



Tracy W. Hatch  
General Attorney

AT&T Florida  
150 South Monroe Street  
Suite 400  
Tallahassee, FL 32301

T: (850) 577-5508  
th9467@att.com

July 9, 2012

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Ms. Ann Cole  
Commission Clerk  
Office of the Commission Clerk  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

**Re: Docket No. 120169-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 New Talk, Inc. by  
Digital Express, Inc.**

Dear Ms. Cole:

Enclosed is an original and seven copies of BellSouth Telecommunications, LLC d/b/a AT&T Florida's Response in Opposition to Digital Express, Inc.'s Notice of Adoption, which we ask that you file in the captioned docket.

Copies have been served to the Parties shown on the attached Certificate of Service list.

Sincerely,

Tracy W. Hatch

cc: Parties of Record  
Gregory R. Follensbee  
Suzanne L. Montgomery

TEL 6  
COM \_\_\_\_\_ 1039849  
APA \_\_\_\_\_  
ECR \_\_\_\_\_  
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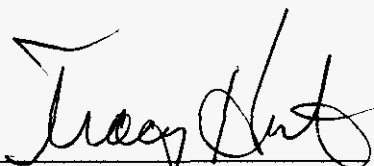
**CERTIFICATE OF SERVICE**  
**Docket No. 120169-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via  
Electronic Mail and First Class U.S. Mail this 9<sup>th</sup> day of July, 2012 to the following:

Lee Eng Tan  
Staff Counsel  
Florida Public Service  
Commission  
Division of Legal Services  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850  
[ltan@psc.state.fl.us](mailto:ltan@psc.state.fl.us)

Digital Express, Inc.  
Mr. Tom Armstrong  
1803 West Fairfield Drive, Unit 1  
Pensacola, FL 32501-1040  
Tel. No.: (850) 291-6415  
Fax No.: (850) 308-1151  
[tom.armstrong.sr@gmail.com](mailto:tom.armstrong.sr@gmail.com)

Moyle Law Firm, P.A.  
Vicki Gordon Kaufman  
118 North Gadsden Street  
Tallahassee, FL 32301  
Tel. No.: 850-681-3828  
Fax No.: 850-681-8788  
[vkaufman@moylelaw.com](mailto:vkaufman@moylelaw.com)  
Atty. for Digital Express, Inc.

  
Tracy W. Hatch

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

Notice of adoption of existing interconnection, ) Docket No. 120169-TP  
unbundling, resale, and collocation agreement )  
between BellSouth Telecommunications, Inc. d/b/a )  
AT&T Florida d/b/a AT&T Southeast and New )  
Talk, Inc. by Digital Express, Inc. )  
\_\_\_\_\_ ) Filed: July 9, 2012

**RESPONSE OF AT&T FLORIDA IN OPPOSITION TO  
NOTICE OF ADOPTION FILED BY DIGITAL EXPRESS, INC.  
AND ANSWER AND AFFIRMATIVE DEFENSES**

BellSouth Telecommunications, LLC d/b/a AT&T Florida (“AT&T Florida”) respectfully submits its Response in Opposition, Answer and Affirmative Defenses to the Notice of Adoption filed by Digital Express, Inc. on June 5, 2012. Digital Express is not entitled to any relief whatsoever, and the Commission should enter an Order rejecting its unilateral Notice of Adoption.

**I. OPPOSITION TO NOTICE OF ADOPTION**

On June 5, 2012, Digital Express filed a letter entitled “Notice of the Adoption of the Interconnection, Unbundling, Resale and Collocation Agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and New Talk, Inc.” (hereinafter, “Notice of Adoption,” attached as Exhibit 1). Digital Express, however, did not advise AT&T Florida of its filing with the Commission, nor did Digital Express send AT&T Florida a copy of the June 5 Notice of Adoption that it filed with the Commission.<sup>1</sup> AT&T Florida became aware of that filing through a review of the Commission’s docket.

<sup>1</sup> On that same day, Digital Express sent a different letter to AT&T Florida’s Contract Management group, advising of its so-called adoption.

Like its sister company,<sup>2</sup> Digital Express has materially breached its current interconnection agreement (“ICA”) with AT&T Florida, and it is seeking to unilaterally adopt a different ICA to avoid and evade the consequences of breaching its current ICA. Specifically, Digital Express has breached its current ICA by refusing to increase its security deposit to an amount commensurate with its actual monthly billings with AT&T Florida as required by the ICA. Digital Express has further breached its current ICA by refusing to pay its bills as required by its agreement based on “disputes” that are not made in good faith and that are inconsistent with the terms of its agreement. To permit Digital Express’ sleight-of-hand would be contrary to public policy and would make a farce of the federal Act’s opt-in provisions. The Commission should therefore reject the purported “adoption.”

