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Public Service Commission

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COMMISSION
CLERK

-M-E-M-O-R-A-N-D-U-M-

DATE: June 2, 2011

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Tan)
Division of Regulatory Analysis (Bates, Trueblood)

Handwritten signatures in black ink, including initials "TB" and "AT", and a larger signature.

RE: Docket No. 110071-TP – Emergency Complaint of Express Phone Service, Inc. against Bellsouth Telecommunications, Inc. d/b/a AT&T Florida regarding interpretation of the parties' interconnection agreement.

Docket No. 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.

AGENDA: 06/14/11 – Oral Argument Requested in Docket No. 110087-TP – Motion for Summary Final Order – Decision Prior to Hearing – Participation at the Discretion of the Commissioners for Issues 1 & 2 – Proposed Agency Action for Item 3 – Parties Can Participate on Issues 3 & 4

COMMISSIONERS ASSIGNED: All Commissioners (110071-TP)
Administrative (110087-TP)

PREHEARING OFFICER: Balbis (110071-TP)
Administrative (110087-TP)

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\110071.110087.RCM.DOC

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Case Background

Docket Nos. 110071-TP and 110087-TP involve Express Phone Service, Inc. (Express Phone) and BellSouth Telecommunications, Inc. d/b/a AT&T Florida (AT&T Florida). Express Phone is a certificated Competitive Local Exchange Company (CLEC) in the state of Florida. Express Phone and AT&T Florida have an existing interconnection agreement (ICA) approved by the Commission in Docket No. 060714-TP. The Parties' ICA was effective until November 2, 2011.

Docket No. 110071-TP

On March 15, 2011, Express Phone filed an emergency complaint against AT&T Florida, requesting emergency relief to avoid customer disconnection, that the docket be held in abeyance, and mediation (Emergency Complaint).¹ The Emergency Complaint alleges that on March 18, 2011, AT&T Florida planned to improperly disrupt Express Phone's service order provisioning, and cut off all services to existing Express Phone customers due to billing disputes arising out of the parties' ICA.² In addition, Express Phone argues that AT&T Florida's failure to honor Express Phone's request to adopt a different ICA violates the Telecommunications Act of 1996 (the Act).

On March 17, 2011, staff held a meeting via conference call to give the parties an opportunity to discuss the Complaint and imminent disconnection of services to Express Phone's customers.

On March 18, 2011, Express Phone filed a motion seeking emergency relief to maintain the status quo, allowing Express Phone to continue service to its customers.³ On March 25, 2011, AT&T Florida filed its Response in Opposition to Express Phone's Motion for Emergency Consideration by the Prehearing Officer to Maintain Status Quo. By Order No. PSC-11-0180-PCO-TP, issued March 30, 2011, Express Phone's Emergency Motion was denied.⁴ Express Phone was disconnected on March 30, 2011.

On April 4, 2011, AT&T Florida filed its Response in Opposition to Express Phone's Emergency Complaint, Request to Hold Docket in Abeyance and Request for Mediation. AT&T Florida contends that Express Phone has not honored its commitments under the ICA and has stopped paying its bills on disputed amounts, contrary to the Parties' ICA language that states "Express Phone shall make payment to [AT&T Florida] for all services billed including disputed

¹ Emergency Complaint, Request for Emergency Relief to Avoid Customer Disconnection, Request to Hold Docket in Abeyance, and Request for Mediation against BellSouth Telecommunications, Inc. d/b/a AT&T Florida.

² Express Phone states that the billing disputes stem from the calculation/application of promotional credits for resold services.

³ Express Phone Service, Inc's Motion for Emergency Consideration by the Prehearing Officer to Maintain Status Quo.

⁴ The Order noted that while Prehearing Officers have much discretion regarding the procedural aspects of dockets, Express Phone's Emergency Motion seeks relief that exceeds the bounds of a procedural ruling authorized by Rule 28-106.305, F.A.C. stating that "[u]pon review of Express Phone's request for an Order maintaining the status quo, it appears that Express Phone's request is more akin to a request for injunctive relief. This Commission has consistently held that we lack authority to grant injunctive relief."

