

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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COMMISSION
CLERK**-M-E-M-O-R-A-N-D-U-M-****DATE:** September 8, 2011**TO:** Office of Commission Clerk (Cole)
FROM: Office of the General Counsel (Tan) *TJ*
 Division of Regulatory Analysis (Bates) *JB*
RE: 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: 09/20/11 – Regular Agenda – Motion to Dismiss – Oral Argument Not Requested – Participation at the Discretion of the Commissioners
COMMISSIONERS ASSIGNED: All Commissioners**PREHEARING OFFICER:** Administrative**CRITICAL DATES:** None**SPECIAL INSTRUCTIONS:** None**FILE NAME AND LOCATION:** S:\PSC\RAD\WP\110087.RCM.DOC

Case Background

On July 27, 2011, Express Phone protested the portions of Order No. PSC-11-0291-PAA-TP (PAA Order), issued July 6, 2011, which relate to its adoption of BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast's (AT&T) interconnection agreement (ICA) with Image Access, Inc. d/b/a NewPhone, Inc. and requested a formal proceeding.

Previously, 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

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Access, Inc. d/b/a NewPhone (Image Access ICA). Express Phone asserted 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 argued 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 argued 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, objecting and withholding consent of Express Phone's attempt to adopt an ICA different from its current and effective ICA on file. AT&T Florida noted that Express Phone's letter did not alter the effectiveness of the then current agreement between the parties, which was signed by both and approved by this 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, stating there are no issues of material fact that remain to be resolved surrounding its right to adopt the Image Access ICA. Express Phone requested that the Commission find that Express Phone's adoption of the Image Access ICA, as amended, was valid pursuant to 47 U.S.C. 252(i) and 47 C.F.R. 51.809 as a matter of law.

At the June 14, 2011, Commission Conference, the Commission denied the Summary Final Order and determined that adoption of the Image Access ICA is not available to Express Phone because Express Phone was in material breach of the Parties' existing ICA. Express Phone protested on the grounds that 47 U.S.C. Section 252(i) requires incumbents to make all ICAs available for adoption and 47 C.F.R. Section 51.809 provides only two exceptions to an adoption. Neither exception applies here.

This recommendation addresses Express Phone's protest of the portions of PAA Order No. PSC-11-0291-PAA-TP that deny the adoption of the Image Access ICA.

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

Discussion of Issues

Issue 1: Should the Commission grant AT&T's Motion to Dismiss?

Recommendation: No, Express Phone's protest of Proposed Agency Action Order No. PSC-11-0291-PAA-TP is sufficient and AT&T's Motion to Dismiss should be denied. (Tan)

Staff Analysis:

Standards

Motion to Dismiss

A motion to dismiss raises as a question of law the sufficiency of the facts alleged to state a cause of action.¹ In order to sustain a motion to dismiss, the moving party must show that, accepting all allegations as true, the petition still fails to state a cause of action for which relief may be granted.² The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations.³ A sufficiency determination should be confined to the petition and documents incorporated therein, and the grounds asserted in the motion to dismiss.⁴

To evaluate a motion to dismiss, all allegations in the petition must be viewed as true and in the light most favorable to the petitioner in order to determine whether there is a cause of action upon which relief may be granted.⁵

Protest

In order to meet the standard for a valid protest under Rule 28-106.201(2), Florida Administrative Code (F.A.C.), a petitioner must explain how the petitioner's substantial interest will be affected by the agency determination.⁶

¹ Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

² *Id.* at 350.

³ Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

⁴ Barbado v. Green and Murphy, P.A., 758 So. 2d 1173 (Fla. 4th DCA 2000), and Rule 1.130, Florida Rules of Civil Procedure.

⁵ See, e.g. Ralph v. City of Daytona Beach, 471 So. 2d 1,2 (Fla. 1983); Orlando Sports Stadium, Inc. v. State of Florida ex rel Powell, 262 So. 2d 881, 883 (Fla. 1972); Kest v. Nathanson, 216 So. 2d 233, 235 (Fla. 4th DCA, 1986); Ocala Loan Co. v. Smith, 155 So. 2d 711, 715 (Fla. 1st DCA, 1963).

⁶ Rule 28-106.201(2), F.A.C., states that :

- ...
- (d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;
 - (e) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action;
 - (f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and
 - (g) A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action.