**A. Digital Express is in Breach of its Current Interconnection Agreement**

On July 11, 2011, AT&T Florida filed with the Commission a notice of adoption, advising the Commission that AT&T Florida and Digital Express had entered an MFN Agreement in which Digital Express adopted the interconnection agreement between AT&T Florida and Image Access, Inc. (“Image Access ICA”).<sup>3</sup> *See generally* Docket No. 110222-TP. On August 11, 2011, the Commission Staff issued a memo acknowledging that the adoption was approved, *see id.*, and that ICA became the operative terms and conditions governing the contractual relation between AT&T Florida and Digital Express. The term of the Image Access ICA as adopted by Digital Express ended in April 2012, and AT&T Florida and Digital Express

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<sup>2</sup> The very same issue is pending before the Commission in Docket No. 110087-TP between AT&T Florida and Express Phone Service, Inc., another CLEC which has common ownership and control as Digital Express. Like Digital Express, Express Phone is attempting to adopt a different ICA to evade the consequences of having refused for two years to pay its bills for services provided by AT&T Florida under its current ICA.

<sup>3</sup> Ironically, in this docket, Digital Express is seeking to get out of the interconnection agreement that its sister company, Express Phone, has been fighting to get for over a year in Docket No. 11087-TP.

have been operating under that agreement on a month to month basis since then.<sup>4</sup> Digital Express is currently in breach of its ICA on two bases: (a) failing to pay an increased security deposit commensurate with its actual monthly billings and (b) withholding payments of billed charges based on disputes made in bad faith and outside the terms of its ICA.

### **1. Breach of Security Deposit Obligation**

Attachment 7 of Digital Express' current interconnection agreement allows AT&T Florida to "secure the accounts of . . . existing CLECs . . . with a suitable form of security" in an amount "not [to] exceed two (2) month's of estimated billing." Digital Express ICA, Attach. 7, §§ 1.3, 1.3.3. The ICA further grants AT&T Florida the right to seek an increased deposit "if a material change in the circumstances of [Digital Express] so warrants and/or gross monthly billing has increased more than twenty-five percent (25%) beyond the level most recently used to determine the level of security deposit . . ." *Id.*, Attach. 7, § 1.3.9. Digital Express is currently in breach of this obligation.

In June and July 2011, AT&T Florida performed a credit assessment of Digital Express, including review of a Confidential Credit Application submitted by Digital Express. *See* Exhibit 2. In the Application, Digital Express represented its anticipated average monthly billing, and AT&T Florida requested an initial deposit from Digital Express based on its good-faith reliance on the anticipated average monthly billing Digital Express represented in its Confidential Credit Application. *See* Exhibit 3. Digital Express paid that deposit, AT&T Florida activated its

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<sup>4</sup> The interconnection agreement that Digital Express is seeking to adopt in this docket was ported into Florida from Texas by New Talk, Inc. in 2009 as part of the FCC merger conditions issued in connection with the SBC/BellSouth merger. *See generally* Docket No. 090364-TP. This agreement was thus available for adoption by Digital Express here in Florida when it signed the MFN Agreement to adopt the Image Access ICA in July 2011.

accounts, and in November 2011 AT&T Florida began providing resale services to Digital Express.

Shortly after Digital Express began operating, however, it became clear that the estimate of monthly billings represented by Digital Express on its Confidential Credit Application was woefully inadequate, as Digital Express was billing at more *than 30 times its estimate*. Compare Exhibit 2 (Confidential Credit Application), with Exhibit 4 (April 2012 Request for Security Deposit). Consistent with the ICA provisions allowing AT&T Florida to request an increased deposit when “gross monthly billing has increased more than twenty-five percent (25%) beyond the level most recently used to determine the level of security deposit,” AT&T Florida performed a credit review and, on April 10, 2012, requested an increased deposit commensurate with Digital Express’ actual monthly billings. See Exhibit 4. As permitted by the ICA, AT&T Florida requested that Digital Express increase its deposit based on the two most recent months’ actual billings. See *id.*

Digital Express failed to submit the requested deposit, and on May 24, 2012, AT&T Florida notified Digital Express that its failure to respond constituted a breach of the interconnection agreement. See Exhibit 5. AT&T Florida gave Digital Express until June 11 to cure that breach or have its service order processing suspended, and until June 18 to cure or have its services terminated. See *id.* AT&T Florida and Digital Express engaged in negotiations, and on several occasions, AT&T Florida extended the deadline for Digital Express to cure. Rather than cure its breach, however, Digital Express filed its Notice of Adoption purporting to unilaterally adopt a different interconnection agreement with different language on security deposit obligations. See Exhibit 1. Thereafter, as a result of Digital Express’ failure to cure its contractual deposit obligation, on June 22, AT&T Florida notified Digital Express that it had

suspended its order processing and that disconnection of its services would be forthcoming if Digital Express remained in breach.<sup>5</sup> See Exhibit 6.

## 2. Breach of Payment Obligation

The Digital Express ICA provides that “[p]ayment of all charges will be the responsibility of [Digital Express]” and “[p]ayment for services provided by [AT&T Florida] is due on or before the next bill date.” Digital Express ICA, Attach. 7, §§ 1.4, 1.4.1. In breach of these provisions, during the nine months it has been purchasing resale services from AT&T Florida, Digital Express has paid AT&T Florida only \$50, and run up a past due bill in excess of \$390,000. Digital Express has withheld more than 99.98% of the charges bill and refused to pay AT&T Florida anything other than this *de minimis* amount based on purported disputes it has submitted which, incredibly, exceed the total amount billed by AT&T Florida.

