts from payment. *See* Tr. at 77:22-78:2. On October 20, Express Phone had a past due balance of $851,335.94, there was more than a year left in the initial term of the Express Phone ICA, and the contractually specified time period for negotiating a successor agreement had not yet opened. *See* Tr. at 225:21-22; 258:1-15. AT&T Florida responded with a short letter noting that Express Phone's adoption request was too early. *See* Exhibit 8; Tr. at 280:1-7.

Months later, after AT&T Florida began formal collection action, Express Phone sent a March 14, 2011 letter "request[ing]" that it be allowed to adopt the Image Access ICA. Exhibit 9. At this point, Express Phone's past due balance had grown by almost another half million dollars to $1,343,984, *see* Tr. at 226:26-27, but the negotiation window specified in the Express Phone ICA had opened. AT&T Florida therefore responded substantively to Express Phone's request on March 25, 2011, and it "conditionally accepted" the request, conditioned (among other things) on Express Phone curing its non-payment breach. Exhibit 10; Tr. at 280:12-18.

Express Phone did not cure that breach, *see* Tr. at 5:24-6:2, and, instead, it commenced this docket on March 29, 2011. Initially Express Phone asked that the Commission allow it to adopt the Image Access ICA "effective immediately." Exhibit 13; *see* also Tr. at 84:13-21. Later, Express Phone changed its position and argued that it should be able to adopt the Image Access ICA retroactive to October 20, 2010. *See* Exhibit 15.

The Commission held an evidentiary hearing on May 3, 2012. AT&T Florida submitted the testimony of AT&T employees David Egan and William Greenlaw. Express Phone submitted testimony from Thomas Armstrong, the President of Express Phone, and Don Wood, its retained expert witness.

II. Statement of Basic Position

Express Phone is not entitled to and should not be allowed to adopt the Image Access ICA 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 with a CLEC who decides that it does not like its existing ICA simply voidable at the will of the CLEC. Express Phone's expert witness conceded that if the Commission were to adopt Express Phone's position, it would mean that any CLEC could continuously and unilaterally change its contract terms without warning and at its whim by adopting different agreements "*ad infinitum.*" Tr. at 187:6-11.

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. The Commission should not countenance such an unreasonable result, and should reject Express Phone's improper attempt to adopt the Image Access ICA.

III. Statement of 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: ** Yes. Express Phone cannot abandon its Commission-approved ICA to adopt an ICA which was available when Express Phone entered its current ICA. AT&T Florida did not

waive its right to require Express Phone to cure its breach before consenting to Express Phone's 2011 adoption request. **

A. Express Phone's October 2010 Request to Adopt the Image Access ICA is Barred by Estoppel and Laches

Through its October 2010 request,[2] Express Phone is seeking the extraordinary relief of unilaterally and retroactively canceling its ICA more than a year before it expired to adopt a different agreement that was available at the time Express Phone voluntarily signed its ICA with AT&T Florida. The Commission reviewed and approved the Image Access ICA via Docket No. 060319-TP; the Commission has taken official notice of this docket. It clearly shows:

- AT&T Florida publicly filed the Image Access ICA requesting approval on **April 4, 2006**;
- the Image Access ICA was approved through 47 U.S.C. § 252(e)(4) on **July 3, 2006**; and
- the Commission issued a memorandum dated **July 7, 2006**, recognizing that the Image Access ICA had gone into effect.

Express Phone voluntarily signed its agreement more than six weeks later on August 23, 2006, without protest, and made no attempt to complain when AT&T Florida filed it with the Commission for approval. Express Phone had a full and fair opportunity pursuant to 47 U.S.C. § 252(i) to adopt the Image Access ICA at that time,[3] or to negotiate or arbitrate different payment terms for its ICA. Once Express Phone signed its agreement, however, it became contractually bound by its terms. *See Medical Ctr. Health Plan v. Brick*, 572 So.2d 548, 551 (Fla. 1st DCA 1990) ("A party is bound by, and a court is powerless to rewrite, the clear and unambiguous

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[2] This issue does not apply to Express Phone's March 2011 request to adopt the Image Access ICA. In March 2011, the window for negotiation of the successor interconnection agreement was open, and thus, Express Phone's request for a different contract was timely.

[3] If Express Phone had exercised its rights under § 252(i) in 2006 to adopt the Image Access ICA, AT&T Florida would have consented to that adoption, just as it did in June 2011, when Express Phone's affiliate, Digital Express, Inc., requested to adopt the Image Access ICA. *See* Exhibit 27; Tr. at 57:3-24.

terms of a voluntary contract.") (citation omitted). That agreement is enforceable and binding on both parties, even if a provision is perceived to be harsh or disadvantageous to one party. *See Applica Inc. v. Newtech Electronics Indus., Inc.*, 980 So. 2d 1194, 1194 (Fla. 3d DCA 2009). The ICA contract terms include clear provisions – Sections 2.1 and 2.2 – that the initial term is for five years and that Express Phone cannot terminate the contract early unless it ceases receiving services from AT&T Florida. *See* Exhibit 23, General Terms and Conditions, §§ 2.1, 2.2.