Docket Nos. 110071-TP, 110087-TP
Date: June 2, 2011

amounts.” AT&T Florida also opposes Express Phone’s request to adopt a different agreement because Express Phone has no right to switch from one ICA to another in mid-stream, stating that the current ICA is in effect until November 2011.

Docket No. 110087-TP

On March 29, 2011, Express Phone filed a Notice of Adoption with the Commission that it was adopting, in its entirety, the ICA between AT&T Florida and Image Access, Inc. d/b/a NewPhone (Image Access ICA). Express Phone asserts it twice attempted to secure AT&T Florida’s acknowledgement of its adoption of the Image Access ICA: first, on October 21, 2010, by correspondence with AT&T Florida indicating its desire to adopt the Image Access ICA and then by letter to AT&T Florida on March 14, 2011. Express Phone argues that AT&T Florida refused to recognize the adoption by imposing conditions on Express Phone which do not appear in Section 252(i) of the Act or its implementing rules. AT&T Florida argues that Express Phone was not entitled to adopt the Image Access ICA because Express Phone’s ICA had not yet expired and Express Phone was withholding payments in dispute.

On March 29, 2011, AT&T Florida submitted a letter in Docket 110087-TP, objecting and withholding consent of Express Phone’s attempt to adopt an ICA different from its current and effective ICA on file with the Commission. AT&T Florida noted that Express Phone’s letter does not alter the effectiveness of the current agreement between the parties, which was signed by both and approved by the Commission. On April 4, 2011, Express Phone filed an Amended Notice of Adoption.

On April 12, 2011, Express Phone filed a Motion for Summary Final Order and Request for Oral Argument. In its Motion, Express Phone states there are no legitimate issues of material fact that remain to be resolved surrounding its right to adopt the Image Access ICA. As such, Express Phone requests that the Commission issue a Summary Final Order that finds Express Phone’s adoption of the Image Access ICA, as amended, valid pursuant to 47 U.S.C. 252(i) and 47 C.F.R. 51.809 as a matter of law. Express Phone believes that the Commission should further find such adoption effective as of October 20, 2010.

On April 18, 2011, AT&T Florida filed its Response in Opposition to the Amended Notice of Adoption. On April 19, 2011, AT&T Florida filed its Response and Objections to Express Phone Service, Inc.’s Motion for Final Summary Order. AT&T Florida argues that Express Phone is not entitled to the relief that it seeks, nor allowed to adopt the Image Access ICA, concluding that Express Phone is currently subject to an existing ICA and is in material breach of the ICA by withholding payments for amounts in dispute.

A decision regarding Express Phone’s Motion for Summary Final Order in Docket No. 110087-TP will directly affect how the Commission may handle issues in Docket No. 110071-TP regarding the Adoption of the Image Access ICA.

Adoption of Interconnection Agreement

Pursuant to the Act, a telecommunications carrier has two methods to interconnect with an incumbent Local Exchange Company (LEC). The first method, described in Section 252(a), is through negotiation, and the second, detailed in Section 252(b), is through compulsory arbitration. However, in lieu of Sections 252(a) and (b), a telecommunications carrier may also adopt an existing interconnection agreement. An interested carrier may choose to adopt an existing interconnection agreement on file with the PSC that best meets its business needs. The requesting carrier must adopt all terms and conditions included within the existing interconnection agreement.

Section 252(i) and 47 C.F.R. 51.809 govern a telecommunications carrier's adoption of an existing interconnection agreement between an ILEC and a non-ILEC.

Section 252(i) provides:

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.

47 C.F.R. 51.809, describes the two instances where an incumbent LEC may deny a requesting carrier the right to adopt an entire effective agreement. 47 C.F.R. 51.809(b) provides "[t]he 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."

Unless an incumbent LEC can demonstrate its costs will be greater to provide the agreement to the new carrier(s), or the agreement is not technically feasible to provide to the new carrier(s), the incumbent LEC may not restrict the carrier's right to adopt.

The purpose of the Federal Communication Commission's (FCC) adoption requirements is to ensure that a LEC cannot discriminate amongst the carriers it serves. However, staff believes the instant case triggers a public policy consideration prior to the application of the FCC's adoption requirements. Specifically, in this case the Commission is being asked to consider whether a CLEC that has an outstanding balance due to its underlying carrier should be permitted to adopt a new ICA that modifies its existing payment obligations.

