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

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

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

d. The total pages in the document are 29 pages.

e. The attached document is EXPRESS PHONE SERVICE, INC.'S STATEMENT OF ISSUES AND POSITIONS AND POST-HEARING BRIEF.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Notice of adoption of existing interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Image Access, Inc. d/b/a NewPhone, Inc. by Express Phone Service, Inc.	Docket No. 110087-TP
_____/	Filed: June 1, 2012

EXPRESS PHONE SERVICE, INC.'S STATEMENT OF ISSUES AND POSITIONS AND POST-HEARING BRIEF

Express Phone Service, Inc. (Express Phone), pursuant to Order No. PSC-12-0058-PCO-TP, files its Statement of Issues and Positions and Post-Hearing Brief.

STATEMENT OF BASIC POSITION

This case involves Express Phone's straight-forward adoption of an interconnection agreement (ICA) and BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast's (AT&T) refusal to recognize that adoption. On October 20, 2010, Express Phone sent notice to AT&T of its adoption of the NewPhone ICA; AT&T wrongfully has refused to acknowledge this adoption.

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

> (i) Availability to Other Telecommunications Carriers.—A local exchange carrier shall make available *any* interconnection, service, or network element provided under an agreement approved under this section to which it is a party to *any* other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.[1]

This federal statute requires AT&T to "make available *any* interconnection agreement" to "*any* other requesting telecommunications carrier." While AT&T has attempted to contrive numerous additional restrictions on the clear federal opt in right – varying its roadblocks with each

[1] Emphasis supplied.

response to Express Phone – no restrictions on the timing of the adoption and no restrictions related to outstanding disputes appear in the law.

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

> (1) The costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement or (2) The provision of a particular agreement to the requesting carrier is not technically feasible.

AT&T has not raised either of these exceptions, nor could it, as they are inapplicable to Express Phone.

Instead, AT&T has claimed, at various times, different theories in support of its failure to follow the opt in requirements, even changing its position at hearing.[2] AT&T has claimed that Express Phone's adoption was inappropriate for a variety of reasons, including:

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

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

As Mr. Wood testified, the reason that underlies the adoption statute and rule is to prevent an incumbent, like AT&T, from discriminating as to its agreements with and among

[2] AT&T previously claimed that Express Phone could not opt in to the NewPhone ICA because it was available to Express Phone at the time the AT&T/Express Phone ICA was executed. AT&T witness Greenlaw recanted that position on the stand.

CLECs – just as AT&T has done in this case. When an ICA with more favorable terms is available, a CLEC is entitled to adopt it so as to prevent discrimination.

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

> We conclude that under an all-or-nothing rule, requesting carriers will be protected from discrimination, as intended by section 252(i). *Specifically, an incumbent LEC will not be able to reach a discriminatory agreement for interconnection, services, or network elements with a particular carrier without making that agreement in its entirety available to other requesting carriers.* If the agreement includes terms that materially benefit the preferred carrier, other requesting carriers will likely have an incentive to adopt that agreement to gain the benefit of the incumbent LEC's discriminatory bargain. Because these agreements will be available on the same terms and conditions to requesting carriers, the all-or-nothing rule should effectively deter incumbent LECs from engaging in such discrimination.[3]

Finally, the effective date of Express Phone's adoption is October 20, 2010. The Commission has already ruled in the *Nextel Order* that:

> When an interconnection agreement is available for adoption under 47 C.F.R. 51.809(a), the adoption is considered presumptively valid and effective upon receipt of the notice by the adoption [sic] party.

AT&T should not be able to profit from its unwarranted delay in recognizing Express Phone's valid notice of adoption. The October 20, 2010 effective date governs the parties' relationship as of that day, both as to events in the future and in the past. See, Exhibit No. 6 (§ 30.1 NewPhone ICA, General Terms and Conditions).

[3] *Second Report and Order*, In the Matter of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, FCC 04-164, ¶19, emphasis supplied.

ISSUES AND POSITIONS

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

EXPRESS PHONE: *Yes. AT&T's denial is barred because it has not come with clean hands. AT&T acted in bad faith when it failed to offer the NewPhone ICA to Express. AT&T advised Express that AT&T would work with Express to resolve billing disputes and then reversed its position.*

As a preliminary matter and as discussed later in this brief, AT&T has no right and is not in the position to "deny" Express Phone's opt in. AT&T is not the judge and jury as to a CLEC's right to adopt another ICA. An opt in is effectuated and valid upon the incumbent's receipt of the CLEC's notice of adoption. Thus, AT&T had no basis upon which to "deny" Express Phone's adoption.

The doctrines of laches, estoppels and waiver are all equitable remedies.[4] While each legal theory is somewhat different, they have in common the general principle that a party may not sit on its rights and then complain after the fact. Similarly, a party may not seek relief when it comes to the tribunal (in this case the Commission) with unclean hands. When a party has violated a restriction which it now seeks to enforce, the equitable doctrine of unclean hands is applicable to prevent the enforcement of such restriction.[5] These equitable doctrines bar the positions AT&T attempts to assert in this case as reasons to refuse to recognize Express Phone's legitimate adoption.

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[4] The elements of estoppel are: a representation as to a material fact that is contrary to a later-asserted position; reliance on that representation; and a change in position detrimental to the party claiming estoppel. *Appalachian, Inc. v. Olson*, 468 So.2d 266, 269 (Fl. 2nd DCA 1985). Waiver is the intentional relinquishment of a known right. *Kimmich v. U.S. Bank Nat. Ass'n*, 2012 WL 126774 (Fl. 4th DCA 2012). Laches arise when there has been an inexcusable delay in enforcing a claim such that enforcement of the claim would be inequitable or unjust. *Edge v. Edge*, 69 So.3rd 348, 349 (Fl. 3rd DCA 2011).

[5] *Pilafian v. Cherry*, 355 So.2d 847, 850 (Fl. 3rd DCA 1978).