Quite simply, Express Phone could not unilaterally reject the contract it signed in order to avail itself of a contract it could have signed but did not. Under the doctrine of laches, Express Phone's failure to adopt the Image Access ICA in 2006 bars it from doing so in October 2010. Laches bars a party from pursuing a legal right that it may have had if it waits too long to do so. *See generally* 35 Fla. Jur. 2d Limitations and Laches § 115. Moreover, until the initial term of its ICA had expired or became subject to negotiation for its successor agreement, Express Phone was estopped from changing its mind, rejecting its ICA, and adopting a different agreement. Under Florida law, equitable estoppel results from the "voluntary conduct of a party" and "absolutely preclude[s]" the party from asserting rights which it might otherwise have had. *State* ex rel. *Watson v. Gray*, 48 So. 2d 84, 87-88 (Fla. 1950). Having chosen not to assert its right to adopt the Image Access ICA in 2006, Express Phone cannot wait nearly four years and then purport to exercise those rights in order to escape the provisions of its contract before that contract expired or became subject to re-negotiation. To hold otherwise, would be to hold that the agreement Express Phone did sign was unenforceable.

Rather than accepting the agreement that it voluntarily entered into, Express Phone offers this Commission a series of excuses. It argues that it was in an inferior bargaining position and

that somehow negates its voluntary agreement; it argues that AT&T Florida presented it with a standard contract that was different from one it had entered with another CLEC,[4] and it argues that AT&T Florida refused to negotiate. The premise of all of these arguments is wrong. First, Express Phone's position that it did not have the resources to negotiate with AT&T Florida has no valid basis. Express Phone's own expert witness said it best in his prior testimony on behalf of Verizon Wireless before the Montana commission. *See* Exhibit 40. In that case, Mr. Wood was asked whether the process of negotiating in good faith for an interconnection agreement would create an undue economic burden for small rural LECs. *See id.* at 6. He responded:

> This seems highly unlikely for several reasons. First, my experience suggests that this need not be the case. I have participated in well over 50 interconnection agreement negotiations, and while some of those negotiations – particularly, those with a large number (sometimes one hundred or more) of outstanding issues have certainly been resource-intensive, those with a limited number of issues have not been. In this case, the list of outstanding issues would be quite short. The parties appear to be in agreement regarding the type of interconnection and the location of the point of interconnection.

Id. at 6-7.

Even if AT&T Florida failed or refused to negotiate with Express Phone in 2006 (which is not the case), Express Phone never availed itself of the options it had before this Commission. In fact, the process for entering an interconnection agreement between a CLEC such as Express Phone and an ILEC like AT&T is unique – nowhere else in commercial law does a party have the procedural safeguards that a CLEC has. *See* Tr. at 153:4-7, 188:1-7. In enacting the 1996 Act, Congress "establishe[d] a system of negotiations and arbitrations in order to facilitate

[4] Express Phone's new argument at the hearing – namely, that AT&T Florida somehow misrepresented the Express Phone ICA as a "standard" agreement while, in Express Phone's view, the Image Access ICA was the standard agreement – is a red herring. AT&T Florida has no obligation to present any specific contract to a CLEC asking to enter an interconnection agreement. As Mr. Greenlaw testified, CLECs can - and many do - identify the agreement from which they want to negotiate. *See* Tr. 294:5-7. Mr. Greenlaw testified that AT&T Florida likely presented this agreement to Express Phone because "Express Phone probably indicated . . . that they were doing resale only, so therefore we provided a resale only agreement to them." Tr. at 294:17-20.

voluntary agreements between the competing carriers to implement its substantive requirements." *Iowa Network Servs., Inc. v. Qwest Corp.*, 385 F. Supp. 2d 850, 890 (S.D. Iowa 2005). The parties can negotiate to reach a mutually acceptable agreement (with mediation assistance if necessary), and can arbitrate any disputes that arise in the negotiating process. *See* 47 U.S.C. § 252(a), (b). Or, instead of negotiation or arbitration, a CLEC has adoption rights under § 252(i) to adopt an existing contract between the ILEC and another CLEC. Express Phone, however, never availed itself of any of these rights. *See* Tr. at 308:6-9.

One right Express Phone does not have, however, is the right to suggest (as it did during the hearing) that AT&T Florida has the burden to research the available interconnection agreements, assess which is best for Express Phone's business plans, and recommend that agreement to Express Phone for adoption. *See* Tr. at 86:23-87:18. Nothing in the 1996 Act or in state law even arguably imposes that burden on AT&T Florida, and for good reason. As Mr. Greenlaw explained, "it's incumbent upon the CLEC to identify what the terms and conditions are that they feel is the best deal." Tr. at 308:4-6. AT&T Florida could not possibly know the business plan of the CLECs, and therefore, "it is not AT&T's place to direct the CLEC to a specific agreement . . . . [S]ome terms and conditions may be very important for one carrier and not as important to others . . . . [I]t is not our position to determine what is favorable to one carrier over another. The terms speak for themselves." Tr. at 295:4-14.

