BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Infotelecom LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 11-4887-TP-CSS
	)	
AT&T Ohio,	)	
	)	
Respondent.	)	

AT&T OHIO'S RESPONSE IN OPPOSITION TO MOTION FOR STAY PENDING DECISION BY THE SECOND CIRCUIT IN A RELATED CASE BETWEEN THE PARTIES

AT&T Ohio respectfully submits this response to Infotelecom LLC's ("Infotelecom") Motion for Stay Pending Decision by the Second Circuit in a Related Case Between the Parties (the "Motion") filed on September 14, 2011.

Infotelecom has been breaching its interconnection agreement ("ICA") with AT&T Ohio for nearly two years by refusing to escrow amounts that the ICA requires Infotelecom to escrow, so that funds will be available for payment to AT&T Ohio when the Federal Communications Commission ("FCC") decides how carriers should compensate each other for VoIP traffic. The amount that Infotelecom has wrongfully failed to escrow and that would be payable to AT&T Ohio is approximately $271,476.15. Infotelecom has the same ICA with other AT&T incumbent local exchange carriers, and is breaching its ICA with them in the same way. In the six states in which Infotelecom exchanges traffic with AT&T[1] the total amount that Infotelcom has failed to

[1] "AT&T" in this brief means AT&T Ohio and the five other AT&T incumbent local exchange carriers with which Infotelcom is interconnected, in California, Illinois, Indiana, Michigan, and Texas. Infotelecom and AT&T

escrow is more than $6.4 million. The amount grows with every call that AT&T terminates for Infotelecom, and AT&T will never collect the shortfall, because Infotelecom does not have the funds to pay it.[2] Consequently, one of Infotelecom's principal aims is delay: The longer Infotelecom can manage to maintain the status quo, the more Infotelecom's illicit profits, and AT&T's potential losses, grow.

Now, Infotelecom asks the Commission to prolong this docket by suspending the proceedings until the United States Court of Appeals for the Second Circuit decides whether to enjoin AT&T from terminating service to Infotelecom while the Second Circuit decides whether to reverse the federal district court's dismissal of Infotelecom's request for a declaration as to the meaning of the parties' ICA and for an injunction. As we demonstrate below, Infotelecom actually has in mind an abeyance that would last approximately *one year*; Infotelecom may be asking for only a few weeks now, but will ask for an additional, much longer, suspension at the end of that period if the Second Circuit grants its motion. Furthermore, the admitted purpose of Infotelecom's Motion–to avoid interpretation of its ICA by this Commission and the other state commissions that approved the ICA in favor of an interpretation by the federal court–is directly at odds with the Telecommunications Act of 1996 Act, in which Congress assigned

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are parties to proceedings substantially identical to this one in the state utility commission in each of those states, and Infotelcom filed substantially identical motions to suspend all of those proceedings.

[2] In the parties' closely related federal lawsuit, Infotelecom admitted in discovery that it was financially unable to come up with even the approximately $5 million it then owed the escrow. The federal court took note of this when it denied Infotelecom's motion for injunctive relief, stating, "Issuing a stay and an injunction would expose AT&T to an increased risk that Infotelecom will be unable to satisfy its potential financial obligation to AT&T. Indeed, Infotelecom has acknowledged during discovery 'that it is not financially able to escrow the cumulative delta amount across the 13-State region of the AT&T ILECs, assuming that amount is, as AT&T calculates, $4,935,981.58.' Mem. in Opp. Ex. D, at 5. That is, Infotelecom is unable to escrow the $4.9 million in dispute with liquid assets 'without having a material impact on Infotelecom's business operations.'" Reply Mem., at 5." See Exhibit 1 hereto, at 7.

responsibility for interpreting and enforcing ICAs to the state commissions that arbitrate and approve them. For these and other reasons discussed below, the Commission should deny Infotelecom's request to suspend this docket.

I. THE COMMISSION SHOULD DENY INFOTELECOM'S MOTION BECAUSE THE MOTION ACTUALLY CONTEMPLATES A ONE-YEAR SUSPENSION OF THE PROCEEDINGS, WHICH WOULD CAUSE AT&T OHIO GREAT HARM.

To appreciate Infotelecom's plan, the Commission must consider the status of the Second Circuit case on which the plan relies. That case originated in federal district court in Connecticut, where Infotelecom filed a complaint seeking a declaration that the "Delta" in the parties' ICA means what Infotelecom claims it means, and an injunction to prohibit AT&T from terminating the ICA by reason of Infotelecom's material breach of the ICA based on its misreading of the Delta.[3]

The district court dismissed Infotelecom's request for a declaration as to the meaning of the ICA, on the ground that interpretation of the ICA is a matter over which the federal court lacked jurisdiction. Having dismissed that claim, the district court terminated Infotelecom's motion for preliminary injunction, which was dependent on the contract claim.

Infotelecom appealed the district court's decision to the Second Circuit on July 19, 2011. Also on that date, Infotelecom moved the district court for a stay to prevent AT&T from terminating service to Infotelecom during the appeal to the Second Circuit. The district court denied that motion.

[3] The "Delta" has been explained in previous filings in this case. For present purposes, all that matters is that AT&T contends it is entitled to terminate the ICA because Infotelecom has materially breached it, and Infotelecom contends, based on its interpretation of the "Delta," that it has not breached the ICA.

Infotelecom then filed, on September 6, 2011, a motion in the Second Circuit, asking that court to prohibit AT&T from terminating service while it decides whether to reverse the district court's dismissal order. We will refer to that motion as the Second Circuit Stay Motion. On September 9, the Second Circuit entered an order stating that Infotelecom's Second Circuit Stay Motion "will be submitted to a motions panel as soon as possible," and enjoining AT&T "from disconnecting services until the motions panel has ruled." The motions panel is expected to rule in about five weeks.

In its Motion here, Infotelecom asks the Commission to suspend this proceeding until the Second Circuit decides whether to grant or deny Infotelecom's Second Circuit Stay Motion, which, again, would prohibit AT&T from terminating service until the Second Circuit renders its decision affirming or reversing the district court's dismissal of Infotelecom's request for an interpretation of the ICA. To be sure, the suspension that Infotelecom is now requesting would last only about five weeks, but then what happens? Infotelecom answers that question in its motion:

> A decision by the Second Circuit granting Infotelecom's motion will have a significant impact on this proceeding. Infotelecom's appeal to the Second Circuit concerns whether the federal district court had jurisdiction to hear the parties' Interconnection Agreement dispute. ***If the Second Circuit grants Infotelecom's motion, this proceeding can be held in abeyance while the Second Circuit determines whether the federal district court erred when it held it did not have jurisdiction over Infotelecom's Interconnection Agreement claims.***

Motion at 4 (emphasis added). In other words, if the Commission grants the present Motion and the Second Circuit grants Infotelecom's Second Circuit Stay Motion, ***Infotelecom will file another motion asking this Commission to hold this case in abeyance for an additional period while the Second Circuit decides whether to affirm or reverse the district court***. And that is not

speculation. Infotelecom cannot not deny it.