Digital Express’ current interconnection agreement allows it to withhold payment of certain disputed charges, but that right is not without bounds. Digital Express may only withhold payment on the basis of a “Valid Dispute” as that term is defined in the ICA. See *id.*, Attach. 7, § 2.1.2. Specifically, Section 2.2 of Attachment 7 to the ICA states, in relevant part:

For purposes of this Section, a billing dispute means a reported dispute of a specific amount of money actually billed by either Party. The dispute must be clearly explained by the disputing Party and, to the extent possible, supported by relevant, written documentation (including e.g. reference to or copies of the relevant bill pages), which clearly shows the basis for disputing charges (Valid Dispute). Examples of written document considered relevant include, but are not limited to: the number of minutes the disputing Party believes were properly and improperly billed, the rate the disputing Party believes was erroneously applied and that which it believes was applicable, the factor the disputing Party believes was erroneously applied and that which it believes was application, etc. . . . The billed Party may withhold payment of such disputed amounts but late payment charges and interest will be assessed per Section 2.3 below, pending resolution of the dispute. These late payment charges must be disputed until the initial dispute

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<sup>5</sup> AT&T Florida has since advised Digital Express that it will grant Digital Express additional time, until July 17, to cure its breach before terminating service.

is resolved. Claims by the billed Party for damages of any kind will not be considered a billing dispute for purposes of this Section.

Digital Express has improperly withheld payments based on purported disputes that are not “Valid Disputes” as defined by the contract. Among other things, Digital Express has submitted disputes based on claims that it is entitled to certain credits associated with long-distance promotions offered by BellSouth Long Distance, Inc., a long distance affiliate of AT&T Florida, (the “LD Promo Claims”) and that AT&T Florida is obligated to provide certain credits to Digital Express in connection with the funding of the state portion of the Lifeline assistance program (the “State Lifeline Subsidy Claims”). AT&T Florida expressly denied and rejected Digital Express’ disputes based on these claims, and on June 12, 2012, AT&T Florida sent a collection letter demanding payment of the amount withheld under the LD Promo Claims and the State Lifeline Subsidy Claims.<sup>6</sup> *See* Exhibit 7. In that letter, AT&T Florida sought payment of the amounts withheld on the basis of these two invalid “disputes” and demanded that Digital Express cure this nonpayment breach. AT&T Florida further notified Digital Express that if it failed to cure that breach by June 27, 2012, AT&T Florida would suspend its order processing and that if it failed to cure by July 12, 2012, AT&T Florida would terminate its service.<sup>7</sup> *See id.* As of the date of this filing, Digital Express has not cured this nonpayment breach.

**B. Digital Express Cannot Adopt A New ICA Until it Cures its Breaches of its Current ICA**

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<sup>6</sup> AT&T Florida does not agree that the other disputes submitted by Digital Express are valid or correct. In not including them in its June 12 collection letter, AT&T Florida merely recognized that the other disputes are of the type that may be considered to be “Valid Disputes” for the purposes of determining how much Digital Express is required to pay AT&T Florida for past due charges for resale services.

<sup>7</sup> As noted, Digital Express’ order processing was suspended on June 22 due to its failure to increase its security deposit. Just as with the security deposit, AT&T Florida has advised Digital Express that it will grant Digital Express additional time, until July 17, to cure its nonpayment breach before terminating service.



**1. Digital Express's Unilateral Notice of Adoption is Contrary to Public Policy and Improper.**

Digital Express is not free to unilaterally abandon its current ICA without first curing its breach of the terms of that agreement. Allowing Digital Express to opt into a new agreement without first requiring that it cure its existing breaches would be contrary to public policy.

Digital Express is wrong when it argues that 47 U.S.C. § 252(i) and 47 C.F.R. § 51.809 grant it the unilateral right to adopt a new interconnection agreement any time it wants and regardless of its state of compliance with its current agreement. The First Circuit, for example, has held that section 252(i) does not grant a CLEC like Digital Express an unconditional right to opt out of one agreement and into another, regardless of its motivation. *See Global NAPS, Inc. v. Verizon*, 396 F.3d 16 (1st Cir. 2005). Instead, as this Commission has previously held, a state commission has "authority to reject [a requesting company]'s adoption of the [ILEC/CLEC] Agreement as not being consistent with the public interest," when there has been "prior inappropriate conduct and actions of one of the parties." *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. 990959-TP, Order No. PSC-99-1930-PAA-TP (Sept. 29, 1999).<sup>8</sup>

The purpose of § 252(i) is to prevent an ILEC from discriminating among competing carriers by requiring the incumbent to make its agreement with one carrier available to another. The purpose is not to allow a carrier to evade its payment or security deposit obligations under

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<sup>8</sup> Other state commissions also apply a public interest standard in reviewing adoption requests. *See, e.g., Order Approving Negotiated Interconnection Agreement, In the Matter of the joint application of Verizon Wash., DC, Inc. and Networks Plus, Inc. for approval of an interconnection agreement*, Case No. TIA-01-13 4, at 2 (D.C. Comm'n Jan. 11, 2002) (applying public interest standard to request for approval of § 252(i) adoption).

an existing agreement. If the Commission were to permit Digital Express to opt into another agreement without first curing its contractual breaches, it would allow Digital Express to engage in “inappropriate conduct and actions” with no consequences whatsoever, thus negating the express and unambiguous terms of the parties’ current interconnection agreement. Here, where Digital Express seeks a new agreement in order to avoid its obligation to make a security deposit commensurate with its monthly billings, while also in breach of its payment obligation, sound public policy precludes the adoption. Accordingly, the Commission should reject any adoption “notice” or request until Digital Express cures its breaches.