Here, Express Phone concedes that it did not ask to adopt the Image Access ICA in 2006 and that it did not attempt to negotiate the terms and conditions of its agreement with AT&T Florida. *See* Tr. at 59:1-22, 61:16-20, 62:5-18, 65:1-5. Instead, it signed its ICA apparently without doing any due diligence on its own, despite the statutory safeguards available to it and despite this being the most important contract to its business. Tr. at 69:18-20 ("Q. But my

question was is that one of the most important contracts for your business? A. Yes."). Having not availed itself of the rights available to it when it voluntarily entered the Agreement with AT&T Florida in 2006, Express Phone was bound by the contract it signed and estopped in October 2010 from trying to get out of that contract and seeking one that it thinks is better.

B. AT&T Florida Did Not Waive its Right to Deny Express Phone's Adoption Request

AT&T Florida did not waive its position that Express Phone must cure its nonpayment breach before Express Phone can adopt the Image Access ICA. Express Phone's first request to adopt the Image Access ICA came on October 20, 2010, when there was more than a year left in the initial term of Express Phone's agreement. At that point, there was no need for AT&T Florida to look beyond the expiration date, and AT&T Florida properly advised Express Phone that its adoption request was simply too early under the terms of its agreement. *See* Exhibit 8. As Mr. Greenlaw explained:

> At that time, Express Phone had more than a year left in its contract term, and, as I stated in my direct testimony, AT&T Florida was not willing to allow Express Phone to adopt a new interconnection agreement midstream. There simply was no need to recite additional reasons that AT&T Florida would have denied that request had that not been the case.

Tr. at 275:1-5; *see also* Tr. at 286:16-22 ("Because at the time we would have receive *(sic.)* a request, the first criteria that our contract team would look at in accordance with our policy would be whether the current and effective agreement is within its negotiation window. Since that wasn't the case here, Express Phone received the letter they received in response.").

Express Phone takes issue with the fact that AT&T Florida did not raise Express Phone's existing breach of contract as a reason to deny its adoption request in October 2010. But any argument that AT&T Florida somehow waived its right to raise the breach later fails as an initial matter under the plain language of the ICA. Section 16 specifically addresses this issue and

provides that a "failure or delay of either Party to enforce any of the provisions hereof . . . 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." Exhibit 23, General Terms & Conditions, § 16.

Moreover, under Florida law, for waiver to occur, a party must have an intention to relinquish its rights. *See State Farm Mut. Auto. Ins. Co. v. Yenke*, 804 So. 2d 429, 432 (Fla. 5th DCA 2001). Here, there was no waiver because it is uncontroverted that AT&T Florida did not intend to give up its right to hold Express Phone to the terms of its ICA when it told Express Phone that its October 20, 2010 request was too early. When Express Phone later made another its request to adopt the Image Access ICA on March 21, 2011, AT&T Florida then substantively addressed the deficiencies in the request because that request was timely under the terms of its ICA. The ICA specifies when the parties can begin negotiating the successor agreement: "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." Exhibit 23, General Terms & Conditions, § 2.2. Consistent with this provision, AT&T Florida will begin substantively responding to adoption requests when the negotiation window opens. For the Express Phone ICA, that window opened on February 6, 2011. *See* Tr. at 258:11-15. Accordingly, AT&T Florida's response to Express Phone's March 14, 2011 adoption request was the time to raise the substantive deficiencies in Express Phone's request, not any earlier.

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. No legal authority allows Express Phone to unilaterally abandon a Commission-approved ICA with an unexpired term or while it is in breach of a material

provision. Instead, relevant authority holds Express Phone to its contract term and requires Express Phone to cure the breach before adopting a new ICA. **

A. Express Phone Cannot Terminate its ICA Early to Adopt the Image Access ICA

Through its October 20, 2010 request, Express Phone is seeking to terminate its current ICA and adopt a different ICA midstream and while it is in breach of its contractual obligations. The weight of legal authority confirms that Express Phone simply does not have this right.

As an initial matter, Express Phone's position that it is not seeking to terminate its ICA is flat-out wrong. To allow Express Phone to adopt another contract to govern the terms and conditions of the resale services it purchases from AT&T Florida would necessarily mean that its existing ICA is terminated. It is two sides of the same coin – Express Phone cannot have two contracts at the same time that govern the same services. That would be nonsensical.

It is black-letter law that once a party enters a contract, it is bound by that contract. *See Medical Ctr. Health Plan*, 572 So.2d at 551. Consistent with that standard, the Commission has already held that a CLEC cannot leave its ICA early to enter a different one. In the *Supra* case in 1998,[5] the Commission rejected a CLEC's request for arbitration of a new interconnection agreement while the parties were operating under an existing agreement. The Commission reasoned that the 1996 Act does not authorize the Commission to conduct an arbitration on matters covered by an agreement and to alter terms within an approved negotiated agreement. *Supra Telecomms. & Info. Sys.*, Order No. PSC-98-0466-FOF-TP, at 7. Specifically, the

[5] *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 (Mar. 31, 1998).