Furthermore, Infotelecom's second motion would ask for an abeyance that, coupled with this one, would yield a suspension of approximately one year. On average, it takes the Second Circuit 13.3 months from the filing of a notice of appeal to reach a decision.[4] Consequently, with Infotelecom's notice of appeal having been filed on July 19, 2011, the Second Circuit will, in the normal course, issue its decision affirming or reversing the district court around August 30, 2012. Thus, if this Commission were to grant that second motion for abeyance that Infotelecom has in mind, this case would, all told, be on ice for approximately one year.[5]

It is possible, of course, that there will be no second suspension. That could occur in two ways: If the Second Circuit denies Infotelecom's stay motion, then Infotelecom will not ask this Commission for that second suspension, because Infotelecom will need this proceeding active so it can move for injunctive relief here. And there would also be no second suspension if Infotelecom requested one and the Commission denied it. *If there is no second suspension, however, the first one will have accomplished nothing except to slow this case down.* That is because the whole purpose of Infotelecom's current Motion is to pave the way for that second request so that, ultimately, the parties' disagreement can be resolved in Infotelecom's preferred

[4] See Exhibit 2 hereto.

[5] It could get worse. Under Infotelecom's plan, if the Second Circuit *affirms* the district court, thus extinguishing Infotelecom's hopes in federal court, this proceeding would resume, about a year from now. But if the Second Circuit *reverses* the district court, as Infotelecom hopes, Infotelecom would probably ask this Commission for yet a third suspension, while the district court case proceeds. For all a reversal by the Second Circuit would mean is that Infotelecom could pursue its quest for injunctive relief in the district court. And if the district court were to deny Infotelecom a preliminary injunction, Infotelecom would then want to come back here to seek the same relief. That third suspension, if granted, would probably last another year or so. Infotelecom states, "If the Second Circuit decides the district court has jurisdiction, this proceeding **may be dismissed**, because the parties will continue their case at the federal district court. Motion at 4 (emphasis added). Thus, and far more likely, dismissal also *may not* be sought.

forum. If this case resumes in five weeks, the suspension will have accomplished delay, but nothing else.

In sum, then, if the Commission grants the present Motion, one of two things is certain to happen: Either there will be a suspension of approximately one year, or there will be a five-week suspension that was pointless. Either result is senseless.

Infotelecom suggests that because a stay in the Second Circuit would have such a significant impact on this complaint case in comparison to the "small burden" that a stay would cause in this proceeding, the Commission should grant its request for a stay. Motion at 4. That is absurd. A five week delay at this point is more than a "small burden." It would delay the conclusion of this proceeding by five weeks, and *that* five weeks–like all the other delay that Infotelecom so assiduously pursues–is yet more time during which AT&T Ohio would be providing service to Infotelecom while Infotelecom breaches the parties' ICA by refusing to deposit funds in escrow for AT&T Ohio's benefit as the ICA requires. A stay of this proceeding is not appropriate.

II. THE COMMISSION SHOULD DENY INFOTELECOM'S MOTION BECAUSE THE ADMITTED PURPOSE OF THE MOTION IS CONTRARY TO THE TELECOMMUNICATIONS ACT OF 1996.

Infotelecom's stated purpose is "to resolve the present Interconnection Agreement controversy between the parties in a single forum, which is why Infotelecom filed its complaint with the federal district court." Motion at 4. To try to achieve that purpose, Infotelecom wants this Commission, and five other state commissions, to sit on the sidelines while Infotelecom tries to revive and then pursue its ICA claim in federal court, while the state commissions stand ready to spring into action when the federal court case does not pan out.

Infotelecom's purpose is directly at odds with the 1996 Act, because under the 1996 Act, it is this Commission, and not a federal district court (let alone a federal district court in Connecticut) that is supposed to interpret and enforce the parties' ICA.

This Commission needs no reminder that it has front-line responsibility for interconnection agreements. Infotelecom does, however. Briefly, then, under the 1996 Act, state utility commissions establish in arbitration the terms of interconnection agreements on which carriers do not agree in negotiations (47 U.S.C. § 252(b)), and state commissions approve or reject all interconnection agreements, whether negotiated or arbitrated (*id*. § 252(e)(1) & (2)). Those state commission determinations are then subject to review in federal district court. *Id*. § 252(e)(6). Congress thus established in the 1996 Act a system of "cooperative federalism" in which the state commissions make the initial decisions concerning interconnection agreements and federal district courts review those decisions. *See, e.g.*, *Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273, 281 (5th Cir. 2010); *Puerto Rico Tel. Co. v. Telecomms. Regulatory Bd. of Puerto Rico*, 189 F.3d 1, 8 (1st Cir. 1999).

The 1996 Act does not explicitly address enforcement of ICAs, but the courts have uniformly concluded, in light of the division of responsibility Congress established for their formation, that a claim for enforcement or interpretation of an ICA must be brought in the first instance in the state commission that approved the agreement, with the state commission's decision then subject to review in federal district court–and federal courts have routinely dismissed breach of ICA claims brought by plaintiffs that failed to exhaust their state

commission remedy. *E.g.*, *Core Commc'ns, Inc. v. Verizon Pa., Inc.*, 493 F.3d, 333, 344 (3d Cir. 2007) (affirming dismissal of claim for breach of ICA, holds that "interpretation and enforcement actions that arise after a state commission has approved an interconnection agreement must be litigated in the first instance before the relevant state commission"); *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs.*, 317 F.3d 1270, 1277 (11th Cir. 2003) ("In granting to the public service commissions the power to approve or reject [ICAs], Congress intended to include the power to interpret and enforce *in the first instance* and to subject their determination to challenges in the federal courts" (emphasis added).

Thus, the very aim of Infotelecom's Motion, to obtain an interpretation of its ICA in federal court, is directly at odds with a fundamental tenet of the 1996 Act. Infotelecom espouses federal court adjudication in order to avoid potentially "inconsistent or conflicting results." Motion at 1. Other competing local exchange carriers ("CLECs") carriers have made the same argument–invariably without success. As the Fifth Circuit explained in another case in which a CLEC made the same plea:

> [P]ermitting the exercise of federal question jurisdiction in this instance has the potential to disrupt the carefully crafted federal-state balance envisioned in the [1996] Act, which erects a scheme of "cooperative federalism." Budget Prepay argued before the district court that unless the injunction issued, "what you are going to have is a series of 18 state [commissions] looking at [the issue], followed by 18 federal appeals" [and] that given the potential for inconsistent results, litigating these issues in the state commissions didn't "make as much sense as coming to one court to get the same result." Yet such differing results . . . are part and parcel of cooperative federalism. The approach divides responsibility for complex regulatory schemes between states and the federal government, with the federal government setting general standards and ensuring overall compliance, while state agencies are given "latitude to proceed in any number of fashions, provided that they are not inconsistent with the Act and FCC regulations." . . . Such a scheme necessarily implies that states may reach differing conclusions on specific issues relating to the implementation of the Act. Far from being a bug, a patchwork of state-by-state implementation rules is a *feature* of this system of cooperative federalism. In implementing such a system, Congress has explicitly rejected the "advantages thought to be inherent in a federal forum," such as uniform application of federal law. We will not disturb this congressional judgment.

Budget Prepay, Inc. v. AT&T Corp., 605 F.3d 272, 281 (5th Cir. 2010) (citations omitted).[6]

Infotelecom does not make clear in its Motion what sort of "inconsistent or conflicting results" it fears. If it is concerned about the possibility that six state commissions might not all interpret the parties' ICA the same way, *Budget Prepay* provides the answer: Differing outcomes are perfectly acceptable under the 1996 Act.[7] And if Infotelecom is concerned about a possible

[6] The district court's dismissal of Infotelecom's ICA claim, which Infotelecom is challenging in the Second Circuit, is consistent with the proposition that ICA claims belong in state commissions. AT&T expects the Second Circuit to affirm the district court. Infotelecom would say it expects the Second Circuit to reverse the district court, but only 9.6% of civil appeals to the Second Circuit result in reversals. See Exhibit 3 hereto. Thus, without doing any independent evaluation of Infotelecom's prospects on appeal, this Commission can reasonably assume that it is 90% likely the Second Circuit will *not* reverse the district court, in which event this case will have to proceed to a conclusion (unless Infotelecom simply withdraws its complaint), which in turn means that any suspension will have done nothing but waste time and hurt AT&T Ohio.

