

State of Florida



Public Service Commission

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DATE: July 5, 2012

TO: Office of Commission Clerk (Cole)

FROM: Division of Regulatory Analysis (Bates) *BT*
Office of the General Counsel (Tan) *Tan*

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: 07/17/12 -- Regular Agenda -- Post-Hearing Decision -- Participation is Limited to Commissioners and Staff

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Balbis

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

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FPSC-COMMISSION CLERK

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Case Background

Express Phone Service Inc. (Express Phone) is a Competitive Local Exchange Company (CLEC) certified since 2000 to provide resale services in Florida. In 2006, BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast (AT&T Florida) and Express Phone negotiated and executed a binding resale interconnection agreement (2006 ICA).¹ Express Phone is currently not providing resale services in Florida.²

On March 29, 2011, Express Phone filed a Notice of Adoption that it was adopting a different interconnection agreement, in its entirety, between AT&T Florida and Image Access, Inc. d/b/a NewPhone (NewPhone ICA). On that same day, AT&T Florida filed a letter and non-consent to the adoption of the NewPhone ICA.

On April 12, 2011, Express Phone filed a Motion for Summary Final Order. The Public Service Commission (Commission) denied the Motion in Proposed Agency Action Order No. PSC-11-0291-PAA-TP (PAA Order), issued July 6, 2011. On July 27, 2011, Express Phone protested the portions of the PAA Order which relate to its adoption of the NewPhone ICA and requested a formal proceeding.

An Order Establishing Procedure, Order PSC-12-0031-PCO-TP, was issued on January 19, 2012 and modified by Order Nos. PSC-12-0058-PCO-TP and PSC-12-0130-PCO-TP, issued on February 10, 2012 and March 20, 2012 respectively. On May 3, 2012, an Administrative Hearing was held.

The Adoption Process

Pursuant to 47 U.S.C. §252 of the Telecommunications Act of 1996 (Act), a telecommunications carrier has three methods to enter into an interconnection agreement with an Incumbent Local Exchange Company (ILEC). The first method, described in §252(a), is negotiation, and the second, in §252(b), is compulsory arbitration. In the alternative, however, in lieu of §252(a) and (b), a telecommunications carrier may adopt an existing interconnection agreement pursuant to §252(i). Depending on its specific business model, an interested carrier may choose to adopt an existing interconnection agreement on file with the Commission, and must adopt all Terms and Conditions included within that interconnection agreement.

Section 252(i) governs 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.

¹ Docket No. 060714-TP - Request for approval of resale agreement between BellSouth Telecommunications, Inc. and Express Phone Service, Inc.

² As of March 31, 2011, AT&T Florida ceased providing services to Express Phone.

The purpose of the FCC's adoption requirements is to ensure that an ILEC cannot discriminate among the carriers it serves.

The AT&T Florida / Express Phone 2006 ICA

The parties agreed that the 2006 ICA would begin on November 3, 2006 and expire on November 2, 2011. Section 2.1 of the Terms and Conditions of the 2006 ICA states in part "[t]he initial term of this Agreement shall be five (5) years, beginning on the effective date . . ." which was agreed upon by the parties to be thirty (30) days after the date of the last signature executing the agreement. (EXH 23) Section 2.3.1 of the Terms and Conditions sets forth the conditions necessary for early termination of the 2006 ICA, and states in part:

Express Phone may request termination of this Agreement only if it is no longer purchasing services pursuant to this Agreement. (EXH 23)

This language, along with the clear language in Section 12.2 regarding modification of the agreement, provides a path for Express Phone to negotiate an amendment permitting early termination. Section 12.2 reads:

No modification, amendment, supplement to, or waiver of the Agreement or any of its provisions shall be effective and binding upon the Parties unless it is made in writing and duly signed by the parties. (EXH 23)

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

Discussion of Issues

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

Recommendation: The Commission has only those powers granted by statute expressly or by necessary implication and does not have authority to order equitable relief. Accordingly, it is not appropriate for the Commission to make a finding that the adoption is barred by the doctrines of equitable relief. (Tan)

Position of the Parties

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

AT&T Florida: Yes. Express Phone cannot abandon its Commission-approved ICA to adopt an ICA which was available when Express Phone entered its current ICA. AT&T Florida did not waive its right to require Express Phone to cure its breach before consenting to Express Phone's 2011 adoption request.