Commission found that the "Act does not authorize a state commission to alter terms within an approved negotiated agreement or to nullify an approved negotiated agreement." *Id.*

Express Phone claims that 47 U.S.C. § 252(i) and 47 C.F.R. § 51.809 grant it an absolute right to terminate its ICA in favor of a different one at any time and regardless of its state of compliance with its current agreement. The case law, however, says that Express Phone's position is wrong. The New York Commission addressed the nearly identical situation in *Petition of Pac-West Telecomm, Inc. v. a Declaratory Ruling Respecting its Rights to Interconnection with Verizon New York, Inc.*, Case No. 06-C-1042 (N.Y. Comm'n Feb. 27, 2007) (Exhibit 42). In that case, twenty months before the expiration date of its interconnection agreement, a CLEC attempted to opt into a different agreement, claiming that "unilateral termination is authorized whenever a § 252(i) option is exercised." *Id.* at 8. The New York commission rejected the CLEC's argument that §252(i) authorizes "voiding a contract." *Id.* at 10. It further held that "§252(i) does not confer an unconditional right to opt-in to an existing agreement or authorize unilateral termination of an existing interconnection," and it ruled that the CLEC "is not authorized to terminate its current . . . interconnection agreement." *Id.* at 11-12.

The *Pac-West* decision was a logical extension of prior decisions of the Massachusetts commission[6] and the First Circuit in *Global NAPs, Inc. v. Verizon*, 396 F.3d 16 (1st Cir. 2005). In *Global NAPs*, both the state commission and the First Circuit rejected a CLEC's attempt to adopt an interconnection agreement after the Commission ruled against it in an arbitration of another agreement. The Massachusetts commission ruled that once it had concluded the

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[6] Order on Verizon New England, Inc. d/b/a Verizon Massachusetts' Motion for Approval of Final Arbitration Agreement or, in the Alternative, for Clarification, *Petition of Global NAPs, Inc., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration to establish an interconnection agreement with Verizon New England, Inc. d/b/a Verizon Mass. f/k/a New England Tel. & Tel. Co. d/b/a Bell Atlantic-Mass.*, Case 02-45 (Mass. D.T.E. Feb. 19, 2003) (Exhibit 41).

arbitration and issued its order, the CLEC was not free to opt into another agreement pursuant to § 252(i) in lieu of accepting the arbitrated terms and incorporating them into its agreement. *Petition of Global NAPs, Inc.*, Case No. 02-45, at 8-14. The Massachusetts commission specifically rejected the CLEC's argument that "§ 252(i) grants [it], and any other CLEC, an unconditional right to avoid obligations under a state-arbitrated agreement and to enter into another agreement of its choosing instead." *Id.* at 8. The First Circuit agreed, concluding that § 252(i) does not grant a CLEC like Express Phone an unconditional right to opt out of one agreement and into another. *See Global NAPs, Inc.*, 396 F.3d at 23-25.

Following the Florida standard that a party is bound by a contract once it voluntarily enters the contract and the precedent from the New York and Massachusetts commissions, Express Phone was not (and is not) authorized to evade its contractual obligations by terminating its Commission-approved interconnection agreement and adopting another one. As Express Phone's own expert witness conceded, the logical extension of Express Phone's position is that a CLEC can leave its contract and adopt a different one every few weeks until the end of time. *See* Tr. at 187:6-11. That position is not supported by the law and certainly is not what Congress intended when it established contracts as the governing document for relationships between ILECs and CLECs. *See, e.g., Mich. Bell Tel. Co. v. Strand*, 305 F.3d 580, 582 (6th Cir. 2002) (interconnection agreement is the "Congressionally-prescribed vehicle implementing the substantive rights and obligations set forth in the Act"). When one party can change the rules of the game at a whim and unilaterally, the contract becomes illusory and there is no contract. *See Office Pavilion South Fla., Inc. v. ASAL Prods., Inc.*, 849 So. 2d 367, 370-71 (Fla. 4th DCA 2003) (illusory contracts unenforceable in Florida). The *Pac-West* and *Global NAPs* decisions confirm that Express Phone's view is not the proper reading of § 252(i).

B. Express Phone's Adoption Requests are Contrary to the Public Interest

Through both its October 20, 2010 and March 14, 2011 requests, Express Phone seeks a different agreement primarily – or perhaps solely – to avoid its obligation to pay its significant past due balance that it owes AT&T Florida. *See* Tr. at 77:22-78:2. It is telling that Express Phone did not seek to adopt the Image Access ICA until shortly after AT&T Florida's counsel reminded it of its contractual obligation to pay its bills in full and pointed out that Express Phone was breaching this obligation. *See* Exhibits 7, 37-38. Allowing Express Phone to unilaterally opt out of its Commission-approved ICA to adopt another agreement while it is in breach of its ICA would be contrary to the public interest. The Commission previously held in the *Fibre Channel Networks* case[7] (at 3) that it has "authority to reject [a requesting company's] adoption of the [ILEC/CLEC] Agreement as not being consistent with the public interest," when, as here, there has been "prior inappropriate conduct and actions of one of the parties."[8]

AT&T Florida conditionally accepted Express Phone's March 14, 2011 request with the primary condition that Express Phone first cure its non-payment breach. *See* Exhibit 10. This condition is fully consistent with the public interest. To put it another way, to allow Express Phone to adopt the Image Access ICA without first meeting this condition would be contrary to the public interest. To hold otherwise would reward Express Phone for its breach and would

[7] *In re: Notice by BellSouth Telecomms., Inc. of adoption of an approved interconnection, unbundling, and resale agreement between BellSouth Telecomms., Inc. and AT&T Commc'ns of the Southern States, Inc. by Healthcare Liability Mgmt. Corps. d/b/a Fibre Channel Networks, Inc. and Health Mgmt. Sys., Inc.*, Docket No. 99059-TP, Order No. PSC-99-1930-PAA-TP (Sept. 29. 1999).