[7] AT&T Ohio anticipates consistent results in this instance, because AT&T's case is so strong, as the Administrative Law Judge in the California proceeding already concluded. That ALJ denied Infotelecom's request for emergency relief based in part on her determination, based on the same evidence the Commission will see here, that "it is not likely that Infotelecom will prevail on the merits." See Exhibit 4 hereto, at 6.

inconsistency between the Second Circuit's ruling on Infotelecom's Second Circuit stay request and this Commission's disposition of [a request for injunctive relief that Infotelecom might make here], it should not be. It is AT&T that will be disadvantaged by any inconsistency, because AT&T will have no alternative but to abide by an injunction, no matter who issues it.

CONCLUSION

Infotelecom is proposing an unacceptable means (a suspension of the proceedings that *either* will be very long and will greatly prejudice AT&T Ohio *or* will be fairly short but absolutely pointless)–to an improper end (adjudication of a breach of interconnection claim by a federal court instead of this Commission). The Commission should deny Infotelecom's Motion.

September 21, 2011

Respectfully submitted,

AT&T Ohio

By: /s/ Mary Ryan Fenlon

Mary Ryan Fenlon (Counsel of Record)
Jon F. Kelly
AT&T Services, Inc.
150 E. Gay St., Room 4-A
Columbus, OH 43215
614-223-3302
mf1842@att.com
jk2961@att.com

Dennis G. Friedman
Mayer Brown LLP
71 S. Wacker Dr.
Chicago, IL 60606
312-701-7319
dfriedman@mayerbrown.com

Its Attorneys

Exhibit 1

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

INFOTELECOM, LLC, Plaintiff,	:	CIVIL ACTION NO. 3:11-CV-739 (JCH)
v.	:	
ILLINOIS BELL TELEPHONE CO., ET AL., Defendants.	:	AUGUST 30, 2011

RULING RE: PLAINTIFF'S MOTION TO STAY AND FOR PRELIMINARY INJUNCTION [Doc. No. 82]

I. INTRODUCTION

Plaintiff Infotelecom, LLC ("Infotelecom") brings this action against defendants Illinois Bell Telephone Company (d/b/a AT&T Illinois), Indiana Bell Telephone Company (d/b/a AT&T Indiana), Michigan Bell Telephone Company (d/b/a AT&T Michigan), Nevada Bell Telephone Company (d/b/a AT&T Nevada), the Ohio Bell Telephone Company (d/b/a AT&T Ohio), Pacific Bell Telephone Company (d/b/a AT&T California), the Southern New England Telephone Company (d/b/a AT&T Connecticut), Southwestern Bell Telephone Company (d/b/a AT&T Arkansas, AT&T Kansas, AT&T Missouri, AT&T Oklahoma, and AT&T Texas), and Wisconsin Bell, Inc. (d/b/a AT&T Wisconsin) (collectively, "AT&T"). Infotelecom seeks a declaration that Infotelecom has not breached its Interconnection Agreement with AT&T and an injunction preventing AT&T from terminating the Interconnection Agreement. Compl., Count One. Infotelecom's Complaint also alleges that AT&T has discriminated against Infotelecom in violation of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of 47 U.S.C.). Compl., ¶¶ 45-46.

On July 15, 2011, the court granted a motion by AT&T to dismiss Infotelecom's declaratory judgment claim for lack of subject matter jurisdiction. See Ruling (Doc. No. 80). Specifically, the court held that Infotelecom's claim that AT&T had breached the Interconnection Agreement arose under state law. As a result, Infotelecom's claim for breach of the Interconnection Agreement did not implicate the court's subject matter jurisdiction under title 28, sections 1331 or 1337(a), nor was Infotelecom authorized to proceed in federal district court by the Telecommunications Act, 47 U.S.C. § 252(e)(6). Id. at 18-19. However, the court denied AT&T's Motion to Dismiss as to Infotelecom's claim that AT&T had discriminated against Infotelecom in violation of the Telecommunications Act. Id. at 19-23. Although the court held that it possessed subject matter jurisdiction over this discriminatory treatment claim, the court declined to exercise supplemental jurisdiction over Infotelecom's claim for breach of the Interconnection Agreement. Id. at 23-26. As a consequence of the court's dismissal of Infotelecom's claim for breach of the Interconnection Agreement, the court terminated as moot Infotelecom's Motion for Preliminary Injunction (Doc. No. 33).

On July 19, 2011, Infotelecom filed an interlocutory appeal of the Ruling pursuant to 28 U.S.C. § 1291(a)(1), which permits the appeal of interlocutory orders that "refus[e] . . . [an] injunction[]." See Doc. No. 81. Infotelecom also filed in the district court an "Emergency Motion for Stay Pending Appeal."[1] Along with a stay of proceedings in the district court, Infotelecom requests an injunction pending appeal under Federal Rule of

[1] Although the original motion was captioned an "Emergency Motion" pursuant to D. Conn. L. Civ. R. 7.1, AT&T subsequently agreed to temporarily forbear from terminating Infotelecom's service, and the parties jointly stipulated that the Motion should no longer be adjudicated on an emergency basis. See Joint Stipulation (Doc. No. 85).

Civil Procedure 62(c). Rule 62(c) provides that:

> While an appeal is pending from an interlocutory order . . . that . . . denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights.

Infotelecom seeks an injunction secured by a $150,000 bond it has already posted. Mem. in Supp. (Doc. No. 84), at 24.

II. STANDARD OF REVIEW

Four factors typically govern the court's decision as to whether to issue a stay pending appeal:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
> (2) whether the applicant will be irreparably injured absent a stay;
> (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
> (4) where the public interest lies.

In re World Trade Center Disaster Site Litigation, 503 F.3d 167, 170 (2d Cir. 2007) (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)). The degree to which a factor must be present varies with the strength of the other factors, meaning that "more of one [factor] excuses less of the other." Thapa v. Gonzales, 460 F.3d 323, 334 (2d Cir. 2006) (internal citation omitted).

III. DISCUSSION

A. Authority to Issue Injunction

AT&T argues that the court lacks the authority to issue the injunction requested by Infotelecom. AT&T observes that, although Rule 62(c) permits the court to enter an injunction while an interlocutory appeal is pending, this court has already determined that it lacked subject matter jurisdiction over the claim for breach of the interconnection agreement. AT&T contends that because the court "never had jurisdiction to

adjudicate" the motion for preliminary injunction in the first place, the court therefore lacks the authority to issue an injunction pending interlocutory appeal. See Mem. in Opp. (Doc. No. 90) at 3.

AT&T's concern does not apply to the case at hand. In this case, the court has the discretion to exercise supplemental jurisdiction, but previously declined to exercise that discretion in light of its conclusion that Infotelecom's state law claim would substantially predominate over the remaining claim for which the court had original jurisdiction. See Ruling at 23-26. However, it was within the court's discretion to exercise supplemental jurisdiction. See 28 U.S.C. § 1367(c)(2) (the "district courts may decline to exercise supplemental jurisdiction . . . if . . . the claim substantially predominates over the claim . . . over which the district court has original jurisdiction."). As such, the court may now exercise supplemental jurisdiction to provide temporary injunctive relief.