A. AT&T Failed to Offer the NewPhone ICA to Express Phone When Express Phone Signed Its ICA with AT&T.

Section 26 of the AT&T/Express Phone ICA (Exhibit No. 5) provides:

> Each party shall act in good faith in its performance under this Agreement and, in each case in which a Party's consent or agreement is required or requested hereunder, such Party shall not unreasonably withhold or delay such consent or agreement.

In this case, AT&T has failed to act in good faith in its dealings with Express Phone. The most blatant example of this occurred when Express Phone initially sought to do business with AT&T. As Mr. Armstrong testified, AT&T supplied Mr. Armstrong with what AT&T claimed was a standard ICA and then told Mr. Armstrong to "take it or leave it." (Tr. 62).[6] That is, if Express Phone expected to do business with AT&T, it had no choice but to sign the proffered ICA. Mr. Greenlaw admitted that the agreement presented to Express Phone was represented to be the standard agreement, (Tr. 293), and that Express Phone was not informed about the NewPhone agreement even though AT&T was clearly aware of it. (Tr. 295).

Mr. Armstrong testified that AT&T's behavior regarding the original ICA was very heavy-handed. He was told that if Express Phone wanted to do business with AT&T in Florida, it had to sign the proffered agreement. (Tr. 62, 65, 69). Because this agreement was presented to Express Phone as a standard agreement, Mr. Armstrong had no reason to expect it to be anything other than the very same agreement offered to all CLECs. (Tr. 59, 92). In fact, it was his understanding that all CLECs were using the same agreement that was presented to him, (Tr. 92), and he relied on that representation. (Tr. 93).

AT&T knew, (Tr. 91), it had a more favorable agreement available at the time it proffered the AT&T/Express Phone agreement to Express Phone; it therefore had a duty to make

[6] AT&T provided no witness to controvert Mr. Armstrong's testimony. In fact, AT&T provided no witness who had ever met Mr. Armstrong or dealt with Express Phone.

Express Phone aware of the more favorable agreement. It was discriminatory for AT&T to represent an agreement to Express Phone as "standard" when it was not standard and is actually discriminatory because it has less favorable billing terms. (Tr. 87). A CLEC who receives a contract from AT&T that is represented as its standard contract has every right to expect that agreement to be consistent with what has been offered to other CLECs. (Tr. 153). AT&T did not make Express Phone aware of any other ICAs and thus acted in bad faith. (Tr. 91).

AT&T presented Express Phone with an ICA that contained terms and conditions that *AT&T knew to be discriminatory.* AT&T's own witness, Mr. Greenlaw, testified that an agreement with a hold and dispute clause (as found in the NewPhone ICA) was certainly more favorable than an ICA without such a clause (as in the AT&T/Express Phone ICA). (Tr. 298-299). Mr. Greenlaw also testified that general terms and conditions "typically are fairly analogous." (Tr. 309). Clearly, this was not the case here.

AT&T was certainly aware that it had entered into an agreement with more favorable terms with NewPhone earlier than its dealings with Express Phone. Nonetheless, it failed to mention this or to offer the NewPhone ICA to Express Phone. Mr. Greenlaw testified that he had no information nor did he present any evidence to demonstrate that AT&T made Express Phone aware of the NewPhone agreement. (Tr. 293-294).

AT&T attempts to argue that Express Phone had a duty to search all ICAs that AT&T had in order to find the one with the most favorable terms. However, there was no reason for Express Phone to do that, even if it were possible,[7] because the ICA presented to Express Phone was represented to be the standard agreement and Express Phone relied upon that representation.

[7] AT&T made no showing that it would even have been possible for Express Phone to accomplish this task in 2006. Further, Express Phone would have to search for a needle in a haystack (based on a belief that AT&T had lied to it) while all the while AT&T knew the more favorable NewPhone ICA had been executed.

When it found out otherwise, Express Phone promptly moved to remedy the situation which AT&T had created through its opt in to the NewPhone ICA.

AT&T's failure to deal with Express Phone in good faith and make Express Phone aware of the NewPhone ICA when it originally dealt with Express Phone illustrates its failure to come to this Commission with clean hands.

B. AT&T Failed to Make the NewPhone ICA Available to Express Phone Without Unreasonable Delay.

47 C.F.R. § 51.809 requires an incumbent, like AT&T, to make available *without unreasonable delay* to any requesting carrier (like Express Phone) an ICA which has been approved by a state commission. The facts on this point are uncontroverted[8] -- Express Phone provided proper notice to AT&T of its adoption of the NewPhone ICA on October 20, 2010. AT&T received and was aware of the notice and what was intended.

Nonetheless, AT&T failed to meet its statutory duty to make that agreement available without unreasonable delay. Instead, AT&T refused to acknowledge the opt in and continued to discriminate against Express Phone. This placed Express Phone at a competitive disadvantage compared to other CLECs. In addition, AT&T leveraged its illegal conduct to cut off service to Express Phone. This conduct further demonstrates AT&T's failure to meet its clear and unambiguous statutory duty and act in good faith.

C. AT&T Represented to Express Phone That It Intended to Work with It on the Promotional Issues.

First, it is important to bear in mind that the matters giving rise to the disputes between AT&T and Express Phone relate to AT&T's failure to apply the appropriate promotional discount amounts to the Express Phone's bill. These are not trumped up disputes, but legitimate disputes occurring across the AT&T region.

[8] See Exhibit No. 7.

Express Phone has tried throughout this ordeal to work with AT&T to resolve the issues between the parties. (Tr. 28, 53). In its dealings with AT&T, Express Phone assumed that AT&T would deal with it in good faith.[9] It further assumed that when AT&T employees made representations to Express Phone representatives, Express Phone could rely upon those representations. Interestingly, at hearing, AT&T presented no witnesses who had any knowledge of Express Phone or who had ever even dealt with Express Phone or met Mr. Armstrong prior to the hearing. (Tr. 237, 282-283). Thus, there is *no evidence* in the record to rebut Mr. Armstrong – who has personal knowledge – of the representations made to him that AT&T would work with Express Phone to resolve the disputes between the parties. Express Phone relied on these representations to its detriment. This may explain why AT&T did not present a single witness with any knowledge of Express Phone's situation or meetings with AT&T.