Before one can be considered to have a substantial interest in the outcome of the proceeding he must show that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and that this substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.⁷

The "injury in fact" must be both real and immediate and not speculative or conjectural.⁸

Protest of Proposed Agency Action Order No. PSC-11-0291-PAA-TP

Express Phone protests the portions of the PAA Order which relate to Express Phone's adoption of another carrier's ICA. Express Phone states that its protest applies to all issues in the instant docket and asserts the following:

- Express Phone's substantial interests are affected by AT&T's failure to allow it to adopt a different ICA under federal law, which are the types of interests the proceeding is designed to protect.⁹
- Disputed issues of material fact include whether Express Phone is permitted to adopt the Image Access ICA under federal law; the Commission's orders and the terms of its ICA with AT&T; whether the ICA requires AT&T to recognize Express Phone's adoption of the Image Access ICA; whether matters outside of federal law may be considered to determine adoption; the effective date of the adoption; and whether the ICA was in breach at the time of the adoption request.
- Express Phone believes that the ultimate facts include its effective adoption of the Image Access ICA by letter on October 20, 2010; that AT&T imposed non-252(i) requirements for an adoption; that AT&T's actions against Express Phone are discriminatory and contrary to federal law; and that AT&T has the obligation to file the notice of adoption with the Commission.

Express Phone asserts that it is entitled to relief pursuant to Sections 120.569 and 120.57, Florida Statutes, 47 U.S.C. Section 252(i) and 47 C.F.R. Section 51.809. Express Phone requests the Commission acknowledge its adoption of the Image Access ICA; require AT&T to restore service; set the matter for an evidentiary hearing and grant other relief as appropriate.

AT&T's Motion to Dismiss

AT&T argues that (1) Express Phone fails to comply with Rule 28-106.201, F.A.C., and Section 120.569, F.S. in filing its protest of the PAA Order. AT&T asserts that Rule 28-106.201,

⁷ Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981).

⁸ International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission, 561 So. 2d 1224, 1225-26 (Fla. 3rd DCA 1990). See also Village Park Mobile Home Assn., Inc. v. State Dept. of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987)(speculation on the possible occurrence of injurious events is too remote).

⁹ Agrico

F.A.C., establishes the information required to initiate proceedings determining substantial interests and argues that Express Phone did not provide adequate information in its protest and contends that Section 120.80(13)(b), F.S., provides that “[i]ssues in the proposed agency action which are not in dispute are deemed stipulated.” In addition, AT&T also notes that Rule 28-106.201, F.A.C., provides that “issues in the proposed action that are not identified in the petition or a cross-petition shall be deemed stipulated.”¹⁰

AT&T contends that Express Phone has the burden to provide a concise statement of ultimate facts alleged, including the specific facts which warrant reversal or modification of the Commission’s Order.¹¹ AT&T asserts that the Commission has granted a motion to dismiss where the petition failed to meet the pleading requirements of Rule 28-106.201.¹²

Specifically, AT&T argues that Express Phone’s protest failed to adequately assert:

- Any specific facts which warrant reversal or modification of the Commission’s Proposed Agency Action.
- Any ultimate facts.
- Why Express Phone is not in material breach of its existing ICA, or why Express Phone should be excused from a breach.
- Support for its termination of an existing, unexpired contract.
- Any explanation of how the alleged facts related to the specific rules or statutes which warrant reversal or modification of the PAA Order.

¹⁰ Rule 25-22.039(3), F.A.C. states that:

One whose substantial interests may or will be affected by the Commission’s proposed action may file a petition for a Section 120.569 or 120.57, F.S., hearing, in the form provided by Rule 28-106.201, F.A.C. Any such petition shall be filed within the time stated in the notice issued pursuant to subsection (1) of this rule, and shall identify the particular issues in the proposed action that are in dispute. Within 10 days of service of the initial petition, any other person substantially affected by the proposed agency action or Commission staff may file a cross-petition identifying additional particular issues on which a hearing is requested. Issues in the proposed action that are not identified in the petition or a cross-petition shall be deemed stipulated.

¹¹ Brookwood Extended Care Center of Homestead, 870 So. 2d 834, 840 (Fla. 3d DCA 2003), (finding that the burden rests on the company requesting the administrative hearing to state the ultimate facts, and to allege the facts that warrant reversal.)