B. Balance of the Four Factors

1. Whether Applicant Has Made a Strong Showing of Likely Success

The first factor for the court to consider is whether Infotelecom has made a strong showing that it is likely to succeed on the merits of its appeal. "The necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other stay factors." Mohammed v. Reno, 309 F.3d 95, 101 (2d Cir. 2002) (quoting Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)).

The court finds that Infotelecom's showing on the possibility of success on appeal is rather weak. The predominant view in the Circuit Courts of Appeal is that

claims for breach of an interconnection agreement arise under state law. See Ruling at 18. Even under the minority view espoused by the Fourth Circuit in Verizon Maryland v. Global NAPS, Inc., 377 F.3d 355 (4th Cir. 2004), Infotelecom's claim does not invoke the court's federal question jurisdiction, because the dispute in this case involves an escrow provision in the interconnection agreement that is "neither mandated nor contemplated by the Telecommunications Act." Ruling, at 19.

Infotelecom contends that the FCC's order in Core Communications, Inc. v. Verizon, Md., Inc., 18 FCC Rcd. 7962 (2003), undermines the court's reliance on the Second Circuit's decision in Law Offices of Curtis V. Trinko LLP v. Bell Atlantic Corp., 305 F.3d 89 (2d Cir. 2002).[2] However, Core involved factual circumstances quite different than the instant matter. In Core, the dispute involved the failure of a party to provide facilities for interconnection in a timely fashion "in accordance with the terms and conditions of the agreement" in contravention of 47 U.S.C. § 251(c)(2)(D). Core, 18 FCC Rcd. at 7973. By contrast, in this case, Infotelecom disputes AT&T's interpretation of a provision of the Interconnection Agreement that relates to when certain funds should be escrowed. This escrow provision does not implement one of the Telecommunications Act's "essential duties." Verizon Maryland v. Global NAPS, Inc., 377 F.3d at 366. Moreover, Circuit Courts of Appeal to have considered this issue after Core have reached the same conclusion as this court: that claims for breach of an interconnection agreement arise under state law. See e.g., Budget Prepay, Inc. v.

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[2] Infotelecom complains multiple times in its brief that the court relied "sua sponte" on the Second Circuit's Trinko decision. Mem. in Supp. at 7, 18, n.6. After the failure of either party to cite to Trinko – which both parties now concede is relevant precedent within the Circuit – the court asked counsel at oral argument to explain how it affected their arguments. Infotelecom had ample opportunity to bring the FCC's decision in Core to the court's attention, and, in any event, the FCC's decision in Core does not affect this court's Ruling.

AT&T Corp., 605 F.3d 273, 279 (5th Cir. 2010); Connect Communications Corp. v. Southwestern Bell Telephone, L.P., 467 F.3d 703, 708 (8th Cir. 2006). Infotelecom fails to convincingly explain why the reasoning in these decisions is not persuasive. Given that Trinko is still binding precedent in this Circuit, the court finds that Infotelecom has not made a strong showing that it is likely to succeed on appeal.[3]

2. Whether Applicant Will Be Irreparably Injured Absent a Stay

Infotelecom contends that it will be irreparably harmed if this court does not issue a stay of proceedings and an injunction, because AT&T will discontinue service to Infotelecom while the court's Ruling is on appeal with the Second Circuit. See Mem. in Supp., at 12. However, if the court denies Infotelecom's request to enjoin AT&T from discontinuing service, the only direct effect will be that Infotelecom must seek injunctive relief in the public utility commissions in the various states in which AT&T has threatened to discontinue service. Indeed, Infotelecom appears to have prepared for this outcome.[4] In response to AT&T's notices of disconnection, Infotelecom has sought injunctive relief from the California Public Utilities Commission and the Indiana Utility Regulatory Commission. Mem. in Opp., Exs. A, B. Infotelecom also sent a notice letter

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[3] AT&T additionally argues that Infotelecom must show that it has a likelihood of prevailing not only on the merits of the appeal, but also on the merits of the associated Motion for Preliminary Injunction. Mem. in Opp. at 6-8. In support of this proposition, AT&T cites a single unpublished case from the District of Arizona. Id. at 7. AT&T also notes the perversity of allowing Infotelecom to obtain a temporary injunction without demonstrating a likelihood of success on the merits. Because the court denies Infotelecom's Motion to Stay on the basis of the four factors that govern any motion to stay with regard to the issue Infotelecom is appealing, the court does not address whether a movant for a preliminary injunction accompanying a stay under Rule 62(c) must also demonstrate a likelihood of success on the merits of the underlying claim for which injunctive relief is sought.

[4] AT&T's willingness to forbear for approximately five weeks has allowed Infotelecom to proceed in state fora and seek such relief.

to AT&T in preparation for filing an expedited complaint with the Illinois Commerce Commission. Id., Ex. C.

To establish irreparable injury, Infotelecom would have to demonstrate "that absent a preliminary injunction [it] will suffer an injury that is neither remote nor speculative, but actual and imminent." Faively Transport Malmo AB v. Wabtec Corp., 559 F.3d 110, 118 (2d Cir. 2009) (internal quotation marks omitted). The Supreme Court's "frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction." Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 22 (2008) (emphasis in original). Infotelecom has not demonstrated that it is likely that the requisite relief is unavailable in the various state public utility commissions. Thus, Infotelecom's asserted harm is too speculative and too remote to be irreparable.

3. Whether Issuance of Stay Would Substantially Injure Other Parties

Issuing a stay and an injunction would expose AT&T to an increased risk that Infotelecom will be unable to satisfy its potential financial obligation to AT&T. Indeed, Infotelecom has acknowledged during discovery "that it is not financially able to escrow the cumulative delta amount across the 13-State region of the AT&T ILECs, assuming that amount is, as AT&T calculates, $4,935,981.58." Mem. in Opp.. Ex. D, at 5. That is, Infotelecom is unable to escrow the $4.9 million in dispute with liquid assets "without having a material impact on Infotelecom's business operations." Reply Mem., at 5.

Infotelecom requests an injunction requiring AT&T to continue permitting Infotelecom to access AT&T's network without escrowing the funds AT&T believes are required by the Interconnection Agreement and which may ultimately be payable to

AT&T if the FCC rules that IP-PSTN traffic is subject to additional intercarrier compensation obligations. Such an injunction would constitute a substantial injury to AT&T, because Infotelecom would accrue additional "delta" that could ultimately be due to AT&T, even though Infotelecom has already conceded that it cannot post the existing "delta" without materially impacting its business operations. Cf. Brenntag Int'l Chemicals, Inc. v. Bank of India, 175 F.3d 245, 249-50 (2d Cir. 1999) (finding that insolvency of a defendant helped establish irreparable harm).

Infotelecom protests that AT&T has not proven that Infotelecom would be unable to obtain funds to make up any difference between cash on hand and the amount required to be escrowed under AT&T's interpretation of the Interconnection Agreement. Reply Mem., at 5. Infotelecom supports this claim with the assertion that it "would be able to raise $4,935,981.58 from investors and lenders if it could identify investors and lenders willing to invest or loan such funds to Infotelecom." Reply Mem. at 5, n.3. Such circular statements provide no assurance that Infotelecom could produce the disputed funds if AT&T prevailed in its interpretation of the Interconnection Agreement.[5] In light of Infotelecom's admission that it is unable to escrow the disputed funds without materially impacting its business operations, the court finds that issuance of a stay and an injunction would substantially injure AT&T.