[8] Other state commissions also apply a public interest standard in reviewing adoption requests. *See, e.g.*, Order Approving Negotiated Interconnection Agreement, *In the Matter of the joint application of Verizon Wash., DC, Inc. and Networks Plus, Inc. for approval of an interconnection agreement*, Case No. TIA-01-13 4, at 2 (D.C. Comm'n Jan. 11, 2002) (applying public interest standard to request for approval of § 252(i) adoption); Order Requesting Interconnection Agreement, Requiring Further Filing, *In the Matter of an Application for Approval of an Interconnection Agreement Adopted under the Federal Telecommunications Act of 1996, Section 252(i)*, Docket No. P-407, 5654/M-98-1920, available at 1999 WL 33595189 (Minn. P.U.C. Feb. 19, 1999) ("[T]he Commission has consistently held that it may reject the adoption of previously-approved agreements and require modifications in the public interest.").

mean that the terms of the Express Phone ICA were not enforceable, which is contrary to the Florida law standard that once a party voluntarily enters a contract, it is bound by that contract. *See Medical Ctr. Health Plan*, 572 So. 2d at 551. Allowing Express Phone to avoid its payment obligation of its current ICA would also be contrary to the Commission's 1998 holding in *GTE Florida* that "[m]erely because a carrier seeks to elect another agreement under Section 252(i) does not mean that whatever prior agreement the carrier had with the LEC was not binding . . . ."[9]

Express Phone argues that it should not be held to its contract term to pay its bills in full because, in its view, the term is discriminatory because it is different from the payment terms in the Image Access ICA. As an initial matter, this argument fails because under Florida law, a party is bound by a contract provision, even if it is somehow perceived to be harsh or unfair. *See Applica Inc.*, 980 So. 2d at 1194. More substantively in the telecommunications context, the premise of Express Phone's argument that a different requirement for a single term of an ICA necessarily equals discrimination is nonsensical. Contracts must be viewed as a whole, with the give and take that necessarily forms the whole contract. This is precisely why the FCC adopted the "all-or-nothing" rule for 47 C.F.R. § 51.809 in 2004.[10] Moreover, Congress contemplated

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[9] *In re: Petition for approval of election of interconnection agreement with GTE Florida Inc. pursuant to Section 252(i) of the Telecommunications Act of 1996, by Sprint Commc'ns Co. L.P. d/b/a Sprint*, Docket No. 97-1159-TP, Order No. PSC-98-0251-FOF-TP, at 12 (Feb. 6, 1998). This case does not support Express Phone's position on its right to adopt the Image Access ICA any time it wants. First, the decision is inconsistent not only with subsequent decisions the First Circuit, Massachusetts Commission and New York Commissions, but also with the subsequent decision of this Commission in *Supra* (Docket No. 980155-TP). Accordingly, it has been overruled and is not good law today. *See, e.g., Hull v. Md. Cas. Co.*, 79 So. 2d 517 (Fla. 1955) (recognizing earlier cases overruled by implication through later decisions). Second, even if that were not the case, the *GTE* decision was issued during the very early stages of the implementation of the 1996 Act and well before there was a robust group of publicly-filed ICAs for the CLEC to choose from at the initial contract stage. The Commission was concerned with rewarding companies that chose to take the "wait and see" approach at the expense of other carriers who proactively sought ICAs early. *GTE Florida Inc.*, Order No. PSC-98-0251-FOF-TP, at 12. It was a very different atmosphere in 2006 when Express Phone entered the ICA that it is seeking to escape from here.

[10] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, 19 F.C.C. R'cd 13,494, 13,501-03 ¶¶ 10-14 (July 13, 2004). The FCC

that contracts that an ILEC has with CLECs would necessarily be different and specifically provided in § 252(a) that the parties would be free to negotiate the terms and conditions that were best for them. That is why Congress determined that contracts would be the "vehicle" to govern the relationship. *Mich. Bell Tel. Co.*, 305 F.3d at 582. If Congress had wanted the same terms to govern the ILEC's relationship with all CLECs, it would have imposed statutory terms and conditions, or it would have required that the relationship be governed by tariffs (which are no stranger to the telecommunications industry). It chose neither course and, instead, gave parties the freedom to contract.

Moreover, Express Phone's argument that there is something fundamentally wrong with the payment terms of its ICA is belied by the Commission's two prior decisions enforcing those terms. *See In re: request for emergency relief and complaint of FLATEL, Inc. against BellSouth Telecomms., Inc. d/b/a AT&T Florida to resolve interconnection agreement dispute*, Docket No. 110306-TP, Order No. PSC-12-0085-FOF-TP (Feb. 24, 2012); *In re: Complaint and petition for relief against LifeConnex Telecom, LLC f/k/a Swiftel, LLC by BellSouth Telecomms., Inc. d/b/a AT&T Florida*, Docket No. 100021-TP, Order No. PSC-10-0457-PCO-TP (July 16, 2010).[11]

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found that the "all-or-nothing" rule would promote negotiations of ICAs: "[w]e find that the record evidence supports our conclusion that an all-or-nothing rule would better serve the goals of sections 251 and 252 to promote negotiated interconnection agreements because it would encourage incumbent LECs to make trade-offs in negotiations that they are reluctant to accept under the existing rule." *Id.* at 13,501-02 ¶ 12.