Staff Analysis:

Parties' Arguments

Express Phone

Express Phone argues that AT&T Florida cannot object to Express Phone's adoption of the NewPhone ICA and believes that an opt in is valid upon the incumbent's receipt of the CLEC's Notice of Adoption. (BR 4) Express Phone's basis for disagreeing with AT&T Florida's refusal is the doctrine of unclean hands. Express Phone asserts that when a party has violated a restriction which it now seeks to enforce, the enforcement of such restriction is prohibited or denied.³

Express Phone argues that AT&T Florida's provision of the 2006 ICA as a "standard" contract during their initial discussions illustrated a failure to provide all options during discussions and therefore was discriminatory by its failure to be consistent with offerings to other CLECs. (BR 6) Moreover, Express Phone contends that AT&T Florida's failure to deal in good faith through the life of the ICA and unreasonable delay toward acknowledging the adoption of the NewPhone ICA bars any refusal from AT&T Florida. (BR 10)

³ See, Pilafian v. Cherry, 355 So.2d 847, 850 (Fla. 3rd DCA 1978)

AT&T Florida

AT&T Florida argues that Express Phone is barred from adopting a new interconnection by estoppel and laches. AT&T Florida contends that Express Phone had an opportunity to adopt the NewPhone ICA or to negotiate or arbitrate different payment terms for its 2006 ICA with AT&T Florida. Furthermore, AT&T Florida argues that once the 2006 ICA was signed, the parties became contractually bound by its terms.⁴ AT&T Florida argues that laches bars a party from pursuing a legal right that it may have had if it waits too long to do so.⁵ AT&T Florida argues that prior to signing the 2006 ICA, there was opportunity to adopt a different ICA or to negotiate or arbitrate different payment terms for its ICA. AT&T Florida stresses that the agreement is enforceable and binding on both parties, even if a provision is perceived to be harsh or disadvantageous to one party. (BR 6)

AT&T Florida contends that equitable estoppel results from the “voluntary conduct of a party” and “absolutely preclude[s]” the party from asserting rights which it might otherwise have had.⁶(BR 6) AT&T Florida disagrees that Express Phone lacked the resources to negotiate and argues that negotiating in good faith for an interconnection agreement would not have created an undue economic burden for Express Phone.

AT&T Florida points out that Express Phone never availed itself of the established options provided by the 2006 ICA. Further, AT&T Florida argues that Express Phone cannot suggest that AT&T Florida has the burden to make business decisions for Express Phone, such as what is the best interconnection agreement suited to Express Phone. The Act does not impose that burden on AT&T Florida. (BR 8) AT&T Florida notes that AT&T witness Greenlaw stated “it is incumbent upon the CLEC to identify what the terms and conditions are that they feel is the best deal.” (TR 308)

AT&T Florida contends that it did not waive its right to deny Express Phone’s adoption and that Express Phone cannot simply change its mind and unilaterally reject the 2006 ICA.

Staff Analysis

In 2006, Express Phone and AT&T Florida entered into an interconnection agreement for an initial term of 5 years. Staff believes that upon the signing of an interconnection agreement, approved by the Commission, the rights and obligations of the parties are set forth in the terms and conditions of the specific interconnection agreement. As a result, the actions of the parties or the availability of an alternative interconnection agreement prior to the signing of the 2006 ICA should not be factors in the Commission’s determination of the validity of an adoption.⁷

⁴ See *Medical Ctr. Health Plan v. Brick*, 572 So. 2d 548, 551 (Fla. 1st DCA 1990) (A party is bound by, and a court is powerless to rewrite, the clear and unambiguous terms of a voluntary contract.)

⁵ See generally, 35 Fla. Jur. 2d Limitations and Laches § 115.

⁶ *State ex re. Watson v. Gray*, 48 So. 2d 84, 87-88 (Fla. 1950)

⁷ 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).

Equitable relief, such as the doctrines of estoppel, laches, waiver and unclean hands, are concepts which the Commission has commented on in previous proceedings, but has not been the basis for a decision. The Commission only has those “powers granted by statute expressly or by necessary implication.”⁸ Section 364.162, F.S., only authorizes the Commission to seek equitable relief in an appropriate circuit court, not to order equitable relief. The Commission’s authority, while “broad enough to inquire into competitive conduct, does not clearly authorize the Commission to impose equitable relief.”⁹ Rather, the resolution of equitable relief is “reserved for agencies with specific statutory authority.”¹⁰ As the Commission is a statutory creature, the Commission has no common law jurisdiction or inherent power as do the courts.¹¹

Staff agrees it is not AT&T Florida’s burden to find the best interconnection agreement for Express Phone. A company seeking an interconnection agreement with AT&T Florida may file arbitration or a complaint. Express Phone failed to avail itself of these remedies. Accordingly, staff believes that discussions and interactions that occurred prior to the signing of the 2006 ICA should not be considered by the Commission.