[5] A child could raise $5 million for his lemonade stand "from investors and lenders if [he] could identify investors and lenders willing to invest or loan such funds to [him]."

4. Evaluation of the Public Interest

As to the last factor, the public interest tips in favor of denying a stay pending appeal. Infotelecom argues that actions which degrade the reliability of the nation's telecommunications network – such as AT&T's threat to terminate Infotelecom's access to its network – threaten the public interest. While perhaps true, Infotelecom may seek injunctive relief in the appropriate state public utility commissions. The termination of Infotelecom's access would not be the result of this court's denial of the Motion to Stay, but the result of Infotelecom's failure to seek relief in the appropriate forum. On balance, the court finds that the public interest is best served by respecting Congress' allocation of authority between state public utility commissions and federal regulators.

In crafting the Telecommunications Act, Congress crafted a complicated compromise between state public utility commissions and federal regulators, reflecting a public policy characterized as "cooperative federalism." Budget Prepay v. AT&T Corporation, 605 F.3d 273, 276 (5th Cir. 2010). Respecting Congress' allocation of responsibility, the public interest is best served by Infotelecom and AT&T proceeding in the applicable state public utility commissions.

IV. CONCLUSION

Finding that all four factors weigh against the issuance of a stay, the court **denies** Infotelecom's Motion to Stay [**Doc. No. 82**].

SO ORDERED.

Dated at Bridgeport, Connecticut this 30th day of August, 2011.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge

Table B-5.
U.S. Courts of Appeals—Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending March 31, 2010

Circuit and Nature of Proceeding	Total Appeals Terminated [1]	Terminations on the Merits							
		Percent of Total Terminations	Total	Affirmed/ Enforced [2]	Dismissed	Reversed	Remanded	Other	Percent Reversed [3]
ALL CIRCUITS	**60,316**	**51.0**	**30,781**	**24,974**	**2,317**	**2,421**	**545**	**524**	**8.4**
CRIMINAL	13,799	71.8	9,913	7,996	1,110	578	179	50	5.8
U.S. PRISONER PETITIONS	5,283	32.4	1,713	1,486	109	89	22	7	5.2
OTHER U.S. CIVIL	3,155	53.6	1,690	1,354	65	234	34	3	13.8
PRIV. PRISONER PETITIONS	10,790	28.1	3,029	2,315	345	278	56	35	9.2
OTHER PRIVATE CIVIL	12,502	49.4	6,181	5,074	216	796	80	15	12.9
BANKRUPTCY	849	47.1	400	308	30	58	4	-	14.5
ADMINISTRATIVE APPEALS	10,209	53.3	5,446	4,259	241	362	170	414	6.6
ORIGINAL PROCEEDINGS	3,729	64.6	2,409	2,182	201	26	-	-	-
DISTRICT OF COLUMBIA	**1,092**	**45.1**	**492**	**403**	**23**	**57**	**9**	**-**	**11.7**
CRIMINAL	106	51.9	55	44	3	4	4	-	7.3
U.S. PRISONER PETITIONS	147	42.2	62	53	4	4	1	-	6.5
OTHER U.S. CIVIL	253	51.8	131	109	4	17	1	-	13.0
PRIV. PRISONER PETITIONS	19	52.6	10	8	-	2	-	-	20.0
OTHER PRIVATE CIVIL	129	60.5	78	66	2	9	1	-	11.5
BANKRUPTCY	3	66.7	2	1	-	1	-	-	-
ADMINISTRATIVE APPEALS	369	30.9	114	86	10	16	2	-	14.0
ORIGINAL PROCEEDINGS	66	60.6	40	36	-	4	-	-	-
FIRST CIRCUIT	**1,759**	**58.4**	**1,027**	**875**	**54**	**87**	**11**	**-**	**8.7**
CRIMINAL	604	65.6	396	344	19	30	3	-	7.6
U.S. PRISONER PETITIONS	129	31.0	40	31	7	2	-	-	5.0
OTHER U.S. CIVIL	103	61.2	63	55	-	5	3	-	7.9
PRIV. PRISONER PETITIONS	168	41.1	69	60	5	4	-	-	5.8
OTHER PRIVATE CIVIL	446	52.9	236	191	9	36	-	-	15.3
BANKRUPTCY	44	61.4	27	21	4	2	-	-	7.4
ADMINISTRATIVE APPEALS	197	67.0	132	113	9	5	5	-	3.8
ORIGINAL PROCEEDINGS	68	94.1	64	60	1	3	-	-	-
SECOND CIRCUIT	**6,850**	**48.8**	**3,344**	**2,796**	**264**	**230**	**53**	**1**	**7.3**
CRIMINAL	874	54.2	474	423	15	30	6	-	6.3
U.S. PRISONER PETITIONS	215	10.7	23	20	-	3	-	-	13.0
OTHER U.S. CIVIL	308	45.1	139	117	-	21	1	-	15.1
PRIV. PRISONER PETITIONS	740	21.1	156	136	3	15	2	-	9.6
OTHER PRIVATE CIVIL	2,080	42.8	890	737	22	117	14	-	13.1
BANKRUPTCY	157	22.3	35	29	2	4	-	-	11.4
ADMINISTRATIVE APPEALS	2,248	63.7	1,431	1,329	31	40	30	1	2.8
ORIGINAL PROCEEDINGS	228	86.0	196	5	191	-	-	-	-

Table B-5. (March 31, 2010—Continued)

Circuit and Nature of Proceeding	Total Appeals Terminated [1]	Terminations on the Merits							
		Percent of Total Terminations	Total	Affirmed/ Enforced [2]	Dismissed	Reversed	Remanded	Other	Percent Reversed [3]
THIRD CIRCUIT	**4,297**	**58.8**	**2,528**	**2,164**	**95**	**217**	**51**	**1**	**9.2**
CRIMINAL	938	82.6	775	697	12	55	10	1	7.1
U.S. PRISONER PETITIONS	336	39.3	132	112	10	9	1	-	6.8
OTHER U.S. CIVIL	204	63.7	130	107	5	15	3	-	11.5
PRIV. PRISONER PETITIONS	780	28.3	221	149	35	31	6	-	14.0
OTHER PRIVATE CIVIL	1,072	57.5	616	518	22	71	5	-	11.5
BANKRUPTCY	79	48.1	38	32	4	2	-	-	5.3
ADMINISTRATIVE APPEALS	633	66.2	419	355	7	31	26	-	7.4
ORIGINAL PROCEEDINGS	255	77.3	197	194	-	3	-	-	-
FOURTH CIRCUIT	**5,190**	**57.6**	**2,991**	**2,671**	**125**	**128**	**63**	**4**	**4.7**
CRIMINAL	1,216	79.9	971	826	48	56	40	1	5.8
U.S. PRISONER PETITIONS	1,368	49.0	671	637	19	9	6	-	1.3
OTHER U.S. CIVIL	233	53.6	125	106	8	11	-	-	8.8
PRIV. PRISONER PETITIONS	877	30.3	266	236	20	8	2	-	3.0
OTHER PRIVATE CIVIL	751	55.5	417	361	17	35	4	-	8.4
BANKRUPTCY	57	49.1	28	23	2	3	-	-	10.7
ADMINISTRATIVE APPEALS	338	66.3	224	193	11	6	11	3	2.7
ORIGINAL PROCEEDINGS	350	82.6	289	289	-	-	-	-	-
FIFTH CIRCUIT	**7,683**	**49.3**	**3,786**	**2,721**	**751**	**262**	**52**	**-**	**7.4**
CRIMINAL	2,464	73.0	1,798	1,142	573	62	21	-	3.4
U.S. PRISONER PETITIONS	614	21.5	132	101	22	6	3	-	4.5
OTHER U.S. CIVIL	330	48.5	160	125	11	21	3	-	13.1
PRIV. PRISONER PETITIONS	1,917	19.8	380	226	98	48	8	-	12.6
OTHER PRIVATE CIVIL	1,261	54.6	688	550	36	99	3	-	14.4
BANKRUPTCY	101	46.5	47	27	6	14	-	-	29.8
ADMINISTRATIVE APPEALS	558	47.7	266	240	5	7	14	-	2.6
ORIGINAL PROCEEDINGS	438	71.9	315	310	-	5	-	-	-
SIXTH CIRCUIT	**4,595**	**52.2**	**2,397**	**2,088**	**44**	**215**	**50**	**-**	**10.1**
CRIMINAL	1,097	65.4	717	614	13	74	16	-	10.3
U.S. PRISONER PETITIONS	299	29.4	88	79	3	6	-	-	6.8
OTHER U.S. CIVIL	233	45.9	107	85	3	14	5	-	13.1
PRIV. PRISONER PETITIONS	1,044	34.6	361	305	5	46	5	-	12.7
OTHER PRIVATE CIVIL	1,074	46.6	500	426	12	57	5	-	11.4
BANKRUPTCY	62	51.6	32	25	3	3	1	-	9.4
ADMINISTRATIVE APPEALS	393	66.9	263	231	5	9	18	-	3.4
ORIGINAL PROCEEDINGS	393	83.7	329	323	-	6	-	-	-