Express Phone discussed these disputed matters often with AT&T. (Tr. 93-94). In each of these discussions, AT&T led Mr. Armstrong to believe that AT&T would work with Express Phone to resolve the underlying issue between the parties. (Tr. 88). The parties proceeded under that assumption until AT&T unilaterally cut off service to Express Phone customers on March 31, 2011. (Tr. 30). As Mr. Armstrong testified, he believed that both parties were working in good faith to solve their differences and AT&T personnel personally made such representations to him. (Tr. 94).

Contrary to AT&T's claim, Express Phone's disputes were *not* an attempt to evade a legitimate bill, but rather legitimate attempts to resolve a dispute between the parties. AT&T allowed Express Phone to proceed under this assumption and then yanked the rug out from under it when it abruptly changed course and cut off service.

[9] *See,* Exhibit No. 5: "Each Party shall act in good faith in its performance under this Agreement...."

D. AT&T Made No Attempt to Collect Any Alleged Past Due Amounts from Express Phone Prior to Its Adoption of the NewPhone ICA.

AT&T suggests that it made attempts to collect amounts it claims Express Phone owed to it *before* October 20, 2010. This is simply not the case.[10] In fact, AT&T made no attempt to collect amounts it claims were due it prior to the NewPhone adoption and any information supporting this premise is noticeably absent from the record. This presents an illustration of how AT&T sat on its rights (or rights it claims it has) in its dealings with Express Phone, to Express Phone's detriment.

The only evidence AT&T provided to support its claim of collection efforts is Exhibit No. 44.[11] (AT&T's response to Staff Interrogatory No. 1). In that interrogatory response, AT&T claims it made attempts to collect via a letter sent to Express Phone on August 25, 2010.[12] A reading of that letter shows that AT&T's "collection attempts" related to a deposit issue between the parties. AT&T requested that Express Phone increase its deposit. Subsequent negotiations took place between AT&T and Express Phone. Express Phone provided an additional deposit, thus closing out this matter. AT&T's Mr. Egan admitted that the August 25th correspondence concerned a deposit request. (Tr. 241-243). Thus, this letter cannot be construed as a collection attempt.

When Commissioner Brown questioned Mr. Egan as to why AT&T had not pursued collection sooner, he said AT&T internal counsel prevented him from doing so. (Tr. 248-249). Mr. Egan had no further knowledge of the matter. (Tr. 249). While that may or may not be the

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[10] As a preliminary matter, it is important to recognize that Express Phone adopted the NewPhone ICA on October 20, 2010. From that point forward, the NewPhone ICA governed the parties' relationship, both in the past and in the future. *See*, Exhibit No. 6 (§ 30.1 NewPhone ICA, General Terms and Conditions), providing that the NewPhone ICA will govern obligations owed as of the effective date of the ICA. Thus, the dispute and hold provisions were applicable to *all* disputed amounts, even those prior to October 20, 2010.

[11] AT&T asserts that the last page of Exhibit No. 44 is confidential.

[12] AT&T initially filed this letter with a Notice of Intent regarding confidentiality. Express Phone does not intend to assert confidentiality for this document.

case (AT&T offered no evidence on this point), the fact is that AT&T engaged Express Phone in conversations representing that the disputes would be settled, made no attempt to collect any monies, and then reversed course and cut off Express Phone's service.

What is most telling about this situation is that AT&T agreed to base its deposit request upon *undisputed* amounts. (Exhibit No. 44). Why would AT&T agree to resolve the deposit question based only on *undisputed* amounts if the August 25, 2010 letter was intended to be a collection letter? Clearly, the August letter was no such thing; even a cursory reading of the letter does not indicate any collection attempt. The resolution of the deposit matter is simply another indication that AT&T represented that it did not intend to pursue collection of disputed amounts, but rather work with Express Phone to resolve these issues.

E. AT&T's Conduct Surrounding the Dispute Issue Precludes Relief.

Mr. Armstrong details instances in which AT&T has failed to work with Express Phone regarding the disputed amounts. As Mr. Armstrong recounts, AT&T's payment of appropriate promotional credits to Express Phone continued to decline throughout the parties' relationship. (Tr. 31). Express Phone initially believed that AT&T would proceed in good faith under its agreement to promptly and reasonably deal with disputes, including those relating to promotional credits. However, AT&T has consistently failed in this obligation. Not only has it not resolved the majority of the billing disputes it has with Express Phone, it has provided no reason for failing to provide a resolution as to such disputes. Rather, AT&T simply denies them. Many of these disputes remain outstanding today. (Tr. 31). As Mr. Armstrong testified, AT&T has acknowledged a very small portion of the disputes submitted and there is no rhyme or reason to what it has approved or disapproved. (Tr. 71). When questioned about Express Phone's assertion that its escalation requests were simply ignored, Mr. Greenlaw testified that he had not

even reviewed the Express Phone disputes and had no idea how they were handled. (Tr. 302-303).[13]

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

EXPRESS PHONE: *Yes. 47 U.S.C. § 252(i) requires AT&T to "make available *any* interconnection agreement" to "*any* other requesting telecommunications carrier." The FCC rule implementing this statute provides two exceptions, neither of which is applicable here. Thus, Express Phone is entitled to adopt the NewPhone ICA effective October 20, 2010.*

A. The Adoption Law is Clear.

It is very clear that under the Federal Telecommunications Act of 1996 (Act) and FCC implementing rules, Express Phone is entitled to opt in to the NewPhone ICA during the term of a prior agreement. Section 47 U.S.C. § 252(i) sets out the requirements for adoption of an ICA:

> (i) Availability to Other Telecommunications Carriers.—A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

The opt in provision described above is clear and broadly-defined: an ILEC must make *any* interconnection agreement available to *any* requesting telecommunications carrier. (Tr. 107). Further, the language of the Act *does not* provide an opportunity for either an ILEC or a state regulator to place conditions on the ability of a CLEC to opt in to an existing ICA. To do so would allow the ILEC to engage in the very discrimination the Act is designed to prevent. (Tr. 108).