The Commission has only those powers granted by statute expressly or by necessary implication and does not have authority to order equitable relief. Accordingly, staff recommends that it is not appropriate for the Commission to make a finding that the adoption is barred by the doctrines of equitable relief.

⁸ *Deltona Corp. v. Mayo*, 342 So.2d 510, 512 (Fla. 1977)

⁹ *In re: Petition by AT&T Communications of the Southern States, Inc., TCG South Florida, and MediaOne Florida Telecommunications, Inc. for structural separation of BellSouth Telecommunications, Inc. into two distinct wholesale and retail corporate subsidiaries*, Docket No. 010345-TP, Order No. PSC-01-2178-FOF-TP, issued November 6, 2001, concurring opinion of Chairman Jacobs.

¹⁰ *Id.*

¹¹ *In re: Petition for expedited enforcement of interconnection agreement with Verizon Florida Inc. by Teleport Communications Group, Inc. and TCG South Florida.*, Docket No. 021006-TP, Order No. PSC-01-2178-FOF-TP, issued December 6, 2002, citing *East Central Regional Wastewater Facilities Bd. v. City of West Palm Beach*, 659 So.2d 402, 404 (Fla. Dist. Ct. App. 1995); *In re: Initiation of show cause proceedings against TELECO COMMUNICATIONS COMPANY for violation of Rule 25-4.004, F.A.C., Certificate of Public Convenience and Necessity Required*, Docket No. 911214-TP, Order No. PSC-96-0007-FOF-TP, issued January 2, 1996.

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?

Recommendation: No. A telecommunications company should not be permitted to adopt an alternative interconnection agreement when it has failed to materially comply with its existing ICA. Express Phone failed to pay disputed amounts as required by its 2006 interconnection agreement with AT&T Florida and thus should not be eligible to adopt an alternative interconnection agreement until it is in compliance with the 2006 interconnection agreement. (Tan, Bates)

Position of the Parties

Express Phone: Yes. 47 U.S.C. § 252(i) requires AT&T Florida 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.

AT&T Florida: No. No legal authority allows Express Phone to unilaterally abandon a Commission-approved ICA with an unexpired term or while it is in breach of a material provision. Instead, relevant authority holds Express Phone to its contract term and requires Express Phone to cure the breach before adopting a new ICA.

Staff Analysis:

Parties’ Arguments

Express Phone

Express Phone contends that it is entitled to opt in to the NewPhone ICA during the term of a prior interconnection agreement. Express Phone asserts that §252(i) sets out the requirements for an adoption of an ICA.¹² Express Phone argues that an Incumbent Local Exchange Company (ILEC) must make any interconnection agreement available to any requesting telecommunications carrier and that the ILEC and the Commission are precluded from placing conditions on an opt-in. (BR 11)

Express Phone argues that 47 C.F.R. §51.809 (§51.809) describes only two instances where 47 U.S.C. §252(i) is inapplicable,¹³ where 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). Express Phone further argues that these two exceptions do not apply nor did AT&T Florida raise them. Express Phone contends AT&T Florida, by

¹² (i) Availability to Other Telecommunications Carriers. – A local exchange carrier shall make available any interconnection agreement 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.

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

failing to allow the NewPhone adoption, discriminated against Express Phone. Such discrimination may give a CLEC a competitive advantage over other CLECs. Express Phone states that the Federal Communication Commission's (FCC) intent is to avoid a situation where a CLEC with better terms in its interconnection agreement will have an advantage over other CLECs with whom it competes. (BR 12)

Express Phone argues that AT&T Florida does not have the ability to do anything but perform in a way consistent with Act. Express Phone asserts that the District Court of North Carolina held that no action by a state commission is required and that an opt-in is self-effectuating.¹⁴ Express Phone argues that the reasons for opting into another interconnection agreement are irrelevant. Express Phone asserts that the Commission has previously held that AT&T Florida could not refuse to recognize an adoption.¹⁵

Furthermore, Express Phone argues that the fact that there are disputes between the parties does not bar it from adopting the NewPhone ICA under 47 U.S.C. §252(i). Express Phone argues that this proceeding is about adoption and the interpretation of interconnection agreements. Express Phone's dispute with AT&T Florida should only affect its adoption if the relevant sections of the Act and the FCC rules contained a restriction on the ability of a CLEC to adopt an existing interconnection agreement based on the presence of a dispute. And since the Act and the FCC do not contain such a restriction, Express Phone contends it should be permitted to adopt the NewPhone interconnection agreement.