**2. The Commission is Required to Enforce the Interconnection Agreement between Digital Express and AT&T Florida.**

The parties’ Commission-approved Agreement grants AT&T Florida the right to require Digital Express to supply a security deposit commensurate with its monthly billings if AT&T Florida’s credit assessment warrants such a deposit. AT&T Florida has made that request after it determined that Digital Express woefully misrepresented its anticipated monthly billings in its Credit Application, granted Digital Express more than ample extensions to make the deposit, and Digital Express has flat out refused to pay. Similarly, while the agreement does grant Digital Express some ability to withhold certain amounts from payment, that ability is not without bounds. AT&T Florida’s position that Digital Express must pay at least the amount demanded in its June 12 collection letter is fully consistent with the plain and unambiguous language of the ICA, and Digital Express is in breach for failing to pay.

The security deposit, dispute and payment provisions in the ICA are unambiguous, and the agreement, which was approved by the Commission, is a valid contract and governs the relationship between AT&T Florida and Digital Express. Once a carrier enters “into an interconnection agreement in accordance with section 252, . . . it is then regulated directly by the

interconnection agreement.” *Law Offices of Curtis V. Trinko LLP v. Bell Atl. Corp.*, 305 F.3d 89, 104 (2d Cir. 2002), *rev’d in part on other grounds sub nom, Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *see also Mich. Bell Tel. Co. v. MCImetro Access Trans. Servs., Inc.*, 323 F.3d 348, 359 (6th Cir. 2003) (“[O]nce an agreement is approved, these general duties [under the 1996 Act] do not control” and parties are “governed by the interconnection agreement” instead, and “the general duties of [the 1996 Act] no longer apply”). Thus, once Digital Express signed the MFN Agreement to adopt the Image Access ICA in June 2011, it became bound by that ICA and the Commission is “powerless to rewrite, the clear and unambiguous terms of [that] voluntary contract.” *Medical Ctr. Health Plan v. Brick*, 572 So.2d 548, 551 (Fla. 1st DCA 1990) (citation omitted); *see also In re: Petition of Supra Telecomms. & Info. Sys. for generic proceeding to arbitrate rates, terms, and conditions of interconnection with BellSouth Telecomms., Inc., or, in the alternative, petition for arbitration of interconnection agreement*, Docket No. 980155-TP; Order No. PSC-98-0466-FOF-TP (Mar. 31, 1998) (“The Act does not authorize a state commission to alter terms within an approved negotiated agreement or to nullify an approved negotiated agreement.”).

**a. Digital Express is in Breach of its ICA for Failing to Post an Increased Security Deposit**

This Commission has previously enforced a security deposit obligation on a CLEC based on contractual language similar to the obligation in Digital Express’ interconnection agreement. In *In re: Complaint of BellSouth Telecommunications, Inc. against IDS Telecom LLC to enforce interconnection agreement deposit requirements*, Docket No. 040488-TP, Order No. PSC-04-0824-PAA-TP (Aug. 23, 2004), the Commission ordered a CLEC to pay a \$3,900,000 security

deposit to AT&T Florida (then, BellSouth).<sup>9</sup> *See id.* at 9-10. The Commission determined that AT&T Florida's right to request a security deposit from the CLEC was "clear and unambiguous" and therefore that the CLEC "shall provide a deposit" to AT&T Florida. *Id.* at 9. Of particular importance to the issue in this docket, the Commission specifically rejected the CLEC's effort to adopt different security deposit language<sup>10</sup> from another interconnection agreement to avoid its deposit obligation because the adoption would not have "retroactive application, and thus, [would have] no direct impact" on the deposit dispute. *Id.* at 10.

The Commission has also rejected a CLEC's effort to have a minimal deposit requirement in its interconnection agreement and, in doing so, reinforced the importance of the deposit requirement. *See In re: Joint petition by NewSouth Commc 'ns Corp., NuVox Commc 'ns, Inc., and Xspedius Commc 'ns, LLC, on behalf of its operating subsidiaries Xspedius Mgmt. Co. Switched Servs., LLC and Xspedius Mgmt. Co. of Jacksonville, LLC, for arbitration of certain issues arising in negotiation of interconnection agreement with BellSouth Telecomms., Inc.,* Docket No. 040130-TP, Order No. PSC-05-0975-FOF-TP (Oct. 11, 2005). In that arbitration, the Commission agreed that a robust two month security deposit obligation was "justified" to protect AT&T Florida financially given the length of time between the provision of service, the bill due date, and the time when AT&T Florida could disconnect for nonpayment. *See id.* at 68. The Commission also accepted contractual language providing that it was appropriate to use "the most recent six months of data" as an "average[]" to calculate any required deposit." *Id.* On

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<sup>9</sup> This decision was a Proposed Agency Action ("PAA"). The CLEC filed a protest to the PAA, but the parties were able to reach a settlement before the Commission ruled on the protest. The Commission has not receded from or rejected the analysis in its PAA, and it thus continues as persuasive authority.