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

[13] Again, AT&T presented no evidence to rebut Express Phone's testimony on this point.

> (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.

AT&T has not raised either of these exceptions nor could they have, as they are inapplicable to Express Phone.

As Mr. Wood, a telecommunications expert, testified, the main purpose of the federal law and implementing federal rules is to promote the development of competitive markets by limiting (and attempting to prevent) discrimination among carriers that would hamper the operation of competitive market forces (thereby harming end use customers who benefit from the operation of competitive markets). (Tr. 106). Particularly applicable in this case is the fact that the Act seeks to prevent an ILEC's actions that would provide a CLEC (or subset of CLECs) an artificial competitive advantage over other CLECs. It is this second form of discrimination that the dispute in this case illustrates. (Tr. 106).

If one CLEC is offered more favorable terms than another CLEC (such as the dispute and hold in the NewPhone ICA), the CLEC with the better terms will have an advantage over the other CLECs with which it competes. (Tr. 107). The FCC has stated that the primary purpose of the rule is to avoid this very situation:

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

> rule should effectively deter incumbent LECs from engaging in such discrimination (emphasis added).[14]

Discrimination can occur when different pricing is offered to different CLECs – for example, one CLEC who pays $5.00/month for an element is discriminated against by the ILEC when another CLEC receives the same element for $4.00. (Tr. 113). Similarly, terms and conditions can be discriminatory, as in this case – where one CLEC is offered a dispute and hold payment provision and the other is not.

In addition, under a hold and dispute provision, AT&T has a much greater incentive to work with the CLEC and to only bill correct amounts. This is illustrated by the fact that AT&T has settled its dispute with NewPhone but not with Express Phone. (Tr. 207-208).

AT&T also attempted to claim that because the NewPhone ICA was executed prior to the AT&T/Express Phone ICA it was not available for adoption. Thus, AT&T implies that if Express Phone wanted the NewPhone ICA, it should have requested it. (Tr. 256). However, when cross-examined about this position, Mr. Greenlaw testified that his recitation of the chronology was somehow related to the negotiation window, though he never explained how. (Tr. 290). Mr. Greenlaw finally admitted that the fact that the NewPhone ICA was executed prior to the AT&T/Express Phone ICA was no barrier to adoption.

> [Ms. Kaufman] Q. . . . Is it your position that a CLEC cannot adopt an agreement that was executed prior to its agreement?
>
> [Mr. Greenlaw] A. No, that's not my position. In essence -- ... but the agreement to be available for adoption would have to be executed prior to their agreement would it not? . . . The Image Access agreement was already approved, so it would have to be

[14] *Second Report and Order*, In the Matter of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, FCC 04-164, ¶19, emphasis supplied. As Mr. Wood testified: "allowing the ILEC to impose conditions on a requesting carrier's ability to adopt an existing ICA would be directly at odds with the anti-discrimination objectives of the Act and would create perverse incentives for an ILEC to engage in discriminatory behavior." (Tr. 115).

> available before a CLEC could even identify it as a potential request to adopt.[15]

Thus, AT&T's own witness abandoned the position that Express Phone could not adopt the NewPhone agreement because it should have requested the agreement.

Finally, AT&T makes several references in its testimony to what AT&T is "willing" to permit Express Phone to do regarding Express Phone's opt in rights.[16] However, Mr. Greenlaw fails to recognize that for Express Phone to adopt the NewPhone ICA, AT&T need not be "willing" to do anything beyond obey the law and perform in a way consistent with the requirements of the Act and FCC rules. (Tr. 133-134).[17]

This is made abundantly clear in the federal court's opinion in *BellSouth Telecommunications, Inc. v. North Carolina Utilities Commission.*[18] In that case, the court held that an opt in is self-effectuating and that no action by the state commission is required. The court went on to find:

> The fact that the FCC requires approved ICAs be made available for opt-in "without unreasonable delay," *see* 47 C.F.R. § 51.809, *does not suggest that the opt-in requests themselves cannot be self-executing* or cannot be made effective as of the date of a requesting carrier's petition. Similarly, the ability of an ILEC to raise objections to an opt-in request before the state commission, *see id.* § 51.809(b), *does not suggest that approval is required and that the resolution of the objections is a condition precedent to the effectiveness of the request.*[19]

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[15] (Tr. 292-293). Mr. Wood testified: "Consistent with the language of §252(i), §51.809 does not limit a CLEC's ability to "opt in" to an ICA to any period of time (either before, during, or subsequent to operation under a different ICA), and does not require that the CLEC and ILEC have a history of undisputed operation pursuant to previous or existing ICAs." (Tr. 109).

[16] In its November 1, 2010 letter to Express Phone, (Exhibit No. 8), AT&T referred to a "conditional" acceptance of the adoption notice. Mr. Greenlaw admitted that he had no idea who drafted the letter. (Tr. 285). Further, Mr. Greenlaw admitted that neither § 252(i) nor § 51.809 reference any type of "conditional" acceptance. (Tr. 287).

[17] AT&T also suggests a parade of horribles, including "rolling adoptions." This is baseless. There would be absolutely no basis for such a scenario to occur unless AT&T continues to enter into discriminatory ICAs. (Tr. 187). No such serial adoption has been seen since the Act's inception in 1996. (Tr. 209).

[18] 2010 WL 5559393 (E.D. N.C. 2010).

[19] *Id.*, footnotes omitted, emphasis added. This vitiates AT&T's argument that there is a requirement that the Commission know about the adoption prior to it taking effect. (Tr. 160). As the court explained, the ICA that is adopted has already been approved by the state commission.