AT&T Florida

AT&T Florida argues that while in breach of its contractual obligations, Express Phone is seeking to terminate its current interconnection agreement and adopt a different interconnection agreement. AT&T Florida contends that by attempting to adopt a new interconnection agreement, Express Phone is seeking to unlawfully terminate its current interconnection agreement.

AT&T Florida asserts that a party that enters into a contract is bound by the contract.¹⁶ AT&T Florida further asserts that the Commission has previously determined that a CLEC cannot leave an interconnection agreement early.¹⁷ While not binding to the Commission, other

¹⁴ BellSouth Telecommunications, Inc. v. North Carolina Utilities Commission, 2010 WL 5559393 (E.D. N.C. 2010).

¹⁵ *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, *affirmed*, Bellsouth Telecommunications, Inc. v. Florida Public Service Commission, Case No. 4:09-cv-102/RS/WCS (April 19, 2010). (Nextel Order)

¹⁶ Medical Ctr. Health Plan, 551.

¹⁷ The Commission rejected arbitration of a new interconnection agreement while the parties operated under an existing agreement on the basis that the Act does not allow the Commission to alter terms within an approved negotiated agreement. *In re: Petition of Supra Telecommunications & Information Systems for generic proceeding to arbitrate rates, terms, and condition 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 (March 31, 1998).

state commissions have addressed the same issue, finding that 47 U.S.C. §252(i) does not authorize “voiding a contract.”¹⁸

AT&T Florida asserts that Express Phone primarily seeks to use its adoption to avoid its obligation to pay a past due balance. AT&T Florida argues that the Commission has previously held that the Commission has the authority to reject an adoption as not being consistent with the public interest.¹⁹ Moreover, AT&T Florida contends that to allow the adoption would reward Express Phone for its breach and establish that the terms of the 2006 ICA were not enforceable. Florida law holds that a party is bound by a contract provision, even if it is somehow perceived to be harsh or unfair.²⁰

Finally, AT&T Florida argues it is not the purpose of §252(i) to allow a carrier to escape its payment obligations under an existing agreement and to allow this to occur would negate the express and unambiguous terms of the parties’ ICA.

Staff Analysis

Pursuant to §252(i), an ILEC’s existing interconnection agreements must be made available for adoption by any requesting telecommunications carrier. The purpose of §252(i) is to ensure that all competitive carriers are on a level playing field. By granting competitive carriers the right to adopt a competitor’s interconnection agreement, Congress ensured that a competitive carrier would not be able to enter into an interconnection agreement with an ILEC that contained favorable terms and conditions not made available to its competitors. However, in the instant proceeding, staff believes Express Phone has contorted the purpose of §252(i), and is attempting to gain a competitive advantage over AT&T by seeking to adopt an interconnection agreement with more favorable payment terms while concurrently failing to meet the payment terms of its existing agreement.

It is undisputed that Express Phone and AT&T Florida mutually entered into the 2006 ICA. (EXH 23) Florida has established that once a party enters into a contract, it is bound by the contract.²¹ Further, the Commission has determined that an interconnection agreement is a binding agreement.²² The United States Court of Appeals for the Eighth Circuit confirmed that, pursuant to §252, state commissions, such as Florida, “are vested with the power to enforce the provisions of the agreements . . . (they) have approved.”²³

¹⁸ *Petition of Pac-West Telecomm, Inc. v. a Declaratory Ruling Respecting its Rights to Interconnection with Verizon New York, Inc. Case No. 06-C-1042* (N.Y. Comm’n Feb. 27, 2007) (EXH 42), Global NAPs, Inc. v. Verizon New England, Inc. 396 F.3d 16 (1st Cir. 2004).