Docket Nos. 110071-TP, 110087-TP
Date: June 2, 2011

The Commission has jurisdiction pursuant to Chapters 120 and 364, Florida Statutes and Section 252(i) of the Act.

Discussion of Issues

Issue 1: Should Express Phone Service, Inc.'s Request for Oral Argument on its Motion for Summary Final Order in Docket No. 110087-TP be granted?

Recommendation: Yes. The Commission should allow each party ten minutes for Oral Argument. (Tan)

Staff Analysis: Rule 25-22.0022(3), Florida Administrative Code (F.A.C.), states that granting or denying a request for oral argument is within the sole discretion of the Commission or the Prehearing Officer, whichever presides over the matter to be argued.

Express Phone believes that oral argument will aid the Commission in understanding and evaluating the legal basis for its Motion for Summary Final Order, including its belief that the standard for summary final order provided in Rule 28-106.204(4), F.A.C., has been met. Express Phone requests that each side be granted fifteen (15) minutes to present its arguments. AT&T Florida did not address the request for oral argument.

Analysis

The Commission has traditionally granted oral argument upon a finding that oral argument would aid the Commission in its understanding and disposition of the underlying matter. Rule 25-22.0022(3), F.A.C., provides that granting or denying a request for oral argument is within the sole discretion of the Commission.

Staff believes the Commissioners would benefit from oral argument presented in this recommendation. If the Commission believes that the motion and responses are clear on their face and that oral argument would not be helpful, it has the discretion to deny the motion. If the Commission decides to hear from the parties, staff recommends that the Commission allow ten minutes per side, addressing Docket No. 110087-TP.

Issue 2: Should Express Phone's Motion for Summary Final Order filed in Docket No. 110087-TP be granted?

Recommendation: No. Express Phone's Motion for Summary Final Order in Docket No. 110087-TP should be denied. (Tan)

Staff Analysis:

Standard of Review

Section 120.57(1)(h), F.S., provides that a Summary Final Order shall be granted if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order. Rule 28-106.204(4), F.A.C., states that "[a]ny party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits."

The purpose of summary judgment, or in this proceeding, summary final order, is to avoid the expense and delay of trial when no dispute exists concerning the material facts. The record is reviewed in the light most favorable toward AT&T Florida, against whom the summary judgment is to be entered. Express Phone carries a heavy burden to present a showing that there is no genuine issue as to any material fact. Subsequently, the burden shifts to AT&T Florida to demonstrate the falsity of the showing. If AT&T Florida does not do so, summary judgment is proper and should be affirmed. Even if the facts are not disputed, a summary judgment is improper if different conclusions or inferences can be drawn from the facts. See Trawick's Florida Practice and Procedure, Section 25-5, Summary Judgment Generally, Henry P. Trawick, Jr. (2011).

Parties Arguments

Express Phone

Express Phone argues that the following facts are undisputed and entitle it to adopt the ICA effective October 20, 2010.

- Express Phone entered into a Resale ICA with AT&T Florida on October 4, 2006. The ICA was filed for approval in Docket No. 060714-TP.
- On October 20, 2010, Express Phone faxed a letter to AT&T Florida stating that it adopted the Image Access ICA.
- AT&T Florida responded to Express Phone on November 1, 2010, claiming that Express Phone was not entitled to exercise its opt in rights because its current ICA was still in effect.
- On March 14, 2011, Express Phone notified AT&T Florida of its desire to adopt the Image Access ICA.

- On March 25, 2011, AT&T Florida responded with a list of conditions it required be fulfilled before it would recognize the adoption.
- AT&T Florida has continued to refuse to acknowledge Express Phone's adoption of the Image Access ICA.
- The Image Access ICA was filed for approval in Docket 060319-TP.
- On March 29, 2011, Express Phone filed a Notice of Adoption of the Image Access ICA with the Commission.
- On April 4, 2011, Express Phone filed its Amended Notice of Adoption with the Commission.

