

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of	)	
Infotelecom, LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 11-4887-TP-CSS
	)	
The Ohio Bell Telephone Company dba	)	
AT&T Ohio,	)	
	)	
Respondent.	)	

ENTRY

The attorney examiner finds:

- (1) On August 24, 2011, Infotelecom, LLC (Infotelecom) filed a complaint against The Ohio Bell Telephone Company dba AT&T Ohio (AT&T Ohio) seeking resolution of a dispute regarding the appropriate interpretation of an interconnection agreement between Infotelecom and AT&T Ohio. Additionally, Infotelecom seeks Commission intervention to prevent AT&T Ohio from taking any action to disconnect service to Infotelecom during the pendency of this complaint.
- (2) AT&T Ohio filed its answer on September 13, 2011.
- (3) Pursuant to the attorney examiner Entry of August 30, 2011, the attorney examiner found that AT&T Ohio should not disconnect service to Infotelecom during the pendency of this dispute. In making this determination, Infotelecom was instructed to pay all amounts owed to AT&T Ohio that are not in dispute during the pendency of this complaint.
- (4) On September 13, 2011, AT&T Ohio filed a motion for security pending a final decision. Specifically, AT&T Ohio asserts that the parties' existing interconnection agreement requires Infotelecom to escrow funds and that Infotelecom refuses to do so. AT&T Ohio submits that as of August 31, 2011, this amount has reached approximately \$271,476.15 for the state of Ohio, and \$6,442,031.80

for all six AT&T states in which Infotelecom operates.<sup>1</sup> AT&T Ohio states that the requisite escrow levels continue to grow each month. According to AT&T Ohio, consistent with its interconnection agreement, it provided Infotelecom with notice of its intent to terminate due to the failure to provide the escrow payments.

While recognizing the prohibition to terminate set forth in the attorney examiner Entry of August 30, 2011, AT&T Ohio avers that this directive will cause undeserved injury if the Commission ultimately resolves this case in AT&T Ohio's favor. In support of this claim, AT&T Ohio submits that, based on the record in the federal proceeding, Infotelecom does not have the requisite funds to pay for an ultimate judgment. Therefore, consistent with the requirement under Ohio law that entities seeking a preliminary injunction must provide a bond, AT&T Ohio believes that the Commission should require Infotelecom to secure AT&T Ohio against any anticipated loss in order to avoid the complainant further exacerbating AT&T Ohio's damages.

- (5) On September 28, 2011, Infotelecom filed its memorandum contra AT&T Ohio's motion for a security. Infotelecom asserts that there is no reason for any security to be required because, pursuant to the parties' interconnection agreement, and by virtue of an order by the Second Circuit Court of Appeals, *Infotelecom LLC v. Illinois Bell Telephone Co. et al*, Case No. 11-2916, slip op., ECF No. 43 (2d Cir. Sept. 9, 2011) and the attorney examiner Entry of August 30, 2011, AT&T Ohio is enjoined from terminating interconnection. Further, Infotelecom represents that it has paid and continues to pay all undisputed amounts to AT&T Ohio. Infotelecom notes that the Second Circuit itself has not ordered any bond while it considers Infotelecom's motion to stay pending appeal. Therefore, Infotelecom submits that the Commission's requiring of a bond will lead to inconsistent results.

As further support for its position, Infotelecom asserts that AT&T Ohio failed to seek escrow payments pursuant to the interconnection agreement for two years. Infotelecom notes that it has paid AT&T Ohio all undisputed amounts and that, depending on the Federal Communications Commission's (FCC) ultimate decision regarding the applicability of access charges for long distance Internet traffic, AT&T Ohio may never actually receive the money that would be placed in escrow. Finally, Infotelecom opines

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<sup>1</sup> These states include Ohio, California, Illinois, Indiana, Michigan, and Texas.

that maintaining the status quo without requiring any security is consistent with Ohio law,

- (6) On October 5, 2011, AT&T Ohio filed its reply in support of its motion for security. AT&T Ohio reiterates its position that it is entitled to protection against the loss that it would otherwise be exposed to as a result of the injunctive relief granted by the Commission. AT&T Ohio references an order from the Michigan Service Commission, in a parallel case, to support its contention that it is entitled to security. See, *In the Matter of the Application of the Complaint and Request for Emergency Relief Filed by Infotelecom, LLC Against Michigan Bell Telephone Company dba AT&T Michigan*, Order Denying Emergency Relief, September 13, 2011.

AT&T Ohio rejects Infotelecom's contention that no bond should be required because the Second Circuit has enjoined AT&T from terminating service to Infotelecom. AT&T Ohio avers that, in light of the fact that Infotelecom sought duplicative injunctive relief in both the federal court and in various state commissions, it is appropriately seeking security in both the federal court and the state commissions, and has the reasonable expectation that any forum that imposes a temporary or preliminary injunction will require Infotelecom to provide adequate security relating to that particular injunction. With respect to the issue of inconsistent or contradictory results regarding both the state commission and federal court consideration of the security requirement issue, AT&T Ohio believes that it is not problem for the potential outcome that one forum imposes the requirement while the other does not.