AT&T's claim that it has some right to "approve" an opt in or that it must be "willing" to accept an opt in or that an opt in can be "conditional" is simply inconsistent with federal law.[20] AT&T wants to create a role for itself in the adoption process that simply does not exist.[21] (Tr. 140).

B. The Florida Commission Has Recognized the Importance of Preventing Discrimination.

This Commission has discussed and recognized the import of the provisions discussed above to prevent discrimination. The Commission had the opportunity to discuss the requirements of the federal opt in provision in a 2007 docket involving AT&T and Nextel.[22] In that docket, AT&T refused to recognize Nextel's adoption of an AT&T/Sprint ICA based on § 252(i) as well as merger conditions (which are not relevant here).

Quoting the *Second Report and Order*, this Commission said:

> *At its sole discretion*, an interested carrier may choose to adopt an existing interconnection agreement on file with the Commission that best meets its business needs. The requesting carrier must adopt all terms and conditions included within the existing interconnection agreement ....
>
> Whether a telecommunications carrier may adopt an entire, effective interconnection agreement is determined by whether a genuine exception to the above provision exists. The rule which implements § 252(i), 47 C.F.R. § 51.809, describes the only two instances where an incumbent LEC may deny a requesting carrier the right to adopt an entire effective agreement.[23]

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[20] Similarly, a CLEC's reasons for opting into another ICA are also irrelevant. (Tr. 139).

[21] AT&T's claim that Express Phone's notice was a "request" for adoption is disingenuous at best. AT&T requires CLECs to use a form labeled "request." (Tr. 55).

[22] *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 (April 19, 2010) (*Nextel Adoption Order*).

[23] *Id.* at 7, emphasis supplied.

The Commission then cited the FCC rule and its two exceptions. The Commission held:

> 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 FCC said that it would "deem an incumbent LEC's conduct discriminatory if it denied a requesting carrier's request to adopt an agreement* to which it is entitled under section 252(i) and our all-or-nothing rule."[24]

The Commission rejected AT&T's position in the Nextel docket, found AT&T's position to be "fatally flawed,"[25] and upheld Nextel's adoption as valid. AT&T appealed the Commission's decision to federal district court, which affirmed the Commission's ruling.[26]

C. AT&T's Citations Are Not on Point.

AT&T presented two court cases and a laundry list of orders to the Commission in its Motion for Official Recognition which it suggests should inform the Commission's decision in this case. The majority of these items are inapplicable to this docket.[27]

1. Court Cases.

AT&T attempts to rely upon *Global NAPS, Inc. v. Verizon New England, Inc.*, to support its position.[28] That case is inapposite for numerous reasons.

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[24] *Id.* at 7-8.
[25] *Id.* at 8.
[26] *BellSouth Telecommunications, Inc., d/b/a AT&T Florida v. Florida Public Service Commission*, Case No. 4:09-cv-102/RS/WCS (April 19, 2010).

[27] An extreme example of AT&T's citation of cases with no relevance is its attempt to rely on *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. 99059-TP, Order No. PSC-99-1930-PAA-TP (Sept. 1999). In this case, the opt in was rejected because the standards in § 252(i) were not met. Health Management was not a telecommunications carrier eligible to enter into an ICA with an ILEC and had not been granted a certificate by the Commission. Obviously, this is not the case regarding Express Phone.
[28] 396 F.3d 16 (1st Cir. 2004).

First, the *Global NAPS* case arose from a ruling of the Massachusetts Commission and was appealed to the First Circuit. As such, neither the Massachusetts Commission's ruling nor the First Circuit's decision binds this Commission. The issues in this docket have never been addressed in this circuit or by any southeast Commission as far as Express Phone is aware.

But more importantly, the facts of the *Global NAPS* case are entirely distinguishable from the case before the Commission here. In *Global NAPS*, the issue considered was one of a larger dispute between Global NAPS and Verizon. Verizon and Global NAPS attempted to negotiate a new ICA. When they were unable to do so, Global NAPS sought to arbitrate the disputes. The Massachusetts Commission held a hearing, resolved all the disputes between the parties, and entered a final arbitration order. *After* the parties had engaged in arbitration and *after* the Commission had entered an arbitration order disposing of all the disputed issues, Global NAPS (apparently dissatisfied with the result) attempted to adopt another agreement. Because the Massachusetts Commission had conducted arbitration, had directed the parties to file an agreement based on that arbitration, and had provided no alternatives, Global NAPS' attempt to opt into another agreement was not permitted.[29]

The court was concerned that Global NAPS' action implicated the statutory duties of good faith and cooperation with the commission as arbitrator.[30] The basic holding of the *Global NAPS* case is that once parties have concluded arbitration and the state commission has issued an order, the parties must abide by it.[31]

But most important to the case before the Commission is what the *Global NAPS* case *does not* hold, as the Court itself described:

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[29] Clearly, in this case, there is no suggestion that Express Phone engaged in arbitration with AT&T (it has not) and then attempted to opt into another agreement when it did not like the Commission's arbitration order.
[30] *Global Naps, Id.* at 25.
[31] *Id.* at 27.

> The [Massachusetts Commission] did not, contrary to Global NAPS' assertion, hold that a party to an arbitrated agreement can never exercise rights under §252(i). It also does not, contrary to Verizon's assertion, hold that a party subject to valid arbitration order could never, under §252(i), take advantage of terms in a previously available agreement.[32]

The facts in this case are entirely distinguishable from *Global NAPS*. Express Phone has not engaged in a lengthy arbitration with AT&T before this Commission, received a decision, rejected it, and attempted to opt into another agreement. Express Phone has not failed to act in good faith. Finally, to refuse to recognize the opt in here would permit AT&T to discriminate among providers.