Express Phone believes there is no genuine issue as to any material fact. Express Phone further believes that it should be allowed to adopt the Image Access ICA as a matter of law because AT&T Florida does not claim a statutory exception as established in 47 C.F.R. 51.809.⁵ Express Phone believes that if AT&T Florida had timely recognized the Image Access adoption request, AT&T Florida would not have been able to terminate service to Express Phone. Therefore, Express Phone requests that the Commission grant its Motion for Summary Final Order and direct AT&T Florida to immediately reinstate service to Express Phone.

AT&T Florida

AT&T Florida requests that the Commission deny Express Phone's Motion for Summary Final Order because the following facts are in dispute.

- The effective date of the attempted adoption.
- The status of the current ICA.
- The identity of the ICA that Express Phone is seeking to adopt.
- The availability of relief sought by Express Phone.

AT&T Florida further argues that Express Phone's motion fails as a matter of law because Express Phone is not in good standing under the Parties' existing ICA. AT&T Florida contends that Commission approval of an ICA does not automatically mean that the ICA is available or appropriate for adoption. AT&T Florida also believes that the underlying complaint in Docket No. 110071-TP has not progressed far enough to consider a motion for summary final order, arguing that the matter is still at a preliminary stage and the parties have not provided testimony or discovery.

Analysis

AT&T Florida and Express Phone were operating under an ICA with a five year term, in effect from November 2006 until November 2011. On March 29, 2011, Express Phone filed a notice to adopt the Image Access ICA.⁶ It appears that the impetus for wanting to adopt the Image Access ICA is that Express Phone believes it contains terms that are more advantageous. Specifically, Express Phone's current ICA contains language that requires it to pay both disputed

⁵ 47 C.F.R. Section 51.809 provides technical feasibility and cost exceptions for adoption.

⁶ The Image Access ICA was amended in 2009, extending the contract term to 2012.

and undisputed amounts for services. The Image Access agreement does not contain the same provisions regarding disputed amounts. Express Phone believes that if it is allowed to adopt the Image Access agreement, any debts in dispute may be withheld. AT&T Florida disagrees with Express Phone unilaterally adopting a different ICA when their current ICA is still in effect and Express Phone is in breach by failing to pay the disputed amounts.

It is staff's recommendation to deny Express Phone's Motion for Summary Final Order. Despite Express Phone's claims that nothing should prevent it from adopting the Image Access ICA, Express Phone has the burden to establish that no material facts are in dispute. The burden is on the movant to demonstrate that the opposing party cannot prevail. Christian v. Overstreet Paving Co., 679 So. 2d 839 (Fla. 2nd DCA 1996). Staff believes that Express Phone has failed to establish that there are no material facts in dispute.

The standard for granting a summary final order is very high. Under Florida law, "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and . . . every possible inference must be drawn in favor of the party against whom a summary judgment is sought." Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993) (citing Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1977)). "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." Moore v. Morris, 475 So. 2d 666 (Fla. 1985); City of Clermont, Florida v. Lake City Utility Services, Inc., 760 So. 2d 1123 (5th DCA 2000). The purpose of a summary final order is to avoid the expense and delay of trial when no dispute exists concerning the material facts. There are two requirements for a summary final order: (1) there is no genuine issue of material fact; and (2) a party is entitled to judgment as a matter of law. If the record reflects the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt that an issue might exist, summary judgment is improper. Albelo v. Southern Bell, 682 So. 2d 1126 (Fla. 4th DCA 1996). "Even where the facts are uncontroverted, the remedy of summary judgment is not available if different inferences can be reasonably drawn from the uncontroverted facts." Albelo, at 1129.

First, Express Phone filed its interconnection agreement with AT&T Florida at the Commission on November 2, 2006, for a five year term. A question has been raised whether a company can adopt a new interconnection agreement for the same services during the life of the current interconnection agreement. Both Express Phone and AT&T Florida have offered interpretations of the terms and conditions of the existing interconnection agreement. This is a question of first impression before the Commission and staff believes it is therefore inappropriate to be dealt with by summary final order.

Second, Express Phone admits to withholding payments that are disputed. AT&T Florida believes that Express Phone's actions constitute a breach of the existing ICA, and as such, Express Phone's service has been disconnected pursuant to the ICA. Express Phone has not conclusively demonstrated that AT&T Florida cannot prevail on this issue. Staff believes that the Commission must decide whether failure to abide by an existing ICA renders a company unable to avail itself of adoption until the existing contract is made whole by company action.