AT&T Ohio dismisses Infotelecom's claim that there is no need for security since it is paying all undisputed amounts. AT&T Ohio asserts that since the escrow amounts are not being paid, these amounts are being put at risk because Infotelecom will not be in a position to pay them at the conclusion of the case.

- (7) Upon a review of the arguments presented, the attorney examiner finds that the motion for a security should be denied. In reaching this determination, the attorney examiner notes that the issue of escrow/security payments is one of the very issues raised in the pending complaint. Specifically, the primary issue pertains to the calculation of what Infotelecom would have paid for the terminated traffic under the interconnection agreement if it was subject to switched access charges and the requisite escrow payment if the "Delta" exceeds a specified threshold. Therefore, it would be

premature for the Commission to rule on this very issue in the context of a motion prior to developing a full record in this case. As discussed, *supra*, Infotelecom must continue to pay all undisputed amounts consistent with the terms of the existing interconnection agreement.

- (8) On September 14, 2011, Infotelecom filed a motion for stay pending a decision by the Second Circuit in *Infotelecom LLC v. Illinois Bell Telephone Co. et al.*, in which Infotelecom asserts that the federal district court was incorrect in its determination that it lacked jurisdiction to hear the parties' interconnection dispute. Infotelecom notes that the Second Circuit has already issued a temporary stay in the federal proceeding enjoining AT&T Ohio and the other AT&T affiliates from disconnecting Infotelecom until a Second Circuit motions panel rules on Infotelecom's motion for stay. Infotelecom anticipates that the Second Circuit motions panel will rule on the motion for a stay within 5 to 6 weeks.

In support of its motion, Infotelecom submits that if the Second Circuit grants its motion for a stay, this case should be held in abeyance while the appellate court determines whether the federal district court erred when it held that it did not have jurisdiction over Infotelecom's interconnection agreement claims. Therefore, Infotelecom asserts that a favorable ruling from the Second Circuit on the motion for a stay may have a significant impact on this proceeding and lead to inconsistent or conflicting results in this case. Further, Infotelecom represents that this case can be ultimately dismissed and pursued at the federal court if the Second Circuit determines that the federal district court does have such jurisdiction. Infotelecom believes that holding this case in abeyance pending the Second Circuit's ruling on the motion for stay will assist in conserving the Commission's and parties' time and resources.

- (9) On September 21, 2011, AT&T Ohio filed its memorandum contra Infotelecom's motion for a stay. AT&T Ohio submits that Infotelecom has been in violation of the existing interconnection agreement for nearly two years due to its refusal to escrow certain funds, amounting to approximately \$271,476.15 in Ohio and a total of \$6.4 million in the six states that Infotelecom exchanges traffic with AT&T. According to AT&T Ohio, these amounts are increasing with each call that is terminated for Infotelecom. AT&T

Ohio submits that it will never be able to collect this arrearage due to Infotelecom's lack of funds.

Specific to Infotelecom's claim that it is only seeking a short five to six-week delay in order for the Second Circuit to rule on its motion for a stay, AT&T Ohio submits that the delay will likely extend to approximately one year if the Second Circuit grants the pending motion for a stay and continues to consider the merits of the appeal on the issue of whether the federal court has jurisdiction over Infotelecom's interconnection agreement claims. As a result, AT&T Ohio avers that it would be required to continue to provide service to Infotelecom for an extended period of time while not having benefit of the escrow account funds.

In support of its position, AT&T Ohio asserts that Infotelecom's motion is just an attempt to avoid the Commission's interpretation of the approved interconnection agreement and, instead, rely upon an interpretation of a federal court. AT&T Ohio opines that such an approach is in direct conflict with the Telecommunications Act of 1996 (1966 Act) in which the Commission is assigned the responsibility for interpreting and enforcing an interconnection agreement that it arbitrated and approved.

In response to Infotelecom's stated desire for this matter to be decided by the federal court in order to avoid inconsistent or conflicting results, AT&T Ohio responds that differing outcomes are perfectly acceptable under the 1996 Act. AT&T Ohio also states that it is actually the entity that will be disadvantaged by any inconsistency because it will have no alternative but to abide by an injunction, no matter who issues it.

- (10) On September 26, 2011, Infotelecom filed its reply memorandum in support of its motion for a stay. Infotelecom submits that the issues now before the Second Circuit are significant and will be dispositive of whether this Commission should ultimately resolve the issues raised in this proceeding. Infotelecom also asserts that the legal question of whether a federal court has original jurisdiction to resolve disputes concerning approved interconnection agreements has never been definitively resolved and is far from settled. In support of its argument, Infotelecom argues that the district court improperly applied the holding in *Law Offices of Curtis v. Trinko LLP v. Bell Atlantic Corp.*, 305 F.3d 89, 98 (2d Cir. 2002). Rather, Infotelecom contends that allegations regarding a breach of an interconnection agreement do give rise to

federal question jurisdiction and, therefore, it is entitled to have this dispute resolved uniformly by the federal court, rather than on a piecemeal basis through individual state commission complaint cases.