¹⁹ *In re: Notice by BellSouth Telecomms., Inc. of adoption of an approved interconnection, unbundling, and resale agreement between BellSouth Telecomms., Inc. and AT&T Commc’ns of the Southern States, Inc. by Healthcare Liability Mgmt. Corps. d/b/a Fibre Channel Networks, Inc. and Health Mgmt. Sys., Inc.* Docket No. 99059-TP, Order No. PSC-99-1930-PAA-TP (Sept. 29, 1999).

²⁰ Applica Inc.v. Newtech Electronics Indus., Inc. 980 So. 2d 1194 (Fla. 3d DCA 2009)

²¹ Medical Center Health Plan v. Brick, 572 So.2d 548, 55(Fla. 1st DCA 1990)

²² *In re: Petition for approval of election of interconnection agreement with GTE Florida Incorporated pursuant to Section 252(i) of the Telecommunications Act of 1996, by Sprint Communications Company Limited Partnership d/b/a Sprint*, Docket No.971159-TP, Order No. PSC-98-0251-FOF-TP, issued February 6, 1998.

²³ Iowa Utilities Board v. FCC, 120 F.3d 753, 804 (8th Cir. 1997)

Express Phone has not paid its disputed amounts as required by the terms and conditions of its 2006 ICA. Express Phone's failure to comply with the terms and conditions of the 2006 ICA is a material breach of the binding agreement. Staff believes that Express Phone's breach of its 2006 ICA renders the company ineligible to adopt the NewPhone ICA until the 2006 ICA's breach is remedied.

A company bound by the terms and conditions of its signed interconnection agreement, should not be allowed to adopt an alternative interconnection agreement if the company is concurrently breaching its existing interconnection agreement. Accordingly, staff does not believe the Commission needs to reach a decision on whether the NewTalk interconnection agreement is available for adoption by Express Phone because Express Phone is not eligible to adopt a new interconnection agreement until it remedies the breach of its 2006 ICA.

Conclusion

A telecommunications company should not be permitted to adopt an alternative interconnection agreement when it has failed to materially comply with its existing ICA. Express Phone failed to pay disputed amounts as required by its existing interconnection agreement with AT&T Florida and thus should not be eligible to adopt an alternative interconnection agreement until it is in compliance with the 2006 ICA.

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

Recommendation: No. Express Phone is not permitted, under the terms of the interconnection agreement with AT&T Florida, to adopt the NewPhone Interconnection Agreement. (Bates, Tan)

Position of the Parties

Express Phone: Yes. Express Phone's prior ICA with AT&T Florida expressly provides that AT&T Florida "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.

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

Staff Analysis:

Parties' Arguments

Express Phone

Express Phone asserts that its adoption rights are spelled out in Section 11 of the Terms and Conditions of the 2006 ICA, and these rights are buttressed by §252(i) of the Act and its implementing rule, 47 C.F.R. §51.809. Express Phone contends that Section 11 of the 2006 ICA overrides the term and termination language contained in Section 2.1 of the ICA. (BR 23, 24)

Express Phone believes AT&T Florida has not acted in good faith regarding credits for promotions. (TR 31) If its adoption request is approved, the terms of the NewPhone ICA will allow Express Phone to withhold amounts which are in dispute, pending resolution. (EXH 6) Witness Woods testified that he understood the NewPhone ICA may also control any current dispute with AT&T Florida. (TR 193)

Express Phone believes AT&T Florida's reliance on the term and termination language of the ICA ignores its rights to adopt an existing agreement as provided under federal law. Express Phone argues that if the language of Section 11 did not permit Express Phone to adopt the NewPhone ICA, there would be no reason to include the language in the 2006 ICA. (BR 23)

AT&T Florida

Express Phone's 2006 ICA specifies an initial five year term, beginning on November 3, 2006 and expiring on November 2, 2011. It is AT&T Florida's position that no other provision

in the ICA altered the term of the ICA, and early termination can only occur if Express Phone was no longer purchasing services pursuant to the 2006 ICA. (EXH 23)

AT&T Florida argues that Section 11 of the ICA, a recitation of §252(i), “does not grant any rights beyond the rights and obligations that the parties already have by law.” In addition, Section 11 is limited to the adoption of any entire *resale* agreement, and does not apply to interconnection agreements such as the NewPhone ICA. (emphasis added) AT&T Florida also argues that Express Phone does not have the right under federal law to adopt a new ICA while it is a party to an existing agreement and while in breach of that agreement. (BR 17, 18) AT&T Florida believes “[t]he public interest would not be served by allowing a CLEC, such as Express Phone, to use 252(i). . . to escape the obligations that they have under such an agreement.” (TR 281)