<sup>10</sup> The IDS Telecom LLC case began before the FCC rejected its prior "pick-and-choose" rule for interconnection agreement adoptions and issued the current "all-or-nothing" rule. *See In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, 19 F.C.C. R'cd 13,494, 13,501-03 ¶¶ 10-14 (July 13, 2004).

appeal, the federal court affirmed this part of the Commission's arbitration decision finding that AT&T Florida's deposit language as approved by the Commission was "reasonable" and "justified." *NuVox Commc 'ns, Inc. v. Edgar*, 511 F. Supp. 2d 1198, 1209-10 (N.D. Fla. 2007), *aff'd Nuvox Commc 'ns, Inc. v. BellSouth Commc 'ns, Inc.*, 530 F.3d 1330 (11th Cir. 2008).

**a. Digital Express is in Breach of its Payment Obligations Under its ICA**

**i. Digital Express Cannot Withhold Payment Absent a "Valid Dispute"**

Under the guise of various credit requests and billing "disputes," Digital Express has simply refused to pay its bills for services that AT&T Florida has indisputably provided to it (and that Digital Express has resold to its own end users). This is a breach of its contractual obligation to pay the portion of its bills for which it has not raised a "Valid Dispute." As defined in § 2.2 of Attachment 7 of its ICA, a Valid Dispute can be raised only with respect to charges AT&T Florida has actually billed to Digital Express, and which Digital Express contends were incorrectly billed by AT&T Florida. *See supra* § I.A.2. The disputes raised by Digital Express based on the LD Promo and State Lifeline Subsidy Claims do not constitute Valid Disputes because they challenge neither the base rate for services charged by AT&T Florida nor the avoided cost discount rate applied to such charges by AT&T Florida. Accordingly, under the express terms of the ICA, Digital Express cannot validly rely on the disputes that are based on those claims to withhold payment. Stated another way, Digital Express is breaching its ICA obligations by withholding payment to AT&T Florida based on those claims.

Furthermore, nothing in its interconnection agreement allows Digital Express to engage in self-help withholding of validly billed, undisputed charges based on any claims for amounts or damages Digital Express contends AT&T Florida and/or BellSouth Long Distance owe it.

Section 2.2 of Attachment 7 of the ICA unequivocally states that “[c]laims by the billed Party for damages of any kind will not be considered a billing dispute for purposes of this Section.” If Digital Express believes that it is owed any amounts by AT&T Florida or BellSouth Long Distance relative to the LD Promo and State Lifeline Subsidy Claims, it may pursue those claims for damages in the appropriate forum. In the meantime, Digital Express is contractually obligated to pay all validly billed and undisputed charges for resale services as defined in the ICA, and its withholding of amounts due based on those claims constitutes a breach of the ICA.

**ii. Digital Express’ LD Promo Claims Fail as a Matter of Law and are not “Valid Disputes”**

Digital Express’ LD Promo Claim fails as a matter of law. The long distance promotions that Digital Express is claiming are (1) offered by BellSouth Long Distance and (2) not telecommunications services offered by AT&T Florida as a local exchange carrier. Therefore, the long distance promotions are not subject to resale under 47 U.S.C. § 251(c)(4) or the interconnection agreement between Digital Express and AT&T Florida. If Digital Express wants to offer a long distance service to its end users and offer whatever promotions it wishes to encourage subscription to its long distance service, it certainly has that latitude. And, if Digital Express believes that BellSouth Long Distance owes it promotional credits, Digital Express is free to pursue those claims for damages against BellSouth Long Distance in an appropriate forum. However, Digital Express cannot implement self-help with regard to damages claims it believes it has against BellSouth Long Distance regarding long distance services by withholding payments owed to AT&T Florida for local services ordered by and provided to Digital Express.