Table B-5. (March 31, 2010—Continued)

Circuit and Nature of Proceeding	Total Appeals Terminated [1]	Terminations on the Merits							
		Percent of Total Terminations	Total	Affirmed/ Enforced [2]	Dismissed	Reversed	Remanded	Other	Percent Reversed [3]
SEVENTH CIRCUIT	**3,367**	**45.5**	**1,531**	**1,149**	**141**	**184**	**22**	**35**	**13.1**
CRIMINAL	681	70.2	478	282	120	58	11	7	12.1
U.S. PRISONER PETITIONS	525	38.5	202	171	10	18	1	2	8.9
OTHER U.S. CIVIL	137	63.5	87	71	-	15	-	1	17.2
PRIV. PRISONER PETITIONS	701	17.7	124	103	2	17	-	2	13.7
OTHER PRIVATE CIVIL	892	41.8	373	306	6	54	3	4	14.5
BANKRUPTCY	58	39.7	23	17	1	5	-	-	21.7
ADMINISTRATIVE APPEALS	192	52.1	100	57	2	15	7	19	15.0
ORIGINAL PROCEEDINGS	181	79.6	144	142	-	2	-	-	-
EIGHTH CIRCUIT	**3,365**	**67.7**	**2,279**	**1,968**	**152**	**134**	**18**	**7**	**6.7**
CRIMINAL	1,136	81.7	928	783	85	45	11	4	4.8
U.S. PRISONER PETITIONS	306	35.9	110	101	3	3	2	1	2.7
OTHER U.S. CIVIL	188	72.9	137	110	11	15	1	-	10.9
PRIV. PRISONER PETITIONS	645	45.1	291	259	18	11	2	1	3.8
OTHER PRIVATE CIVIL	642	65.6	421	352	18	50	1	-	11.9
BANKRUPTCY	33	69.7	23	19	-	4	-	-	17.4
ADMINISTRATIVE APPEALS	140	75.0	105	86	11	6	1	1	5.7
ORIGINAL PROCEEDINGS	275	96.0	264	258	6	-	-	-	-
NINTH CIRCUIT	**12,889**	**43.9**	**5,653**	**4,288**	**208**	**588**	**102**	**467**	**10.6**
CRIMINAL	1,717	67.3	1,156	1,013	22	71	19	31	6.1
U.S. PRISONER PETITIONS	474	18.6	88	68	5	9	2	4	10.2
OTHER U.S. CIVIL	708	53.0	375	298	5	67	3	2	17.9
PRIV. PRISONER PETITIONS	2,223	32.8	729	610	12	60	16	31	8.2
OTHER PRIVATE CIVIL	2,282	48.8	1,113	892	28	172	11	10	15.5
BANKRUPTCY	177	56.5	100	81	5	14	-	-	14.0
ADMINISTRATIVE APPEALS	4,472	44.1	1,973	1,208	131	194	51	389	9.8
ORIGINAL PROCEEDINGS	836	14.2	119	118	-	1	-	-	-
TENTH CIRCUIT	**2,396**	**59.1**	**1,415**	**1,019**	**198**	**91**	**105**	**2**	**6.8**
CRIMINAL	646	82.8	535	374	102	25	34	-	4.7
U.S. PRISONER PETITIONS	281	32.4	91	60	16	9	6	-	9.9
OTHER U.S. CIVIL	156	67.9	106	77	5	11	13	-	10.4
PRIV. PRISONER PETITIONS	436	32.3	141	87	33	7	14	-	5.0
OTHER PRIVATE CIVIL	602	55.6	335	249	22	33	30	1	9.9
BANKRUPTCY	30	76.7	23	14	3	3	3	-	13.0
ADMINISTRATIVE APPEALS	110	77.3	85	61	17	1	5	1	1.2
ORIGINAL PROCEEDINGS	135	73.3	99	97	-	2	-	-	-

Table B-5. (March 31, 2010—Continued)

Circuit and Nature of Proceeding	Total Appeals Terminated [1]	Terminations on the Merits							
		Percent of Total Terminations	Total	Affirmed/ Enforced [2]	Dismissed	Reversed	Remanded	Other	Percent Reversed [3]
ELEVENTH CIRCUIT	**6,833**	**48.9**	**3,338**	**2,832**	**262**	**228**	**9**	**7**	**7.6**
CRIMINAL	2,320	70.3	1,630	1,454	98	68	4	6	4.2
U.S. PRISONER PETITIONS	589	12.6	74	53	10	11	-	-	14.9
OTHER U.S. CIVIL	302	43.0	130	94	13	22	1	-	16.9
PRIV. PRISONER PETITIONS	1,240	22.7	281	136	114	29	1	1	10.3
OTHER PRIVATE CIVIL	1,271	40.4	514	426	22	63	3	-	12.3
BANKRUPTCY	48	45.8	22	19	-	3	-	-	13.6
ADMINISTRATIVE APPEALS	559	59.7	334	300	2	32	-	-	9.6
ORIGINAL PROCEEDINGS	504	70.0	353	350	3	-	-	-	-

Note: This table does not include data for the U.S. Court of Appeals for the Federal Circuit.

[1] Totals include reopened and remanded appeals as well as original appeals.

[2] Affirmed includes merit terminations affirmed in part and reversed in part.

[3] Percent not shown where the total number of cases terminated on the merits is less than 10. Percentages of cases reversed have not been computed for original proceedings because of their difference from appeals, nor are they included in the percentage of total appeals reversed.