The other court case AT&T has raised is *BellSouth Telecommunications, Inc. v. Southeast Telephone, Inc.* (*Southeast Telephone*).[33] This case is inapposite here as well. The *Southeast Telephone* case arose during the period in which the FCC was changing from its "pick-and-choose" rule to the current "all or nothing" rule regarding opt ins. As the court explained in *BellSouth Telecommunications, Inc. v. North Carolina Utilities Commission (North Carolina),*[34] *Southeast Telephone* dealt with the issue of which set of regulations was applicable to an opt in request. The *North Carolina* court held that:

> By contrast, this case [*North Carolina case*] involves whether, upon adjudicating a dispute where there has been *no* change in the regulatory regime, the Commission's enforcement of its order may properly touch upon a time prior to its final decision. Consequently, adjudication of plaintiff's objection in the instant matter "involved that form of administrative action where retroactivity is not only permissible but standard." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 221 (1988) (Scalia, J., concurring); *see also id.* ("Adjudication deals with what the law was; rulemaking deals with what the law will be.").[35]

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[32] *Id.* at 21.
[33] 462 F.3d 650 (6th Cir. 2006).
[34] 2010 WL 555939 (E.D. N.C. 2010). AT&T fails to mention this case.
[35] *Id.*

No regulations have changed here and thus the *Southeast Telephone* case is inapplicable.

2. Commission Orders.

As to the state commission orders AT&T has mentioned, most of the cases do not relate to an opt in issue at all. For example, in Order No. PSC-12-0085-FOF-TP,[36] the Commission granted AT&T's motion to dismiss a request for emergency relief based primarily on the grounds that it had no authority to grant such relief. While the Commission discussed the provisions in the FLATEL ICA related to the payment of disputed amounts, FLATEL did not opt into another agreement pursuant to § 252(i), and thus, that case has no applicability to the issues before the Commission here. The same is true for many of the other cases AT&T cites.[37]

Regarding cases that touch on an opt in issue, again such cases are not on point. For example, the New York Commission's decision involving Pac-West is not helpful to AT&T's position.[38] In the *Pac-West Order*, the New York Commission considered a dispute between Pac-West and Verizon regarding Pac-West's request to opt in to a different ICA. The New York Commission ruled that unilateral early termination was not authorized based on the provisions in the existing interconnection agreement between PAC-West and Verizon.[39] There is no mention in the New York Commission's decision of the existence of a specific contractual provision (like

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[36] *In re: Request for Emergency relief and complaint of FLATEL, Inc. against BellSouth Telecommunications, Inc., d/b/a AT&T Florida to resolve interconnection dispute*, Docket No. 110306-TP (Feb. 2012).

[37] The same is true for Order No. PSC-10-0457-PCO-TP; *In the Matter of: BellSouth Telecommunications, Inc. d/b/a AT&T Alabama or AT&T Southeast v. LifeConnex Telecom, LLC f/k/a Swiftel, LLC*, Docket No. 31450 (Al. PSC 2010); *In the Matter of: BellSouth Telecommunications, Inc., d/b/a AT&T Southeast d/b/a AT&T Kentucky v. LifeConnex Telecom, LLC f/k/a Swiftel, LLC*, Docket No. 2010-00026 (Ky PSC 2010); and *In the Matter of the Disconnection of LifeConnex Telecom, Inc. f/k/a Swiftel, LLC by BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T North Carolina*, Docket No. P-55 (NC PSC 2010). And in fact, each of these cases involve the very same CLEC – LifeConnex.

[38] *Declaratory Ruling, Petition of Pac-West Telecomm, Inc. for a Declaratory Ruling Respecting Its Rights to Interconnection with Verizon New York, Inc.*, Case No. 06-C-1042 (Feb. 27, 2007) (*Pac-West Order*). As explained, this case is inapposite to the case before the Commission. Further, this Commission is not bound by a decision of the New York Commission.

[39] *Id.* at 11.

the one described above from the prior Express Phone/AT&T agreement) requiring AT&T to provide other interconnection agreements for adoption upon the request of the CLEC.

Moreover, the New York Commission's decision should not be regarded as a persuasive authority or even a reasoned modification of the federal statutory mandate of § 252(i). The New York Commission observed that § 252(i) "does not confer an unconditional right to opt in to an existing agreement or authorize unilateral termination of an existing interconnection agreement."[40] In support of that statement, the New York Commission provided this footnote focusing on the two opt in exceptions:

> A CLEC's ability to pick and choose provisions from existing agreements was restricted from the FCC's first interpretation of §252(i) in the *Local Competition Order, i.e.,* ILEC's were required to make provisions available only for a reasonable period of time and could avoid the rule based on technical nonfeasibility or greater cost. *47 C.F.R. §51.809.*[41]

Thus, the New York Commission did not offer anything new other than a recitation of the statutory mandate which expressly requires ILECs to make interconnection agreements available for adoption by CLECs with only two exceptions as noted. The New York Commission's decision does nothing to change the law or the contractual provision in Section 11 of the General Terms and Conditions of the prior ICA between AT&T and Express Phone.

Finally, this Commission's *Supra Order*[42] is easily distinguishable. First, it is notable that the *Supra Order* was issued long before the *Second Report and Order* adopting the all-or-nothing rule and discussing discriminatory conduct of incumbents. Further, in the *Supra* case, Supra filed a petition with the Commission seeking a generic arbitration for all Florida CLECs,

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[40] *Id.* at 12.
[41] *Id.*
[42] *In re: Petition of Supra Telecommunications & 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 agreement*, Docket No. 980155-TP; Order No. PSC-98-0466-FOF-TP (*Supra Order*).

or, alternatively, an individual petition for arbitration. The Commission found it had no authority to conduct a generic arbitration or to arbitrate where the parties had an agreement. In this case, Express Phone is not asking the Commission to conduct an expensive and time-consuming arbitration; it merely wants access to an agreement the Commission has already approved.

D. This Docket Is Not About Disputed Amounts.

AT&T has suggested that Express Phone has opted into the NewPhone ICA "for the sole purpose of evading its contractual obligations." (Tr. 262). As noted above, Express Phone is not trying to evade anything – it simply wants its disputes resolved, not ignored. It seeks fair treatment from AT&T in managing and resolving such disputes, rather than simply having the disputes ignored. But more importantly, the fact that there are disputes between the parties does not bar Express Phone from exercising its opt in rights under § 252(i).