Staff notes that this Commission has recognized that policy considerations should be taken into account in ruling on a motion for summary final order.⁷ Because the Commission has a duty to regulate in the public interest, the rights of not only the parties must be considered but also the potential impact to others and the decision cannot be made in a vacuum. Policy considerations must be taken into account in granting a summary judgment.⁸

Finally, should the Commission decide that the Image Access ICA is adoptable by Express Phone, AT&T Florida and Express Phone have both offered different effective dates for the Image Access ICA adoption. With respect to the effective date, staff believes that conflicting interpretation exists regarding the point in time the adoption was noticed and that therefore, a genuine issue of material fact exists concerning the effective date of the adoption.

The Commission has rendered decisions previously on the effective date of an adoption; however, the questions regarding the status of the existing interconnection agreement are new. Staff believes that genuine issues of material fact exist. There are outstanding questions of fact regarding the status of the interconnection agreement, the effective date of adoption and whether Express Phone can adopt the Image Access ICA as a matter of law. As such, staff recommends denying the Motion for Summary Final Order.

Conclusion

Staff recommends that Express Phone's Motion for Summary Final Order should be denied.

⁷ Order No. PSC-98-1538-PCO-WS, issued November 20, 1998, in Docket Nos. 970657-WS and 980261-WS, In Re: Application for Certificates to Operate a Water and Wastewater Utility in Charlotte and Desoto Counties by Lake Suzy Utilities, Inc., and In Re: Application for Amendment of Certificates Nos. 570-W and 496-S To Add Territory in Charlotte County by Florida Water Services Corporation.

⁸ PSC-07-1008-PAA-TL, issued December, 19, 2007, in Docket No. 070126-TL, In re: Petition for relief from carrier-of-last-resort (COLR) obligations pursuant to Section 364.025(6)(d), F.S., for Villages of Avalon, Phase II, in Hernando County, by BellSouth Telecommunications, Inc. d/b/a AT&T Florida.

Issue 3: Should Express Phone be permitted to adopt the Image Access ICA?

Recommendation: No. Adoption of the Image Access ICA is not available to Express Phone because Express Phone is in material breach of the Parties' existing ICA. The adoption would be inconsistent with sound public policy and would not promote effective business practices in the state of Florida. (Tan, Bates)

Parties Arguments:

Express Phone

Express Phone asserts that a competitor's right to adopt an existing ICA is set out in Section 252(i) of the Act which provides:

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 argues that AT&T Florida's rejection of Express Phone's request for adoption of the Image Access ICA is contrary to the Act. Express Phone notes that the two exceptions, found in Rule 51.809(b)(1) and (2), technical feasibility and cost, have not been argued by AT&T Florida. Express Phone contends that the Commission determined in Order No. PSC-08-0584-FOF-TP, issued September 8, 2008 (Nextel Adoption Order) that unless one of the two exceptions of Section 51.809(b) is met, the adoption is valid and must be recognized.⁹ Express Phone believes the conditions AT&T Florida imposes is an attempt to use the parties' billing dispute to prohibit Express Phone from adopting the Image Access ICA.¹⁰ Express Phone argues that AT&T Florida cannot deny Express Phone's request to adopt a new ICA simply because its current agreement has not expired or is not ripe for re-negotiation. First, Express Phone believes that Section 11 of the General Terms and Conditions of the current ICA recites the provisions found in 47 U.S.C. 252(i) and 47 C.F.R. 51.809, regarding adoptions.

Pursuant to 47 U.S.C. Section 252(i) and 47 C.F.R. Section 51.809, BellSouth shall make available to Express Phone any entire resale agreement filed and approved pursuant to 47 U.S.C. Section 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.

⁹ 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, issued April 19, 2010.

¹⁰ AT&T requests that Express Phone pay amounts withheld in dispute.

Express Phone argues that this section allows Express Phones to adopt another agreement at any time. In addition, if Express Phone cannot leave its ICA for the life of the agreement, Express Phone is unprotected from discrimination. Express Phone states that to accept AT&T Florida's position would be to allow AT&T Florida to discriminate among carriers.