Table B-4.
U.S. Courts of Appeals—Median Time Intervals in Months in Cases Terminated After Hearing or Submission, by Circuit, During the 12-Month Period Ending September 30, 2010

Circuit	Total Cases	From Filing of Notice of Appeal to Filing of Last Brief [1]		From Filing of Last Brief to Hearing or Submission [2]		From Hearing to Final Disposition		From Submission to Final Disposition		From Filing of Notice of Appeal to Final Disposition [1]		From Filing in Lower Court to Final Disposition in Appellate Court [1]	
		Cases	Interval	Cases	Interval	Cases	Interval	Cases	Interval	Cases	Interval	Cases	Interval
ALL APPEALS AND ORIGINAL PROCEEDINGS													
TOTAL	**30,914**	**13,059**	**5.5**	**17,289**	**4.4**	**8,165**	**2.1**	**22,749**	**0.6**	**22,743**	**11.7**	**22,743**	**30.3**
DISTRICT OF COLUMBIA	520	204	8.2	271	3.0	231	2.6	289	0.8	383	11.4	383	32.7
FIRST	965	552	6.7	659	2.4	279	3.2	686	1.2	779	11.7	779	32.8
SECOND	3,304	1,125	5.9	2,133	4.1	1,246	0.7	2,058	0.6	1,929	13.3	1,929	40.4
THIRD	2,483	1,277	7.1	1,740	3.3	344	3.2	2,139	1.6	1,753	12.1	1,753	33.0
FOURTH	2,894	875	5.6	1,018	5.3	379	2.1	2,515	0.5	2,401	9.1	2,401	27.6
FIFTH	3,773	2,010	5.5	2,231	4.0	926	1.4	2,847	0.7	3,171	10.6	3,171	24.3
SIXTH	2,350	1,401	6.9	1,600	6.4	730	2.2	1,620	1.0	1,803	15.5	1,803	35.8
SEVENTH	1,512	894	5.7	974	2.2	706	3.2	806	0.2	1,225	10.5	1,225	31.1
EIGHTH	2,293	1,142	3.6	1,250	5.0	537	3.5	1,756	0.2	1,917	10.0	1,917	25.6
NINTH	6,324	663	6.2	2,189	21.5	1,870	1.3	4,454	0.5	3,661	16.3	3,661	36.2
TENTH	1,353	935	4.9	1,001	2.3	407	3.9	946	1.4	1,200	9.3	1,200	26.7
ELEVENTH	3,143	1,981	4.6	2,223	2.5	510	2.0	2,633	1.1	2,521	9.1	2,521	25.8

NOTE: This table does not include data for the U.S. Court of Appeals for the Federal Circuit.

[1] Appeals from administrative agencies and original proceedings are not included in this interval.

[2] Original proceedings are not included in this interval.

Exhibit 4

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ALJ/KAJ/gd2 9/12/2011

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Infotelecom, LLC (U6946C), Complainant, vs. Pacific Bell Telephone Company, dba AT&T California (U1001C), Defendant.	Case 11-07-021 (Filed July 25, 2011)

ADMINISTRATIVE LAW JUDGE'S RULING DENYING INFOTELECOM, LLC'S MOTION FOR EMERGENCY INJUNCTIVE RELIEF

1. Background

On July 25, 2011, Infotelecom LLC (Infotelecom) filed a complaint against Pacific Bell Telephone Company d/b/a AT&T California (AT&T) requesting interpretation of its interconnection agreement (ICA) with AT&T and to prevent disconnection of service. On August 9, 2011, the parties filed a joint motion to stay the case during settlement discussions. The motion indicated that since Infotelecom had filed the complaint, the parties had engaged in productive settlement discussions to resolve their dispute. They agreed it would be desirable to focus exclusively on those conversations and to temporarily suspend further litigation activities.

Then on August 25, 2011, Infotelecom filed a motion for emergency injunctive relief. Infotelecom requests that the Commission issue a stay to maintain the status quo pending resolution of its complaint. According to Infotelecom, on August 17, 2011, AT&T discontinued settlement conversations and sent Infotelecom a notice of termination setting September 1, 2011 as the date AT&T will terminate the ICA and disconnect Infotelecom. Infotelecom indicates that it filed the motion for emergency injunctive relief to prevent the imminent and irreparable harm that will flow to Infotelecom and consumers if AT&T disconnects service before the Commission has an opportunity to fully evaluate the merits of the parties' positions.

Infotelecom's August 25, 2011 Motion for Emergency Injunctive Relief was accompanied by a motion for order shortening the time for response to Infotelecom's motion. Infotelecom requested that the Commission set August 26, 2011 as the due date for a response. On August 25, 2011, I ruled on Infotelecom's motion for order shortening time via an e-mail to the parties. In that e-mail I gave AT&T until August 29, 2011 to respond to Infotelecom's motion. I indicated that I would rule on Infotelecom's Motion for Emergency Injunctive Relief again via e-mail, on August 30, 2011. That e-mail ruling would be followed by an official ALJ Ruling. AT&T filed its response in opposition to Infotelecom's motion on August 29, 2011. In its response AT&T indicated that it agreed to defer the disconnection of Infotelecom until September 9, 2011.[1]

[1] In an e-mail to the parties on August 30, 2011, I indicated that in light of AT&T's extension in time, I would delay ruling until September 8, 2011. I also clarified that AT&T had intended to set September 9, 2011 as the disconnection date.

2. Standard For Injunctive Relief

The Commission uses the same test for temporary restraining orders that it uses for preliminary injunctions.[2] "To obtain a temporary restraining order, the moving party must show (1) a likelihood of prevailing on the merits; (2) irreparable injury to the moving party without the order; (3) no substantial harm to other interested parties; and (4) no harm to the public interest." *Id.*

3. Discussion

In the following section, the four-pronged analysis for injunctive relief outlined above is applied to Infotelecom's request.

3.1. Likelihood of Prevailing on the Merits:

The parties disagree as to whether Infotelecom will prevail. Infotelecom asserts that it has shown a likelihood of success that the escrow provision in the ICA should be interpreted as a monthly, non-cumulative, and state-specific calculation based on the plain language of the ICA.

Some background information is needed to analyze Infotelecom's assertion. Following is the language that is in dispute:

> 7.3 The Party delivering IP-PSTN Traffic for termination to the other Party's end user customer (the "Delivering Party") shall pay to the other party the rate for Total Compensable Local Traffic as defined in Section 6 above. On a monthly basis, no later than the 15th day of the succeeding month to which the calculation applies, the Delivering Party shall report its calculation of the difference between the amounts Level 3 paid to SBC for terminating such traffic (at rates

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[2] *AT&T Communications of California, Inc. et al., v. Verizon California Inc.,* D.04-09-056, mimeo., p. 6 (citing *Westcom Long Distance, Inc. v. Pacific Bell et al.,* D.94-04-082, 54 CPUC 2d 244, 259; *see also Re Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates,* D.98-12-075, 84 CPUC 2d 155, 169.)

> applicable to Total Compensable Local Traffic (as defined herein)) and the amounts Level 3 would have paid had that traffic been rated according to SBC's intrastate and interstate switched access tariffs based upon originating and terminating NPA-NXX ("Delta"). At such time as the Delta exceeds $500,000 the Parties will negotiate resolution of the Delta for a period not to exceed eleven business days. If the Parties are unable to reach resolution, Level 3 shall pay the Delta into an interest bearing escrow account with a First Party escrow agent mutually agreed upon by the Parties.

The above language was negotiated between SBC (the precedessor to AT&T)[3] and Level 3, a Competitive Local Exchange Carrier (CLEC). Infotelecom was not a party to those negotiations but, pursuant to 47 U.S.C. § 252(i), Infotelecom adopted the terms and conditions of the 13-State ICA, including the First Amendment, which AT&T had negotiated with Level 3.