In response to AT&T Ohio's contention that Infotelecom is simply seeking delay for delay's sake, Infotelecom argues that its motion for a stay is directed at: (a) preventing AT&T Ohio from unlawfully terminating its interconnection agreement and disconnecting Infotelecom's service, and (b) avoiding to have the AT&T entities use their substantial resources to needlessly create duplicative and conflicting proceedings. According to Infotelecom, neither of these objectives undermine AT&T Ohio's legal rights nor present any immediate or irreparable harm.

- (11) Upon a review of the arguments set forth above, the attorney examiner determines that the motion for a stay pending a decision by the Second Circuit should be denied.

In reaching this decision, the attorney examiner notes that, pursuant to its complaint, Infotelecom seeks resolution of a dispute concerning the appropriate interpretation of an interconnection agreement between Infotelecom and AT&T Ohio. This agreement was approved by the Commission pursuant to Case No. 07-1065-TP-NAG, *In the Matter of the Application of The Ohio Bell Telephone Company dba AT&T Ohio for an Agreement with Infotelecom LLC*. Therefore, this complaint is properly before the Commission for the purpose of seeking resolution of a dispute regarding the appropriate interpretation of the interconnection agreement between Infotelecom and AT&T Ohio.

Although Infotelecom focuses on its pending appeal before the Second Circuit, the Commission is not bound by the determinations reached in that proceeding. Rather, the Commission, in this case, is acting pursuant to its independent statutory authority to resolve interconnection agreement disputes pertaining to terms and conditions approved by the Commission. It is clear from the arguments raised by Infotelecom in relation to its motion that one of the following two scenarios will occur as a result of its waiting for the Second Circuit to rule on the motion pending before it: (a) the motion will be granted and the complainant will then seek an additional, but yet to be determined, stay until its ultimate jurisdictional appeal is ruled upon, or (b) its motion will be denied by the Second Circuit and the complainant will seek to move

forward with this complaint. The attorney examiner determines that neither of these outcomes justifies a delay in moving forward with this proceeding.

- (12) At this time, the attorney examiner finds that this matter should be scheduled for a settlement conference. The purpose of this settlement conference will be to explore the parties' willingness to negotiate a resolution of this complaint in lieu of an evidentiary hearing. In accordance with Rule 4901-1-26, Ohio Administrative Code (O.A.C.), any statements made in an attempt to settle this matter without the need for an evidentiary hearing will not generally be admissible to prove liability or invalidity of a claim. An attorney examiner from the Commission's legal department will facilitate the settlement process. However, nothing prohibits either party from initiating settlement negotiations prior to the scheduled settlement conference.
- (13) Accordingly, a settlement conference shall be scheduled for Friday, October 28, 2011, at 11:00 a.m., in Hearing Room 11-D, in the offices of the Commission, 11<sup>th</sup> Floor, 180 East Broad Street, Columbus, Ohio 43215-3793.
- (14) Pursuant to Rule 4901-1-26(F), O.A.C., the representatives of the public utility shall investigate the issues raised in the complaint prior to the settlement conference and all parties attending the conference shall be prepared to discuss settlement of the issues raised and shall have the requisite authority to settle those issues. In addition, parties attending the settlement conference shall bring with them all documents relevant to this matter.
- (15) If settlement is not reached at the conference, the attorney examiner will conduct a discussion of procedural issues. These may include discovery dates, possible stipulations of facts, and potential hearing dates.
- (16) As is the case in all Commission complaint proceedings, the complainant has the burden of proving the allegations of the complaint. *Grossman v. Public Util. Comm.* (1966), 5 Ohio St.2d 189.

It is, therefore,

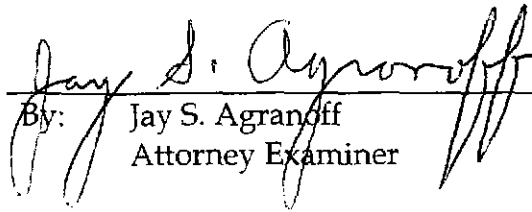
ORDERED, That AT&T Ohio's motion for security be denied in accordance with Finding (7). It is, further,

ORDERED, That Infotelecom's motion for a stay be denied in accordance with the Finding (11). It is, further,

ORDERED, That a settlement conference be scheduled in accordance with Finding (13). It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

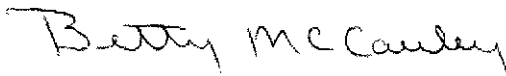
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
By: Jay S. Agranoff  
Attorney Examiner

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Entered in the Journal

OCT 11 2011



Betty McCauley  
Secretary