[11] The Commission took official notice of both decisions at the May 3, 2012 hearing. The Alabama, Kentucky and North Carolina Commissions all reached similar decisions. Order Granting in Part and Denying in Part LifeConnex Telecom, LLC's Petition and Motion for Emergency Relief, *In the Matter of: BellSouth Telecomms., Inc. d/b/a AT&T Alabama or AT&T Southeast v. LifeConnex Telecom, LLC f/k/a Swiftel, LLC*, Docket 31450 (Ala. P.S.C. Aug. 20, 2010) (Exhibit 28); Order, *In the Matter of: BellSouth Telecomms., Inc. d/b/a A&T Southeast d/b/a AT&T Kentucky v. LifeConnex Telecom, LLC f/k/a Swiftel, LLC*, Case No. 2010-00026 (Ky. P.S.C. Aug. 20, 2010) (Exhibit 29); Order Ruling on Dockets, *In the Matter of the Disconnection of LifeConnex Telecom, Inc. f/k/a Swiftel, LLC by BellSouth Telecomms., Inc. d/b/a AT&T Southeast d/b/a AT&T North Carolina*, Docket No. P-55, Sub 1817 (N.C. Utils. Comm'n Sept. 22, 2010) (Exhibit 30).

It is not the purpose of § 252(i), nor should it be construed, to allow a carrier to escape its payment obligations under an existing agreement. If the Commission were to allow Express Phone to adopt the Image Access ICA through either its October 20 or March 14 requests, it would allow Express Phone to engage in "inappropriate conduct and actions" with no consequences whatsoever, thus negating the express and unambiguous terms of the parties' ICA.

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

<u>Position</u>: ** No. Section 2.1 establishes an initial five-year term which ended in November 2011; Express Phone has no early termination right. Section 11 is merely a recitation of the relevant section of the Act and FCC regulations. It does not grant any rights beyond those the parties already have by law. **

Express Phone argues that, if the Commission disagrees with its expansive reading of § 252(i), then its 2006 ICA somehow grants it the right to escape that contract. That argument is plainly wrong. To the contrary, its 2006 ICA clearly and unambiguously specifies that it has a five year term. *See* Exhibit 23, General Terms and Conditions, § 2.1. That term began on November 3, 2006 and did not expire until November 2, 2011. There is nothing in the ICA that alters that five year term. Instead, Express Phone can terminate the agreement early "only if it is no longer purchasing services pursuant to this Agreement." *Id.* § 2.3.1. Express Phone continuously purchased services from AT&T Florida under the Agreement until April 20, 2011, when AT&T Florida disconnected those services for non-payment. *See* Tr. at 227:10-13.

Express Phone focuses on Section 11 of the General Terms and Conditions and claims that it expands § 252(i) and 47 C.F.R. § 51.809 to grant it broader adoption rights. But that

argument fails, too. On its face, Section 11 does nothing more than repeat, rather than expand upon, the statutory and regulatory rights of those provisions:

> **Adoption of Agreements**
> Pursuant to 47 U.S.C. § 252(i) and 47 C.F.R. § 51.809, BellSouth [AT&T Florida] 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.

Exhibit 23, General Terms and Conditions, § 11.

Section 11 does not grant any rights beyond the rights and obligations that the parties already have by law. As discussed 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.

Even if the Commission somehow agreed that Section 11 was more expansive than § 252(i), it still does not help Express Phone. Section 11 is limited to resale agreements – "any entire ***resale agreement***" – and does not apply to interconnection agreements such as the Image Access ICA that Express Phone is seeking to adopt. Mr. Greenlaw explained the difference:

> [S]ome CLECs that maybe had a business plan that involved collocation, or UNEs, interconnection, the generic agreement, if you will, that they would have been provided would have been, of course, different than the one Express Phone was provided. The agreement that Express Phone was provided at the time would have been our standard agreement for CLECs that had indicated they were only doing resale.

Tr. at 306:16-24; *see also id.* at 309:20-24 ("But when you get into a position where you have a carrier that is ordering UNEs from us, there are entire sections dedicated to that to ensure that the provisions of the Act, any law is memorialized properly. . . . If the CLEC is not interested in that, there is really no need to put that in the agreement."); *id.* at 310:19-20 ("[T]he provisions that govern the purchase of those services in question are typically what would be different.").

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

__Position:__ ** The adoption can never be effective because Express Phone has not cured its breach and the contract it wants to adopt is no longer available. Alternatively, the adoption should be effective no earlier than 90 days after March 29, 2011, the first filing date with the Commission. **

For the myriad reasons discussed in AT&T Florida's responses to Issues 1-3, Express Phone's effort to adopt the Image Access ICA should be denied. Express Phone's request to adopt the Image Access ICA can never be effective because Express Phone has not cured its breach under its existing ICA, and its failure to cure that substantial breach prior to the expiration of the Image Access ICA means that, as a result of its own actions (or more correctly, inactions in failing to pay AT&T Florida and cure its breach), its opportunity to opt into the Image Access ICA is now gone.