The dispute between SBC and Level 3 centered around the amount that would be paid for traffic that originates on an Internet network in Internet Protocol (IP) format and is carried for termination at points on the public switched telephone network (PSTN). The parties reached a compromise that all such IP-PSTN traffic would be treated as local traffic, and a rate of $.000035 per minute would be charged for IP-PSTN traffic. That traffic would not be subject to the higher tariffed access charges associated with originating and terminating traditional long distance traffic. However, the First Amendment provides that Infotelecom shall perform a series of monthly calculations to determine the amount that Infotelecom would have paid for any non-local traffic to determine the amount that Infotelecom would have paid for the traffic, had such traffic

[3] The terms SBC and AT&T are used interchangeably throughout this Ruling.

been traditional telecommunications traffic subject to AT&T's tariffed switched access charges. Those monthly calculations are referred to as the "Delta" in ICA Section 7.3 cited above.

AT&T and Infotelecom disagree about the interpretation of Section 7.3. It is clear from the proprietary negotiating documents used by SBC and Level 3 that those two companies were in agreement on what the section means. Specifically, they were in agreement that the so-called Delta calculation would be performed across the 13-state SBC region and cumulative from month to month. This fact is confirmed in a deposition of Rogier Ducloo on behalf of Level 3 in Federal District Court, District of Connecticut on June 24, 2011. The document was marked proprietary so I cannot cite specific sections in support.

Since Infotelecom adopted the SBC/Level 3 ICA pursuant to § 252(i), Infotelecom has stepped in the shoes of Level 3 and must receive the same terms and conditions as Level 3. As AT&T states, when Infotelecom adopted Level 3's ICA, it got the whole agreement. Indeed, the FCC's rule implementing section 252(i) of the 1996 Act is called the "All or Nothing Rule" because it requires the requesting carrier to adopt "in its entirety" an existing, state commission-approved ICA.[4]

AT&T points to First Amendment Paragraph 9.4 which provides that it is the "joint work product of the Parties and has been negotiated by the Parties and their respective counsel and shall be fairly interpreted in accordance with its terms and, in the event of any ambiguities, no inferences shall be drawn against

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[4] Second Report and Order, *In the Matter of the Review of the Section 252 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, 19 FCC Rcd 13494, (rel. July 8, 2004), at Paragraph 1.

either Party." Infotelecom suggests that this should not apply here because Infotelecom was not a party to the negotiation of the First Amendment. That is not the case. When Infotelecom adopted Level 3's ICA, it stands in exactly the same shoes as Level 3 under the ICA. Infotelecom suggests that the terms of the ICA with AT&T should not be the same as those adopted for Level 3. In light of the requirements of Section 252(i), I do not agree. I find that it is not likely that Infotelecom will prevail on the merits.

3.2. Irreparable Injury to the Moving Party

Infotelecom indicates that there can be no dispute that Infotelecom would suffer irreparable harm if AT&T discontinues service to Infotelecom while the complaint is pending. Infotelecom states that because AT&T possesses a physical monopoly over the telecommunications facilities that connect an end user customer to the telephone network, it is not possible to deliver calls to customers that receive local exchange service from AT&T without a direct or indirect interconnection. Thus, if Infotelecom is not able to complete calls to the end users of AT&T, or vice versa, a significant amount of the traffic flowing through Infotelecom's network will not be able to reach its intended recipient. This disruption would affect calls to Infotelecom and calls from Infotelecom.

AT&T responds that Infotelecom will not suffer harm unless it chooses to. To avoid the termination of service, Infotelecom need only pay into escrow the amounts it is supposed to have paid to AT&T. AT&T states that if Infotelecom needs to borrow to pay the Delta into escrow, so be it.

3.3. No Substantial Harm to AT&T

Infotelecom states that while Infotelecom faces the destruction of its business in the absence of a stay preserving the status quo, AT&T would suffer no substantial harm. Infotelecom states that from AT&T's perspective this

dispute is entirely about money, and therefore can be cured through money damages. AT&T refutes Infotelecom's allegation, saying that it faces substantial harm if a stay is granted. AT&T says that the emergency injunction would exacerbate this harm by forcing AT&T to continue providing services to Infotelecom while Infotelecom refuses to escrow the Delta for safe keeping until the FCC issues its decision on IP-PSTN traffic.

AT&T points out that the reason the escrow provision was added to the ICA in the first place, was that CLECs are at a historical risk for insolvency. Indeed, in connection with its federal lawsuit, Infotelecom admitted that it is currently not financially able to escrow the cumulative Delta amount across the 13-state region of AT&T, assuming the amount is, as AT&T calculates, $4,935,981.58.

According to AT&T, California courts have long held that a party may be substantially harmed if it is unable to collect on a judgment entered in its favor, including where the opposing party would be "judgment proof" due to insolvency.[5]

I concur that the harm that AT&T will suffer if it is enjoined from disconnecting service to Infotelecom is both concrete and substantial. Any additional services provided by AT&T to Infotelecom will only increase the amount of the un-escrowed Delta.

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[5] *See, e.g. Paradise Hills Associates v. Procel,* 235 Cal.App.3d 1528, 1538 (1991) (considering plaintiff's assertion that defendant lacked resources to pay damages); *West Coast Constr. Co. v. Oceano Sanitary Dist.*, 17 Cal.App.3d 693, 700 (1971) (monetary loss may be considered irreparable where the "parties causing the loss are insolvent or in any manner unable to respond in damages").

3.4. No Harm to the Public Interest

Infotelecom asserts that public interest favors preserving the status quo pending the resolution of Infotelecom's complaint. Infotelecom points out that the Commission has admonished carriers not to block calls because of compensation disputes.[6] Infotelecom also states that the FCC has made clear that any actions by a carrier that "may degrade the reliability of the nation's telecommunications network," is against the public interest. (*Call Blocking by Carriers, supra,* at 11631, Paragraph 6.) The cases that Infotelecom cites are not on point, but it is critical that phone calls reach their intended recipient.

There will be harm to the public, if Infotelecom's customers are not given timely notice that AT&T is terminating service to their carrier. I do not want Infotelecom's customers to wake up one morning and not be able to place or receive calls.

In light of that, I ask that AT&T defer termination of service to Infotelecom until we can set up a plan for Infotelecom to provide notice to its customers. I request that AT&T and Infotelecom set up a conference call with me within the next few days, so that we can discuss the issue of notice to Infotelecom's customers.

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[6] *Pac-West Telecomm, Inc. v. Evans Tel. Co, et al.,* D97-12-094, 77 CPUC 2d 717, 724.

IT IS RULED that Infotelecom's August 25, 2011 motion for emergency injunctive relief is hereby denied.

Dated September 12, 2011, at San Francisco, California.

/s/ KAREN A. JONES
Karen A. Jones
Administrative Law Judge

Certificate of Service

I hereby certify that a copy of the foregoing has been served this 21st day of September, 2011 by e-mail on the parties shown below.

/s/ Mary R. Fenlon
Mary R. Fenlon

Benita A. Kahn
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
Columbus, OH 43215
bakahn@vorys.com
smhoward@vorys.com

Ross A. Buntrock
G. David Carter
Arent Fox LLP
1050 Connecticut Ave, N.W.
Washington, DC 20036-5339
Buntrock.ross@arentfox.com
Carter.david@arentfox.com

Alexander E. Gertsburg
General Counsel
1228 Euclid Avenue, Suite 390
Cleveland, OH 44115
agertsburg@infotelecom.us

11-4887.sl

Summary: Memorandum in Opposition to Infotelecom's Motion for Stay electronically filed by Ms. Mary K. Fenlon on behalf of AT&T Ohio