AT&T called Mr. Egan to the stand to recite AT&T's view of the monies allegedly owed. However, Mr. Egan's testimony cannot be relied on for several reasons. First, this case is about adoption and the interpretation of interconnection agreements. Mr. Egan admitted that he is not an expert in the interpretation of interconnection agreements or in the application of federal statutes and rules at issue in this case. (Tr. 236-237). In fact, Mr. Egan admitted that he has not been involved in any discussions with Express Phone and had never even met Mr. Armstrong before the hearing. (Tr. 237). Mr. Egan did not even prepare or review the interrogatory responses submitted on his behalf, (Tr. 239-240), nor did he have any input into any correspondence sent to Express Phone. (Tr. 241).

While AT&T tried very hard to make this case about the amounts it claims Express Phone owes to it, AT&T provided little if any rebuttal to any of the points Mr. Wood or Mr.

Armstrong made. The reason for this may be that none of the AT&T witnesses were at all familiar with the Express Phone situation,[43] or the law governing this case. As Mr. Wood testified: "Mr. Greenlaw offers no explanation – in the form of expert testimony or otherwise – why a course of action that is directly at odds with the language of the statute is nevertheless somehow "consistent" with the requirements of the statute." (Tr. 130).

As Mr. Armstrong testified, there is a large disagreement between the parties on this point; it is Express Phone's view that AT&T owes money to Express Phone. But regardless of the outcome of the disputes, they are *not* before the Commission in this case. AT&T's repeated efforts to suggest that such disputes have some relation to the outcome here must be rejected.

As Mr. Wood explained:

> The Act does not . . . require that the CLEC and ILEC have a *history of undisputed operation pursuant to previous or existing* ICAs.

(Tr. 107). What is relevant to this docket is the correct application of federal law. The dispute could only impact a CLEC's adoption of an ICA if the relevant sections of the Act and FCC rules contained a restriction on the ability of a CLEC to adopt an existing ICA based on the presence of a dispute. (Tr. 125). There is no such language in the Act.

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

EXPRESS PHONE: *Yes. Express' prior ICA with AT&T expressly provides that AT&T "*shall make available to Express Phone any entire resale agreement filed* and approved pursuant to 47 U.S.C. §252." This is consistent with the law and does not restrict Express Phone's ability to adopt the NewPhone ICA.*

[43] Mr. Egan, the sponsor of some discovery answers, had not even seen the answers until after they were submitted, raising the question of who actually drafted such answers and what reliance, if any, can be placed upon them. (Tr. 239).

The terms of Express Phone's prior ICA explicitly address adoption. The excerpt from the AT&T/Express Phone ICA directly provides that Express Phone is permitted to adopt another carrier's ICA. Specifically, Paragraph 11 of the "General Terms and Conditions" section of the ICA provides:

> **Adoption of Agreements**
>
> Pursuant to 47 U.S.C. §252(i) and 47 C.F.R. § 51.809, BellSouth 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.[44]

Thus, the very ICA that AT&T attempts to rely upon to block Express Phone's opt in contains an *explicit clause* permitting the actions Express Phone has taken. There would be no need to include such language in the ICA if it had no meaning.

AT&T prefers to ignore this clause and rely instead on language in the ICA setting out the term of the agreement. However, to do so ignores federal law – which provides only two exceptions to the right to opt in. There is no language in the AT&T/Express Phone ICA (or the law) that restricts the ability of Express Phone to adopt an existing ICA because of a dispute with AT&T. (Tr. 127-128). In fact, AT&T's Mr. Greenlaw fails to offer any explanation at all as to why AT&T's refusal to make available to Express Phone the AT&T/NewPhone ICA – an agreement that both parties agree was "filed and approved pursuant to 47 U.S.C. Section 252" – did not represent a direct violation of the terms of the agreement. (Tr. 131). And, when AT&T witness Greenlaw was asked about the pertinent provisions in the AT&T/Express Phone ICA related to the issue before the Commission, he omitted in its entirety the clause quoted above. (Tr. 297).

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[44] Exhibit No. 16.

Instead, Mr. Greenlaw referred to provisions in the ICA that are unrelated to a carrier's right to opt in to an already approved agreement. (Tr. 257-258). For example, he refers to the provision dealing with contract term. (Tr. 257). As Mr. Wood explained, requiring a CLEC to remain in a discriminatory ICA for its entire term when a more favorable ICA is available simply guts the requirements of the federal law. (Tr. 114-115). Mr. Greenlaw also refers to that provision in the original AT&T/Express Phone ICA related to disputed amounts. (Tr. 257). That provision has no application here; it has been superseded by the NewPhone ICA. (Exhibit No. 6, § 30.1). Finally, Mr. Greenlaw refers to the negotiation window. (Tr. 258). Such window is inapplicable in an opt in situation. Noticeably absent from Mr. Greenlaw's list is any mention of the explicit reference to the adoption requirement of section 11, quoted above. This is the specific section[45] dealing with adoption and it controls this case.

It is AT&T's view that regardless of the above-quoted provision in the original ICA, as well as Express Phone's federal right to opt in to another CLEC's approved ICA, Express Phone is locked into its ICA with AT&T for five (5) years, despite the fact that AT&T has negotiated more favorable language with another CLEC. AT&T's position is directly contrary to the stated purpose of the opt in rule which is to protect carriers from discrimination.

The language of the ICA is consistent with the language of the Act and also with the language of the FCC rules: each requires AT&T to make the AT&T/NewPhone ICA available to Express Phone for adoption upon request; none of the three contain any restrictions regarding the timing of adoption (except to require that the adoption be effective without unreasonable delay), and none of the three contain any restrictions related to outstanding disputes. (Tr. 132).

[45] It is a primary rule of construction that specific clauses take precedence over general clauses. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 133 (Fla. 2000).