It is undisputed that Express Phone breached its ICA by failing to pay its bills in full, that Express Phone never cured that breach, and that Express Phone currently owes AT&T Florida more than $1.3M. *See* Tr. at 225:21-22, 226:26-27, 227:10-13, 228:13-19. As a result, AT&T Florida terminated the provision of services to Express Phone on April 20, 2011. *See* Tr. at 227:10-13. To allow Express Phone to adopt the Image Access ICA at any time before this breach is cured would effectively be to excuse it from complying with its contract, which is contrary to Florida law which holds that a "party is bound by, and a court is powerless to rewrite, the clear and unambiguous terms of a voluntary contract." *Medical Ctr. Health Plan*, 572 So. 2d at 551.

As a practical matter, at this point, it is too late for Express Phone to adopt the Image Access ICA after curing its breach.[12] The term of the Image Access ICA expired on April 18, 2012. *See* Exhibit 6. Express Phone's expert witness conceded at the hearing that the Image Access ICA is already expired and not available for adoption. *See* Tr. at 184:7-23; *see also* 47 C.F.R. § 51.809(c) (providing that ICA only available for adoption "for a reasonable period of time" after it is approved by the Commission). Express Phone's own counsel objected when AT&T Florida tried to pose a hypothetical to its expert based on the adoption being effective on the date of the hearing because it was a "hypothetical on something that both people seem to agree could not possibly happen." Tr. at 185:2-4. Thus, even if Express Phone were to cure its breach today (and regardless of this outcome of this case, it is still obligated to pay AT&T Florida all outstanding charges), it should not be permitted to adopt the Image Access ICA.

Alternatively, and assuming hypothetically that the Commission could somehow excuse Express Phone's blatant breach of its existing ICA to permit it to opt-in to another ICA (concededly to take advantage of language in that ICA that, in Express Phone's view, would allow Express Phone to stop paying AT&T Florida, *see* Tr. at 77:22-78:2, and put the onus on AT&T Florida to chase Express Phone through this Commission and the courts), any such adoption, ill-advised as it would be, should be effective no earlier than June 27, 2011, which is 90 days after March 29, 2011, which is the date Express Phone filed its first Notice of Adoption with the Commission.

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[12] This is not a situation where there could even be an argument that there has been delay caused by AT&T Florida that prevented Express Phone's adoption of the Image Access ICA. AT&T Florida clearly told Express Phone on March 25, 2011 that if it cured its nonpayment breach while the Image Access ICA remained available for adoption, AT&T Florida would consent to the adoption. *See* Exhibit 10. Express Phone did not – and has not – cured that breach in time.

Express Phone's October 20, 2010 and March 14, 2011 requests to AT&T Florida for adoption of the Image Access ICA were not sufficient to create a binding contract. Those letters were merely intended to start the process by which AT&T Florida would then review the request for adoption and the factors that could impact the request, including as key factors here, that Express Phone had substantial time remaining on the initial term of its ICA and was already in substantial breach of that ICA. Any Commission finding that October 20, 2010 or March 14, 2011 could be the effective date of the adopted ICA not only would reward Express Phone for its breach of its existing agreement, it would be a finding that AT&T Florida can be forced to be a party to a contract without its consent and that the Commission has the authority to deny AT&T Florida its right to evaluate the request subject to the provisions of 47 C.F.R. § 51.809.

That is something the Commission should not, and indeed cannot, do. The plain language of 47 C.F.R. § 51.809(a) confirms that an adoption is not self-effectuating and requires some lapse of time between the filing of the notice and the effectiveness of the adoption. The language from § 51.809(a) that Express Phone's counsel conveniently omitted during her opening statement at the hearing (*compare* Tr. at 17:5-8, *with id.* at 23:7-15) is critical: "[a]n incumbent LEC shall make available ***without unreasonable delay*** to any requesting telecommunications carrier any agreement in its entirety . . ." 47 C.F.R. § 51.809(a) (emphasis added). If the Commission were faced with a circumstance where it needed to establish an opt-in date for a CLEC that was ***not*** in breach of its existing ICA – certainly not the case here – then in that instance, a good proxy for the "[]reasonable" time provided by § 51.809(a) would be the 90 days granted to the Commission to review contract approvals under 47 U.S.C. § 252(e).[13]

[13] AT&T Florida recognizes that this position is somewhat inconsistent with the Commission's holding in the *Nextel Adoption Order*, Docket No. 070368-TP, Order No. PSC-08-0584-FOF-TP (Sept. 8, 2008), which held that the adoption was effective on the date the carrier filed the notice with the Commission. AT&T Florida respectfully notes that the holding in the *Nextel Adoption Order* that the adoption was

To hold that Express Phone's adoption somehow became effective the moment it was filed would be to find that the adoption is self-effectuating. But the only federal appellate court to address this issue has already rejected that argument. Consistent with the plain language of § 51.809(a), in *BellSouth Telecommunications, Inc. v. Southeast Telephone, Inc.*, 462 F.3d 650 (6th Cir. 2006), the Sixth Circuit rejected the CLEC's argument that the adoption was "'an already-completed event' at the moment that the request was filed." *Id.* at 660. Instead, the CLEC's "opt-in application did not mature until the PSC gave its approval." *Id.* at 662. Thus, Express Phone's position that the adoption should have been considered effective on October 20, 2010, when it sent its first request to AT&T Florida, is simply wrong.