Express Phone believes that the current ICA should not impact Express Phone's adoption of the Image Access ICA and argues that the Image Access ICA is more favorable as it allows the CLEC to retain its funds until a disputed item is resolved. Failure to allow the adoption allows AT&T Florida to discriminate against Express Phone in billing matters. Moreover, Express Phone asserts that it pays all undisputed bills and it would be in full compliance with its contractual obligations had AT&T Florida honored its request for adoption.

AT&T Florida

AT&T Florida argues the ICA is a valid and binding contract and the Commission should require Express Phone to honor it and pay AT&T Florida all past due amounts. AT&T Florida further asserts that Express Phone's ability to pay its bills is questionable.

AT&T Florida contends that while Section 252(i) generally permits a requesting carrier to obtain an interconnection agreement with an incumbent local exchange carrier, by adopting another carrier's agreement, it is not automatic and not without a process. AT&T Florida contends that the existing ICA is clear that Express Phone must pay all amounts, including "disputed" amounts prior to the next bill date. AT&T Florida reiterates that Express Phone has failed to comply with this provision.

AT&T Florida asserts Express Phone is in material breach of the Parties' ICA due to Express Phone's failure to pay amounts in dispute. AT&T Florida contends that since Express Phone has admitted that it has withheld payments, the Commission should enforce the terms of the Agreement as written. AT&T Florida argues that the Commission found in a similar docket¹¹ that AT&T Florida is entitled to prompt payment of all billed amounts and to terminate services if such amounts are not paid.

AT&T Florida argues the contract language is unambiguous and the Commission is required by Florida law to enforce the agreement. Paddock v. Bay Concrete Indus., 154 So.2d 313 (Fla. 2d DCA 1963). See also Brooks v. Green 993 So.2d 58 (Fla. 1st DCA 2008) ("It is established law in this state that a contract must be applied as written, absent an ambiguity or some legality.") Medical Center Health Plan v. Brick, 572 So.2d 548, 55(Fla. 1st DCA 1990) ("A party is bound by, and a court is powerless to rewrite, the clear and unambiguous terms of a voluntary contract. Nat'l Health Laboratories, Inc. v. Bailmar, Inc., 444 So.2d 1078, 1980 (Fla. 3d DCA 1984).").

¹¹ Order No. PSC-10-0457-PCO-TP, issued July 16, 2010, Docket 100021- TP, In re: Complaint and petition for relief against LifeConnex Telecom, LLC f/k/a Swiftel, LLC by BellSouth Telecommunications, Inc. d/b/a/ AT&T Florida.

AT&T Florida argues that both parties are obligated to comply with the Agreement and Express Phone may only terminate, modify, or negotiate a new agreement pursuant to the terms in the ICA.¹² In Global Naps, Inc. v. Verizon, 396 F.3d 16 (1st Cir. 2005) a CLEC filed a petition for arbitration pursuant to Section 252 and the state commission and the First Circuit Court of Appeals concluded that Section 252(i) does not grant a CLEC the right to opt out of one agreement into another.

AT&T Florida also cites to Order No. PSC-98-0466-FOF-TP, issued March 31, 1998, when the Commission stated that the Act does not authorize the Commission to conduct an arbitration on matters covered in an agreement and to alter terms within an approved negotiated agreement under Section 252(e).¹³

It is AT&T Florida's position that allowing Express Phone to adopt an ICA before the company cures its breach of the existing agreement would be inconsistent with public interest. In order to cure its breach of the existing ICA, AT&T Florida argues that Express Phone should have to remit all past due amounts pursuant to the provisions of the parties' ICA. AT&T Florida contends that the Commission has held that an adoption can be rejected when it is not in the public interest. Order No. PSC-99-1930-PAA-TP, issued September 29, 1999.¹⁴

Staff Analysis:

Express Phone believes it has adopted the Image Access ICA effective October 20, 2010. Staff notes that Express Phone sent letters regarding adoption of the Image Access ICA to AT&T Florida but did not file a Notice of Adoption with the Commission until March 29, 2011. AT&T Florida objects to the October 20, 2010 effective date of the alleged adoption. Express Phone also did not properly identify the correct Image Access ICA until April 4, 2011.