**iii. Digital Express’ State Lifeline Subsidy Claims Fail as a Matter of Law and are not “Valid Disputes”**

The same holds true with respect to Digital Express' self-help withholding of payments due based on the State Lifeline Subsidy Claims. There is no contractual or other legal obligation for AT&T Florida to fund the state portion of the Lifeline subsidy program. Instead, Digital Express is responsible for providing the state Lifeline subsidy credit to its own end users. AT&T Florida offers Lifeline services to Digital Express for resale pursuant to the ICA, which incorporates by reference AT&T Florida's General Exchange Guidebook (the "Guidebook"). Section A3.31.2(A)(12) of the Guidebook expressly provides that, although the non-discounted federal Lifeline credit amount will be passed through to resellers, the "additional [\$3.50] credit to the end user *will be the responsibility of the reseller.*"<sup>11</sup> Exhibit 8 (emphasis added). Therefore, Digital Express -- and not AT&T Florida -- is responsible for providing any state Lifeline credit to its own end users in Florida. In a similar case interpreting similar language in the AT&T Tennessee Guidebook, the Tennessee Regulatory Authority has held that the resellers are responsible for funding the state portion of the Lifeline subsidy; like Florida, Tennessee does not have a state Lifeline fund. *See In re: Examination of Issues Surrounding BellSouth Telecomms., LLC d/b/a AT&T Tennessee's Notice of June 28, 2011 Concerning BLC Mgmt., LLC d/b/a Angles Commc'n Solutions, DPI Teleconnect, LLC, Ganoco, Inc. d/b/a American Dial Tone, Image Access, Inc. d/b/a New Phone, and OneTone Telecom, Inc., Docket No. 11-00109 (Tenn. Reg. Auth. Dec. 16, 2011).* Accordingly, Digital Express has no good faith basis to withhold based on its State Lifeline Subsidy Claims, and is in breach of the ICA for withholding payment due based on those claims.

### **3. Conclusion**

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<sup>11</sup> The language quoted from the Guidebook was taken from AT&T Florida's General Subscriber Service Tariff which was in effect for many years before being replaced with the Guidebook in November 2011.

Given Digital Express' utter failure to increase its security deposit to an amount commensurate with its monthly billings, payment of a mere \$50 on its substantial charges incurred under the current ICA, and its withholding substantial sums based on invalid disputes, AT&T Florida questions whether Digital Express intends to, or even can pay its bills on a going-forward basis, much less its substantial past-due balance. AT&T Florida is increasingly concerned that its stockholders will have to bear the burden of the substantial amounts that remain uncollectable from Digital Express. Just like its sister company Express Phone in Docket No. 110087-TP, Digital Express is attempting to distort the federal Act's adoption procedures for purposes unrelated the purposes that underlie the Act. AT&T Florida, therefore, respectfully asks that the Commission deny the relief requested in Digital Express's Notice of Adoption.

## **II. ANSWER**

1. AT&T Florida denies the allegations of the paragraph of the Notice of Adoption. AT&T Florida specifically denies that Digital Express has "adopted" the Interconnection Agreement between AT&T Florida and New Talk, Inc.
2. AT&T Florida denies the allegations of the first sentence of the second paragraph of the Notice of Adoption.
3. AT&T Florida admits that it received the letter referenced in the second sentence of the second paragraph of the Notice of Adoption on June 6, 2012, but denies that it has any legal effect. AT&T Florida specifically denies that Digital Express has "adopted" the Interconnection Agreement between AT&T Florida and New Talk, Inc.
4. No response is required to the third paragraph of the Notice of Adoption.
5. Except as expressly admitted herein, AT&T Florida denies the allegations contained in Digital Express's Notice of Adoption and demands strict proof thereof.



### **III. AFFIRMATIVE DEFENSES**

6. The Notice of Adoption fails to state a cause of action for which relief can be granted.

7. Digital Express' adoption of another interconnection agreement in order to avoid payment to AT&T Florida of a security deposit under its current and effective interconnection agreement would not be in the public interest.

8. Digital Express' adoption of another interconnection agreement without first curing the breaches of its current and effective interconnection agreement would not be in the public interest.

9. Digital Express' adoption of another interconnection agreement in order to avoid payment to AT&T Florida of a security deposit would not be consistent with 47 U.S.C. § 252(i).

10. Digital Express' adoption of another interconnection agreement without first curing the breaches of its current and effective interconnection agreement would not be consistent with 47 U.S.C. § 252(i).

11. One or more exceptions to the availability of other agreements for adoption by Digital Express contained in 47 C.F.R. § 51.809 and relevant case law applies.

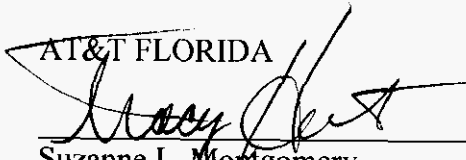
12. Digital Express' Notice of Adoption is barred by the doctrines of laches, estoppel, unclean hands, and waiver.

AT&T Florida respectfully requests that the Commission conduct a full evidentiary hearing pursuant to Section 120.57(1), Florida Statutes.

WHEREFORE, AT&T Florida requests that the Commission enter an order denying Digital Express' Notice of Adoption.

Respectfully submitted this 9th day of July, 2012.

AT&T FLORIDA



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Suzanne L. Montgomery  
Authorized House Counsel No. 94116  
Tracy W. Hatch  
c/o Gregory R. Follensbee  
150 South Monroe Street  
Suite 400  
Tallahassee, Florida 32301  
(305) 347-5558

# DIGITAL EXPRESS, INC.

1903 W. FAIRFIELD DRIVE, UNIT 1  
DEASACOLA, FL 32501  
PSC 291-6415  
FAX PSC 303-1151

June 5, 2012

Mrs. Ann Cole  
Director, Division of The Commission Clerk and Administrative Services  
Florida Public Service Commission  
7540 Shumard Oak Boulevard  
Tallahassee, Florida 32399

Re: Notice of the Adoption of Interconnection, Unbundling, Resale and Collocation Agreement between BellSouth Telecommunications, Inc d/b/a AT&T Florida d/b/a AT&T Southeast and New Talk, Inc.