Express Phone further argues that this Commission's *Nextel Adoption Order* made the adoption effective as soon as AT&T Florida received its October 20, 2010 request. But that is a gross misreading of the Commission's holding. Under the *Nextel Adoption Order*, simply sending a letter to AT&T Florida is not enough; the carrier must also provide notice to the Commission. Here, Express Phone did no such thing until March 29, 2011. The North Carolina Commission reached a similar decision in the case that Express Phone raised for the first time during the redirect testimony of Don Wood. Just like this Commission, the North Carolina Commission held that the Nextel adoption was effective on the date Nextel filed its notice with the Commission, not when it earlier made a request to AT&T. *Compare BellSouth Telecomms., Inc. v. N.C. Utilities Comm'n*, No. 4:09–CV–33–FL, 2010 WL 5559396, at *1 (E.D.N.C. Jan. 26, 2010) (filing date), *with id.* at *2, *5 (effective date).

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effective on the date of filing ignores the phrase "without unreasonable delay" from § 51.809(a). For that language to have any meaning there must be a lapse between the notice and the effective date. In addition, the circumstances of the *Nextel Adoption Order* were very different from those presented here – it concerned an FCC-imposed merger condition on AT&T Florida's parent company which was a much stricter requirement than what the regulation itself imposes.

Thus, the appropriate comparison from the *Nextel Adoption Order* to Express Phone's October 20 letter is a letter that Nextel sent AT&T Florida on May 18, 2007, before it commenced the docket. *See* Exhibit 39. Through that May 18, 2007 letter, Nextel gave "notice" to AT&T Florida that it was adopting the Sprint interconnection agreement, *see id.*, and the Commission still held that the adoption was not effective until Nextel filed its notice with the Commission. Here, Express Phone did not file any notice with this Commission until March 29, 2011. *See* Exhibit 13.

To accept Express Phone's position that the adoption could have become effective on October 20, 2010, would mean that an ILEC and a CLEC could be parties to an interconnection agreement without the knowledge of this Commission, which is contrary to the process established by the 1996 Act. As Express Phone's expert witness conceded:

> Q. On October 20th, 2010 nothing had been filed with the Commission that notified the Commission that that was the contract that Express Phone believed it was operating under, is that correct?
>
> A. That's my understanding, yes.
>
> Q. And these Commissioners had no information to indicate that that was the contract that Express Phone believed was the operating contract?
>
> A. They didn't, but AT&T did.
>
> Q. But the Commissioners did not?
>
> A. The Commissioners did not. . . .
>
> * * *
>
> Q. . . . On October 20th, 2010, these five Commissioners sitting before us today had no knowledge that Express Phone believed that the contract between AT&T and Image Access was the controlling terms and conditions for Express Phone and AT&T?
>
> A. They wouldn't have known about that yet, that's right.

Tr. at 160:6-16, 161:9-15.

The practical problem with Express Phone's position is evident by the companion docket, Docket No. 110071-TP. In that case, Express Phone sought a Commission order barring AT&T Florida from exercising its contractual right to enforce the payment provisions of the Express Phone ICA. Express Phone claimed that a different contract applied – the Image Access ICA – but the Commission and its staff knew nothing about that. According to Mr. Armstrong's testimony, Express Phone only filed the Notice of Adoption and commenced this docket (Docket No. 110087-TP) "in response to an inquiry or a statement by – I believe it was by staff. I don't believe it was by the Commissioners themselves, but by staff in a discussion that they said have you ever filed a notice with us, so from my memory that – this was filed." Tr. at 84:21-85:1.

Thus, under the Commission's own decision, there is absolutely no merit to Express Phone's position that AT&T Florida should have treated Express Phone's October 20 letter as self-effectuating and effective. Even if the Commission could somehow overlook Express Phone's breach of its then-existing contract to permit Express Phone to opt into a different one – and it should not – the earliest reasonable date such an opt in could have been allowed would have been June 27, 2011, that is, a date that assumes the 90 review timeline under § 252(e) after Express Phone first provided notice to the Commission on March 29, 2011. For all periods before then, the ICA signed by Express Phone in 2006 would govern, including with respect to AT&T Florida's right to demand payment from Express Phone and exercise its right to terminate services because of Express Phone's failure to pay.

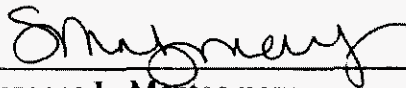
IV. Conclusion

Express Phone had a full and fair opportunity to adopt the Image Access ICA in 2006 and instead voluntarily signed a different ICA with a five year term. Express Phone is currently and

has for some time been in breach of that ICA for failing to pay its bills in full. As all the recent authority interpreting it has uniformly held, Section 252(i) of the Act does not exist to provide CLECs with a vehicle to abandon contracts before their terms expire and while they are in breach. Despite having more legal protections in the contract negotiation process than what is afforded any other commercial entity, Express Phone chose a contract without performing its due diligence on what might be available to it, and it therefore must live with that choice. AT&T Florida respectfully requests that the Commission adopt its positions on each of the issues.

Respectfully submitted this 1st day of June, 2012.

AT&T FLORIDA



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