Finally, AT&T Florida argues that the 2006 ICA requires Express Phone to pay all amounts due, whether they are in dispute or not. (TR 21; EXH 23) AT&T Florida believes Express Phone is and continues to be, in material breach of the contract between the parties for failing to pay approximately \$1.5 million. (TR 22)

Staff Analysis

The Commission has previously determined that parties are bound by the Terms and Conditions of Commission-approved agreements.²⁴ The Terms and Conditions section of Express Phone’s 2006 ICA clearly state the agreement was for five (5) years; Express Phone was permitted to request early termination if it was no longer ordering services; any modification to the agreement must be mutual, in writing, and binding on both parties; and Express Phone must pay all amounts due, whether they are in dispute or not. (EXH 23) Staff believes this is a case of first impression and neither the Commission, the FCC, nor the courts have addressed the specific issue of whether a party to an ICA is permitted to adopt another ICA without first fulfilling the obligations of its existing ICA.

Without prior written agreement to amend the 2006 ICA, Express Phone withheld payments it considered to be in dispute. (TR 88; 93) The plain language of the resale agreement with AT&T Florida requires that payment for services must be provided, including disputed charges, at the billing date established by the ICA. (TR 226; EXH 23) Express Phone’s failure to pay disputed amounts is contrary to the explicit terms contained in the 2006 ICA. (EXH 23)

By seeking to adopt the NewPhone ICA, Express Phone attempts to terminate the 2006 ICA without mutual agreement by the parties which is in direct opposition to the clear Terms and Conditions of the 2006 ICA. (EXH 23)

Express Phone argues that AT&T Florida does not object to its adoption request/notification on the basis of the two available exceptions in §51.809(b)(1) and (2). Staff agrees that based on the facts and circumstances in the Nextel Order, the Commission found that

²⁴ 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.

technical feasibility and the cost to serve an adopting party were the only two exceptions to §252(i) of the Act.²⁵ However, the circumstances in this case differ from Nextel because Express Phone was in breach of its 2006 ICA by failing to pay disputed amounts contrary to Section 1.4 of the Terms and Conditions of the 2006 ICA. (EXH 10)

Express Phone argues that Section 11 of its 2006 ICA permits it to adopt any valid ICA at any time, and this provision overrides all other terms of the ICA, including Section 2, which controls the length of the contract and the date it terminates. (TR 107) AT&T Florida argues that this conclusion is bad public policy and believes such a conclusion would “make voidable every ICA simply at the will of a CLEC that doesn’t like the terms of its agreement.” (TR 24). Staff agrees with AT&T Florida that a party which is in violation of an existing ICA should not have the right to adopt another agreement until it has fulfilled the obligations of the existing ICA.

Conclusion

The terms of Express Phone’s 2006 ICA specify the duration of the ICA, the window of opportunity to negotiate a new agreement, the terms under which the agreement can be renegotiated or terminated, and payment responsibilities. Express Phone has not followed the terms of the agreement, arguing instead that regardless of its standing in relation to the agreement, the agreement provides an opportunity to adopt another agreement without the consent of AT&T Florida.

Staff believes that Express Phone is in breach of its agreement with AT&T Florida and, because of that breach, it should not be permitted to adopt the NewPhone agreement until the breach is remedied. Staff agrees with AT&T Florida that allowing Express Phone to adopt the NewPhone agreement while in violation of the terms of its 2006 ICA would be bad public policy. Therefore staff recommends that Express Phone is not permitted under the terms of its ICA with AT&T Florida to adopt the NewPhone ICA.

²⁵ Order No. PSC-08-0584-FOF-TP in Docket No. 070368-TP Notice of adoption of existing interconnection agreement between BellSouth Telecommunications, Inc. 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, Page 7, issued on September 10, 2008.

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

Recommendation: If the Commission agrees with the recommendations in Issues 2 and 3 then this issue is moot. If the Commission determines in Issues 2 and 3 that the NewPhone Interconnection Agreement is available for adoption by Express Phone, the effective date should be March 29, 2011. (Bates, Tan)

Position of the Parties

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 adopting party.”

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

Staff Analysis:

This issue is moot if the Commission agrees with the recommendations in Issues 2 and 3.