In the Nextel Adoption Order, the Commission determined that the effective date of an adoption is from the date that the Notice of Adoption is filed with the Commission. While Express Phone discussed adoption with AT&T Florida, it did not file a Notice of Adoption with the Commission until March 29, 2011.

Parties are bound by the terms and conditions of Commission-approved agreements. Supra. Express Phone does not deny that it has withheld payments of the amounts it considers in dispute. Express Phone's failure to pay disputed amounts is an issue that affects its ability to adopt the Image Access ICA.

¹² Express Phone may request termination of the Agreement only if it is no longer purchasing services pursuant to the Agreement. No modification or amendment ... shall be effective and binding upon the parties unless it is made in writing and duly signed by the parties. Negotiations for a new agreement shall commence "no earlier than two hundred seventy (270 days... prior to the expiration of the initial term of the Agreement.

¹³ In re: Petition of Supra Telecommunications and Information Systems for generic proceeding to arbitrate rates, terms, and conditions of interconnection with BellSouth Telecommunications, Inc., or in the alternative, petition for arbitration of interconnection , Docket No. 980155-TP

¹⁴ In re: Notice by BellSouth Telecommunications, Inc. of adoption of an approved interconnection, unbundling, and resale agreement between BellSouth Telecommunications, Inc. and AT&T Communications of the Southern States, Inc. by Healthcare Liability Management Corporations d/b/a Fibre Channel Networks, Inc. and Health Management Systems, Inc. Docket No. 990959-TP.

Staff believes that Express Phone was attempting to escape its outstanding obligations by breaching its existing ICA to adopt a more favorable agreement. Express Phone was unilaterally attempting to terminate the existing ICA without mutual agreement by the parties, in contravention of the terms and conditions of the existing ICA. The existing ICA states that payment for services must be provided, including disputed charges, at the billing date established by the ICA.¹⁵ Staff does not believe that the adoption of an ICA would cure past billing issues in dispute, and disagrees with Express Phone's assertion that such an adoption would cure outstanding billing obligations.

The Commission must determine whether Express Phone can adopt a new ICA when there is a material breach of the existing ICA. A material breach must be of the type that would discharge the injured party from further contractual duty. Beefy Trail Inc. v. Beefy King International, Inc., Here, Express Phone has withheld payments in dispute, resulting in AT&T Florida's disconnection of Express Phone for failure to pay using termination provisions provided by the ICA.

Express Phone argues that AT&T Florida does not object on the basis of the two available exceptions in 47 C.F.R. Section 51.809(b)(1) and (2), lack of technical feasibility or greater costs to serve adopting party. Staff agrees that based on the facts and circumstances in the Nextel Adoption Order, the Commission found that technical feasibility and the cost to serve an adopting party were the only two exceptions. However, the circumstances in this case differ, as by Express Phone's own admission, it did not pay disputed amounts pursuant to terms and conditions of the existing ICA.¹⁶ For Express Phone to benefit while not in good standing of its existing ICA is inconsistent with sound public policy and does not promote effective business practices in the state of Florida.

Conclusion

Staff believes that if Express Phone were in good standing in its existing ICA, the adoption may be effective from the date of the Notice filed with the Commission, providing that there is not a finding of a lack of technical feasibility or greater costs to serve. However, staff does not believe that the terms and conditions of the Image Access ICA would modify anything that occurred during the previous ICA, including outstanding billing. Unless Express Phone is in good standing with the existing ICA, staff recommends that the Commission find that AT&T Florida does not have to enter into a new ICA and Express Phone's adoption of the Image Access ICA should be denied.

¹⁵ Sections 1.4 and 1.4.1 of the ICA.

¹⁶ Staff notes that AT&T argues that in addition to these exceptions, an ICA's terms and conditions may also serve as a limitation to a requesting carrier's right to adopt. This issue has not been previously addressed by the Commission.

Issue 4: Should Docket No. 110071-TP be set for hearing?