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

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

The Commission addressed the issue of the effective date of an ICA adoption in a recent case,[46] which was affirmed by the federal court. In that case, AT&T argued that the adoption at issue should not become effective until 30 days after the final party executed the adoption contract. The Commission rejected AT&T's position and held:

> When an interconnection agreement is available for adoption under 47 C.F.R. 51.809(a), the adoption is considered presumptively valid and effective upon receipt of the notice by the adoption party.[47]

Consistent with this language, the adoption is effective upon AT&T's receipt of Express Phone's notice on October 20, 2010. The Commission also commented that "[t]he effective date should not be affected by the passage of time during litigation of this issue...."[48] That is, AT&T's continued refusal to recognize the opt in does not delay the effective date of Express Phone's notice.

When AT&T appealed the *Nextel Order* to the federal court, the court held:

> ...FPSC's determination that backdating is allowed because "the adoption is considered presumptively valid and effective upon receipt

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[46] *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 (April 19, 2010) (*Nextel Adoption Order*).

[47] *Id.* at 11.

[48] *Id.*

> of the notice by the adoption party" and that effective dates are not affected by any filed objections is not contrary to federal law.[49]

Thus, no action is required by the state regulator to effectuate an adoption.

In addition, the federal court in *BellSouth Telecommunications, Inc. v. North Carolina Utilities Commission*[50] held that an opt in is self-effectuating and that no action by the state commission is required. In that case, Nextel sought to adopt the ICA of Sprint which contained more favorable terms. The basis for Nextel's request was 47 U.S.C. § 252(i). BellSouth objected, claiming the ICA had expired; however, it was subsequently extended for three years. The North Carolina Commission found that Nextel's adoption would have been effective on the date of its notice had BellSouth not raised objections which were later found to be meritless.

Just as AT&T argues here, BellSouth argued that for an opt in to be effective it had to be submitted to the state commission for approval and that any such approval could not be "back dated." The federal court rejected that notion and held:

> Plaintiff's argument against setting pre-order effective dates for ICAs is based primarily on the requirement that any ICA adopted through negotiation or arbitration must be submitted to the state commission for approval. *See* 47 U.S.C. § 252(e)(1). Assuming *arguendo,* however, that the effective date of a negotiated or arbitrated ICA can be set no earlier than the date on which a state commission approves it under § 252(e), the same does not necessarily hold true for an ICA entered into through the opt-in process of § 252(i). As detailed below, nothing in the Act or the implementing regulations requires the same approval process for § 252(i) opt-in requests.[51]

The court went on to hold:

> Nor do the regulations support plaintiff's position. The fact that the FCC requires approved ICAs be made available for opt-in "without unreasonable delay," *see* 47 C.F.R. § 51.809, *does not*

[49] *BellSouth Telecommunications, Inc. v. Florida Public Service Commission*, Case No. 4:09-cv-102/RS/WCS (April 19, 2010).
[50] 2010 WL 5559393 (E.D. N.C. 2010).
[51] *Id.*

> *suggest that the opt-in requests themselves cannot be self-executing* or cannot be made effective as of the date of a requesting carrier's petition. Similarly, the ability of an ILEC to raise objections to an opt-in request before the state commission, *see id.* § 51.809(b), *does not suggest that approval is required and that the resolution of the objections is a condition precedent to the effectiveness of the request.* Though in some cases an ILEC may attempt to "prove [ ] to the state commission" that providing the agreement to the requesting carrier will be technically infeasible or more expensive than the original agreement, *see id.*, neither the statute nor regulations dictate the process a state commission must use to resolve these questions. There is no prohibition on attempting, postadjudication, to place the parties in the position they would have occupied if not for the objection.[52]

AT&T's Mr. Greenlaw attempted to suggest that there was some requirement that a filing be made with the Commission before an opt in could take effect. He even went so far as to refer to a "Notice of Adoption" in his testimony. (Tr. 264). However, on cross-examination, Mr. Greenlaw admitted that no such notice exists or is required nor is any form or filing required at the Commission. (Tr. 301).

Finally, the language of the NewPhone ICA (§ 30.1) makes it clear that once the NewPhone ICA is adopted – as it was in this case on October 20, 2010 – that ICA governs the parties' relationship in the past, the present and the future. The NewPhone ICA states:

> This Agreement sets forth the entire understanding and supersedes prior agreements between the Parties relating to the subject matter contained in this Agreement.... Any orders placed under prior agreements between the Parties shall be governed by the terms of such prior agreements between the Parties until the Effective Date of this Agreement and Image Access acknowledges and agrees that any and all amounts and obligations owed for services provisioned or orders placed under prior agreements between the Parties, *shall be due and owing under such prior agreements between the Parties and by governed by the terms and conditions of the prior agreements between the Parties* <u>*until the Effective Date of this*</u>

[52] *Id.*, footnotes omitted, emphasis added. This vitiates AT&T's argument that somehow there is a requirement that the Commission have knowledge about the adoption prior to it taking effect. (Tr. 161). As the court explained, the ICA that is adopted has already been approved by the state commission.

Agreement at which time the orders and services will be governed by the terms of this Agreement.[53]

This language makes the NewPhone ICA applicable to *all* services ordered under the prior agreement as of the date of the opt in. (Tr. 206). As of October 20, 2010, the NewPhone ICA governed the parties' relationship, including the fact that only undisputed amounts are due until resolution of disputes under the NewPhone ICA.

CONCLUSION

Pursuant to the law, as well as the evidence presented in this case at hearing, the Commission should find that Express Phone adopted the interconnection agreement between AT&T and NewPhone on October 20, 2010 and that ICA governs the parties' relationship.

s/ Vicki Gordon Kaufman

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[53] Exhibit No. 6, § 30.1, emphasis added.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Express Phone Service, Inc.'s Statement of Issues and Positions and Post-Hearing Brief has been furnished by Electronic Mail and U.S. Mail this 1st day of June, 2012, to the following:

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