Parties’ Arguments

Express Phone

In Express Phone’s view, its adoption of the NewPhone ICA became effective on the day it filed notice with AT&T Florida, October 20, 2010. To buttress this argument, Express Phone quotes a portion of the Commission’s decision in the Nextel case:

“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.” (BR 25)

Express Phone also cites, in part, the federal court decision in that case:

“. . . FPSC’s determination that backdating is allowed because “the adoption is considered presumptively valid and effective upon receipt of the notice by the adoption party” and that effective dates are not affected by any filed objections is not contrary to federal law.” (BR 25, 26)

Express phone argues the federal decision in Nextel permits the adoption of the NewPhone ICA to go into effect on October 20, 2010, the date Express Phone noticed AT&T Florida that it was adopting the ICA. (BR 25)

AT&T Florida

AT&T Florida argues that Express Phone's request to adopt the NewPhone ICA can never be effective because Express Phone has not cured its breach under the 2006 ICA. Express Phone breached its ICA by failing to pay its bills in full, Express Phone never cured that breach, and now owes AT&T Florida in excess of \$1.3M. (BR 19)

AT&T Florida further argues that since the NewPhone ICA expired on April 18, 2012, it is no longer available for adoption. (BR 20)

If the Commission permits Express Phone to adopt the NewPhone ICA, it should be effective no earlier than 90 days after March 29, 2011, on June 27, 2011. (BR 20)

Staff Analysis

A CLEC's initial §252(i) notification/request to an ILEC for adoption of a new or different ICA is the beginning of the process between CLEC and ILEC by which the CLEC may adopt an existing ICA instead of negotiating or arbitrating terms of a new agreement. Express Phone notified AT&T Florida on October 20, 2010 that it was adopting the terms of the NewPhone ICA. (EXH 7)

Express Phone believes it has adopted the NewPhone ICA effective October 20, 2010. (TR 38) In support of October 20, 2010 being the proper effective date for its notice of adoption, Express Phone cites a portion of 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 party. (TR 118, 150)²⁶

However, Express Phone omits a significant sentence from the Nextel Order. The complete paragraph reads:

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. Without objection from the ILEC, the adoption would be acknowledged effective as of the filing date.²⁷

Omitting the final sentence in the above paragraph distorts the meaning and intent of the passage. This passage is clear: the ILEC is on notice that the CLEC wants to adopt an ICA;

²⁶ Id.

²⁷ Id.

concurrent with that notice to the ILEC, if the ILEC objects to the adoption, the objection must be filed within a reasonable time.

Staff notes that Express Phone sent letters regarding adoption of the NewPhone ICA to AT&T Florida but did not file a Notice of Adoption with the Commission until March 29, 2011. (EXH 13) AT&T Florida objected to the October 20, 2010 effective date of the alleged adoption. (TR 255; EXH 22)

In the Nextel Order, the Commission determined that the effective date of an adoption is the date that the Notice of Adoption is filed with the Commission.²⁸ While Express Phone discussed adoption with AT&T Florida, it did not file a Notice of Adoption with the Commission until March 29, 2011.

Conclusion

If the Commission agrees with the recommendations in Issues 2 and 3 then this issue is moot. If the Commission determines in Issues 2 and 3 that the NewPhone ICA is available for adoption by Express Phone, the effective date should be March 29, 2011, in keeping with the previous Commission decision in the Nextel Case.

²⁸ Id.

Issue 5: Should this docket be closed?

Recommendation: Yes. If the Commission approves staff's recommendations in all issues this docket should be closed after the time for filing an appeal has run. (Tan)

If the Commission denies staff's recommendation in Issues 2 and 3 and approves the adoption, this docket should remain open pending the filing of the signed adoption between the parties, which should occur no later than 7 days following the Commission's vote. This docket should be closed administratively after the time for filing an appeal has run and upon issuance of a memo by staff acknowledging the Adoption of the NewPhone Interconnection Agreement. (Tan)

Staff Analysis: If the Commission approves staff's recommendations in all issues this docket should be closed after the time for filing an appeal has run.

If the Commission denies staff's recommendation in Issues 2 and 3 and approves the adoption, this docket should remain open pending the filing of the signed adoption between the parties, which should occur no later than 7 days following the Commission's vote. This docket should be closed administratively after the time for filing an appeal has run and upon issuance of a memo by staff acknowledging the Adoption of the NewPhone Interconnection Agreement.