Recommendation: Yes. Additional discovery and testimony is required to resolve Docket 110071-TP and an evidentiary hearing should be set on the promotional credits. (Tan, Trueblood)

Staff Analysis:

Parties' Arguments

Express Phone

Express Phone asserts that there is an ongoing billing dispute with AT&T Florida involving promotional credits. Express Phone states that it has a past due balance and was notified that services would be suspended if \$1,268,490 were not paid by March 14, 2011, for services provided in Florida, and that all services would be terminated if past due balances were not paid by March 29, 2011.¹⁷ Moreover, Express Phone contends that AT&T Florida's threat to discontinue service and disconnect its resale service is unlawful and anticompetitive.¹⁸

Express Phone recognizes that the ICA¹⁹ between AT&T Florida and Express Phone states in Section 1.4 that "Express Phone shall make payment to BellSouth for all services billed including disputed amounts." Section 1.4.1 of the ICA states "Payment for services provided by BellSouth, including disputed charges, is due on or before the next bill date." Express Phone understands that under the current ICA it is required to pay for all services billed including disputed amounts. However, Express Phone asserts that it pays all undisputed bills and it would be in full compliance with its contractual obligations had AT&T Florida honored its lawful request for adoption.

AT&T Florida

AT&T Florida states that the Commission approved the ICA between AT&T Florida and Express Phone. AT&T Florida argues the ICA is a valid and binding contract and the Commission should require Express Phone to honor it and pay AT&T Florida all past due amounts because when they entered into the agreement, Express Phone agreed to pay AT&T Florida for all services billed including disputed amounts on or before the next bill date.

Analysis:

Staff believes that without additional evidence beyond Express Phone's initial petition and AT&T Florida's response, there is insufficient information for the Commission to render a decision regarding promotional credits. Staff also believes that Express Phone cannot withhold disputed amounts from AT&T Florida.

¹⁷ Revised Notice of Suspension and Termination letter dated February 23, 2011 listed as Attachment A to the Complaint.

¹⁸ As discussed earlier in this recommendation. AT&T disconnected service to Express Phone on March 30, 2011.

¹⁹ Resale Agreement dated August 23, 2006.

The parties' conduct is governed by an ICA with clear terms. Staff believes that the terms and conditions of the Parties' ICA are clear and unambiguous. Specifically, that Express Phone shall make payments for all services billed including disputed amounts. Furthermore, the Commission has already ruled in LifeConnex, with identical language in the ICA, that the billed party is required to pay all sums billed, including disputed amounts, pursuant to the terms and conditions in the ICA. Express Phone must pay all disputed amounts. Staff notes dispute of promotion credits, does not affect the billing time frame or payment obligations established by the ICA. Staff believes AT&T Florida is entitled under the clear terms of the ICA to prompt payment of all sums billed; and in the absence of such payment, is entitled to proceed with the actions outlined in the Notice of Commencement of Treatment; and that AT&T Florida appropriately disconnected Express Phone on March 30, 2011.

Conclusion

The determination of whether Express Phone should receive the requested promotional credits is a valid question before the Commission. However, it is clear that additional discovery and testimony are required to resolve Docket 110071-TP. Therefore, staff recommends that an evidentiary hearing should be set.

Issue 5: Should these dockets be closed?

Recommendation: If Express Phone is granted Summary Final Order and the staff's recommendation in issue 2 is denied, issue 3 is rendered moot and Docket No. 110087-TP should be closed. If staff's recommendation to deny Summary Final Order is approved, and staff's recommendation in issue 3, that the Image Access ICA is not available for Express Phone's adoption, is approved, Docket No. 110087-TP should be closed. If staff's recommendation in issue 4 is approved, Docket No. 110071-TP should remain open for an evidentiary hearing to be conducted on the promotional credits. (Tan)

Staff Analysis: If Express Phone is granted Summary Final Order and the staff's recommendation in issue 2 is denied, issue 3 is rendered moot and Docket No. 110087-TP should be closed. If staff's recommendation to deny Summary Final Order is approved, and staff's recommendation in issue 3, that the Image Access ICA is not available for Express Phone's adoption, is approved, Docket No. 110087-TP should be closed. If staff's recommendation in issue 4 is approved, Docket No. 110071-TP should remain open for an evidentiary hearing to be conducted on the promotional credits.

The Order issued from this recommendation will be proposed agency action except for the Commission's decision regarding Issue 2, Express Phone's Motion for Summary Final Order. Thus, the Order will become final and effective for Issues 3 and 4 upon issuance of the Consummating Order if no person whose substantial interests are affected timely files a protest within 21 days of issuance of this Order.