Dear Mrs. Cole:

Digital Express, Inc. hereby provides notice to the Florida Public Service Commission of the adoption by Digital Express, Inc. of the Interconnection, Unbundling, Resale and Collocation Agreement between BellSouth Telecommunications, Inc d/b/a AT&T Florida d/b/a AT&T Southeast and New Talk, Inc. for the State of Florida entered into between BellSouth Telecommunications, Inc d/b/a AT&T Florida d/b/a AT&T Southeast and New Talk, Inc. which was filed with this Commission on July 10, 2009 and deemed approved by operation of law approved by this Commission on October 8, 2009 in Docket No. 090364-TP.

Digital Express, Inc. is adopting the agreement and all amendments (if applicable) as provided by Section 252(i) of the Telecommunications Act of 1996 and 47 CFR 51.809. Enclosed is an original and one copy of notice of adoption by Digital Express, Inc. sent to BellSouth Telecommunications, Inc d/b/a AT&T Florida d/b/a AT&T Southeast.

If you have any questions please do not hesitate to contact Tom Armstrong at (850) 291-6415.

Very truly yours,



Thomas M. Armstrong  
President

**EXHIBIT 1**

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FPSC-DISTRICT CLERK

### A3. BASIC LOCAL EXCHANGE SERVICE

#### A3.31 Lifeline

##### A3.31.1 Description of Service

- A. The Lifeline program is designed to increase the availability of telecommunications services to low income subscribers by providing a credit to monthly recurring local service to qualifying low income residential subscribers. Basic terms and conditions are in compliance with the FCC's Order on Universal Service in FCC 97-157, which adopts the Federal-State Joint Board's recommendation in CC Docket 96-45, which complies with the Telecommunications Act of 1996 and the FCC Report and Order and Further Notice of Proposed Rulemaking in WC Docket No. 11-42, adopted January 31, 2012. Specific terms and conditions are as prescribed by the Florida Public Service Commission and are as set forth in this tariff.
- B. Lifeline is supported by the federal universal service support mechanism.
- C. Federal *uniform* support of \$9.25 and intrastate matching support of \$3.50 is available for each Lifeline service, and is passed through to *an eligible customer via a monthly Federal Lifeline credit*. The total *monthly* Lifeline credit available to an eligible customer in Florida is \$12.75. The amount of credit will not exceed the charge for local service. (C)

##### A3.31.2 Regulations

###### A. General

1. One low income credit is available per household and is applicable to the primary residential connection only. Lifeline support is limited to a single subscription per household where household is defined to be any individual or group of individuals who are living together at the same address as one economic unit. For the purposes of this rule, an economic unit consists of all adult individuals contributing to and sharing in the income and expenses of a household.
2. A Lifeline customer may subscribe to any local service offering available to other residence customers.
3. Toll blocking will be provided at no charge to the Lifeline subscriber.
4. The deposit requirement is not applicable to a Lifeline customer who subscribes to toll blocking. If a Lifeline customer removes toll blocking prior to establishing an acceptable credit history, a deposit may be required. When applicable, advance payments will not exceed the connection and local service charges for one month.
5. A Lifeline customer is exempt from the Installment Billing Service Fee in Section A4.
6. The Federal Universal Service Charge will not be billed to Lifeline customers.
7. A Lifeline subscriber's basic local service will not be disconnected for non-payment of toll charges or ancillary services, but may be disconnected for non-payment of basic local service charges, taxes and fees. Access to toll service may be denied for non-payment of toll charges. Access to ancillary services may be denied for non-payment of basic or non-basic local charges. A Lifeline subscriber's request for reconnection of basic local service will not be denied if the service was previously denied for non-payment of toll or ancillary charges. Partial payments will first be applied to basic local service.
8. Lifeline eligible customers who have previously been disconnected for nonpayment of local charges may obtain local service equipped with toll blocking upon payment of outstanding debt for non-toll charges, taxes and fees. Toll blocking shall not be removed prior to receipt of full payment of all outstanding toll charges.
9. The outstanding non-toll balance may be paid in up to twelve installment payments with a minimum per month payment of \$5.00. This installment option is separate from any other installment arrangements (such as Installment Billing of non-recurring charges in Section A4). Should the customer default on this payment arrangement, service will be disconnected and the customer must pay the outstanding non-toll balance in full before local service will be re-established. Installment payments are not available on defaulted amounts previously installment billed.
10. Payment for other outstanding debt will be pursued in the same manner as for non-Lifeline customers.
11. The non-discounted federal Lifeline credit amount will be passed along to resellers ordering local service at the prescribed resale discount from this Guidebook, for their eligible end users. Any additional credit to the end user will be the responsibility of the reseller. Eligible carriers, as defined by the FCC, are required to establish their own Lifeline programs.
12. Lifeline customers shall not be subject to any rate increase authorized by S.364.164 for four (4) years from November 5, 2005, or until the customer no longer qualifies for the Lifeline benefits established by this section or S.364.105, or unless otherwise determined by the commission upon petition by a LEC.