¹² See, Order No. PSC-07-0724-PCO-EQ, issued September 5, 2007, In re: Petition of approval of new standard offer for purchase of firm capacity and energy from renewable energy facilities or small qualifying facilities and approval of tariff schedule REF-1, by Gulf Power Company; In re: Petition for approval of renewable energy tariff standard offer contract by Florida Power & Light Company; In re: Petition for approval of standard offer contract for purchase of firm capacity and energy from renewable energy producer or qualifying facility less than 100kW tariff, by Progress Energy Florida, Inc.; In repetition for approval of standard offer contract for small qualifying facilities and producers of renewable energy, by Tampa Electric Company, Docket Nos. 070232-EQ, 0702735-EQ, 070236-EQ. See also, Blackwood v. Agency for Health Care Admin., 869 So.2d 656 (Fla. 4th DCA 2004), (where the court upheld denial of petition for failure to comply with pleading requirement in Rule 28-106.201(2)(e), F.A.C.).

Further, AT&T alleges that Express Phone requests the right to add additional facts, which pursuant to Rule 25-22.029(3), F.A.C., is improper. Without clear identification of an issue in dispute in the protest of PAA Order, the issue is deemed stipulated, and, as such, AT&T argues there are no issues available for the administrative hearing. AT&T requests that Express Phone's protest be dismissed. In the alternative, AT&T requests that the Commission direct Express Phone to file a more concise statement in keeping with the applicable pleading requirements.

Express Phone's Response

Express Phone argues that it clearly exercised its right to challenge the Commission's Proposed Agency Action. Express Phone contends that AT&T is attempting to impose additional expense.

Express Phone asserts that AT&T has failed to state any basis upon which a motion to dismiss can be granted and that Express Phone has met the pleading requirements. In support, Express Phone states the following:

- The adoption date, which Express Phone believes is October 10, 2010, is an ultimate fact.
- Express Phone asserts that requirements or issues outside section 252(i) may not be considered in an adoption request.
- AT&T mistakenly relies on Brockwood, in which the court denied a petition because of generality of the petition. Express Phone contends that its protest was made with specificity and asserts compliance with the pleading requirements. Express Phone also distinguishes Blackwood, in which the applicant failed to address allegations in the request for hearing.
- Express Phone has raised the issue of whether a breach of contract is grounds to deny an adoption.

Further, Express Phone argues that a protest of a Proposed Agency Action begins the hearing process, at which time issues are identified, discussed and established in an issue identification meeting. Express Phone requests that the Commission deny AT&T's Motion to Dismiss.

Analysis

In considering AT&T's Motion to Dismiss, the Commission must view the facts set forth in the light most favorable to Express Phone to determine whether the pleading requirements are met under Rule 28-106.201, F.A.C., and Section 120.569, F.S. While sparse, staff believes that Express Phone's protest adequately meets the minimum pleading requirements for a protest.

Staff believes that Express Phone has demonstrated that as the party whose attempted adoption was denied in the PAA Order it (1) has a substantial interest in the outcome of this

proceeding and (2) has identified factual matters in dispute relating to the circumstances of the attempted adoption. Primarily the issue of whether a material breach of an existing ICA prevents a company from adopting a new, more advantageous ICA. Therefore, staff believes that AT&T's Motion to Dismiss should be denied.

AT&T has raised a question regarding the scope of the docket, stating that anything not protested is deemed stipulated. Staff agrees that any disputed issues that are not raised may effectively preclude a party from addressing new issues at hearing.¹³ However, staff believes that Express Phone's protest sufficiently addresses all aspects of the Commission's denial of Express Phone's adoption of the Image Access ICA.

Recommendation

Express Phone's protest is based on its belief that the Commission's decision to deny Express Phone's adoption of the Image Access ICA was incorrect. As provided by Section 120.569(2)(b), F.S., a party is afforded an opportunity for an evidentiary hearing. Staff believes that Express Phone's protest of Proposed Agency Action Order No. PSC-11-0291-PAA-TP is sufficient and AT&T's Motion to Dismiss should be denied.

¹³ Section 120.80(13)(b), F.S., provides that:

Notwithstanding Sections 120.569 and 120.57, a hearing on an objection to proposed action of the Florida Public Service Commission may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated.

Docket No. 110087-TP
Date: September 8, 2011

Issue 2: Should this docket be closed?

Recommendation: No, if staff's recommendation is granted, the docket should remain open to address Express Phone's protest of PAA Order No. PSC-11-0291-PAA-TP and the issue identification meeting rescheduled. If staff's recommendation is denied, this docket should be closed. (Tan)

Staff Analysis: No, if staff's recommendation is granted, the docket should remain open to address Express Phone's protest of PAA Order No. PSC-11-0291-PAA-TP and the issue identification meeting rescheduled. If staff's recommendation is denied, this docket should be closed.