### EXHIBIT 8

### A3. BASIC LOCAL EXCHANGE SERVICE

#### A3.31 Lifeline (Cont'd)

##### A3.31.2 Regulations (Cont'd)

###### B. Eligibility

1. To be eligible for Lifeline, a customer must be a current recipient of any of the following low income assistance programs. (T)
  - a. Temporary Assistance *for* Needy Families (TANF) (T)
  - b. Supplemental Security Income (SSI) (T)
  - c. **Supplemental Nutrition Assistance Program (SNAP)** (T)
  - d. Medicaid (T)
  - e. Federal Public Housing *Assistance*/Section 8 (T)
  - f. Low-Income Home Energy Assistance Plan (LIHEAP) (T)
  - g. National School Lunch *Program's* free lunch program (T)
2. Additionally, customers not receiving benefits under one of the preceding programs, and whose total gross annual income does not exceed one hundred and fifty percent (150%) of the Federal Poverty Guidelines *are eligible for Lifeline.* (T)
3. All applications for service are subject to verification with the state agency responsible for administration of the qualifying program. (T)

###### C. Certification

1. Proof of eligibility in any of the qualifying low income assistance programs should be provided to the Company at the time of application for service. The Lifeline credit will not be established until the Company has received **proof of eligibility**. If the customer requests installation prior to the Company's receipt of **proof of eligibility**, the requested service will be provided without the Lifeline credit. When eligibility documentation is provided subsequent to installation, the Lifeline credit will be provided on a going forward basis. **Recertification is required annually.** (C)
2. **The Company reserves the right to periodically audit its records**, working in conjunction with the appropriate state agencies, for the purpose of determining continuing eligibility. Information obtained during such verification audit will be treated as confidential information to the extent required under State and Federal laws. The use or disclosure of information concerning enrollees will be limited to purposes directly connected with the administration of the Lifeline plan. (C)
3. When a customer is determined to be ineligible as a result of verification, the Company will contact the customer. If the customer cannot provide eligibility documentation, the Lifeline credit will be discontinued and at such time the customer will be transitioned to the Lifeline Transitional Discount (LTD), as set forth in A3.23 of this Guidebook. (C)
4. Resellers providing Lifeline service from this Guidebook are responsible for determining proof of eligibility prior to requesting the service. As set forth in 47 C.F.R. § 417(a) and (b), a reseller must provide a certification, upon request, to **AT&T** that it is complying with all FCC and applicable State requirements governing Lifeline/Tribal Link-Up programs, including certification and verification procedures. Resellers are required to retain the required documentation for three (3) years and be able to produce the documentation to the Commission or its Administrator to demonstrate that they are providing discounted services only to qualified low-income customers as outlined in B. preceding. Disclosure requirements described in 2. preceding are applicable to resellers of Lifeline service. (T)

### A3. BASIC LOCAL EXCHANGE SERVICE

#### A3.31 Lifeline (Cont'd)

##### A3.31.3 Rates and Charges

###### A. General

1. Lifeline is provided as a monthly credit on the eligible residential subscriber's bill for local service.
  2. Service Charges in Section A4 are applicable for installing or changing Lifeline service.
  3. The Secondary Service Charge in Section A4 is not applicable when existing service is converted intact to Lifeline service.
- B.** The total Lifeline credit consists of one Federal credit plus one Company credit.

###### 1. Federal credit

	<b>Monthly Credit</b>	
(a) Temporary Assistance for Needy Families (TANF)	<b>\$9.25</b>	(T)
(b) Supplemental Security Income (SSI)	<b>9.25</b>	(C)
(c) Supplemental Nutrition Assistance Program (SNAP)	<b>9.25</b>	(C)
(d) Medicaid	<b>9.25</b>	(C)
(e) Federal Public Housing Assistance/Section 8	<b>9.25</b>	(C)
(f) Low-Income Home Energy Assistance Plan (LIHEAP)	<b>9.25</b>	(C)
(g) Income at or below 150% of the Federal Poverty Guidelines	<b>9.25</b>	(C)
(h) National School Lunch Program's free lunch program	<b>9.25</b>	(C)

###### 2. Company credit

(a) All programs, one per Lifeline service	<b>3.50</b>	
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##### A3.31.4 Tribal Lifeline

###### A. Description of Service

Qualified residents of federally recognized tribal lands may receive up to *twenty-five* dollars (\$25.00) per month in additional federal Lifeline support for their residential service (C)

###### B. Regulations

1. Tribal Lifeline support is in addition to traditional Lifeline support.
2. All Lifeline regulations are applicable to Tribal Lifeline.

###### C. Eligibility

To qualify, in addition to meeting the tribal land residency requirement, the customer may be a current recipient of any of the programs identified for Lifeline, or may be a recipient of one of the following federal programs:

1. BIA (Bureau of Indian Affairs) General Assistance
2. Tribally administered Temporary Assistance for Needy Families (TANF)
3. Head Start (income eligible)
4. Food Distribution Program on Indian Reservations

###### D. Rates and Charges

###### 1. General

- a. **(DELETED)** (D)
- b. The Tribal Lifeline credit is in addition to state and federal Lifeline credits. (T)