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 REPLY IN SUPPORT OF MOTION
FOR SECURITY PENDING FINAL DECISION

AT&T Ohio respectfully submits this reply in support of its motion to require Complainant Infotelecom LLC ("Infotelecom") to provide adequate security to protect AT&T Ohio against loss during the pendency of this proceeding (the "Motion"), and states as follows:

1. As AT&T Ohio explained in the Motion, AT&T Ohio is entitled to protection against the loss to which it would otherwise be exposed as a result of the injunctive relief granted by this Commission if AT&T Ohio prevails on the merits (and is thus entitled to the Delta that Infotelecom should be escrowing while the case is litigated). And AT&T Ohio will ultimately prevail. As the Motion noted, that expectation is strengthened by the finding in the parallel case in California that Infotelecom is not likely to prevail.[1] Further corroborating that expectation, the Staff of the Illinois Commerce Commission concluded in the parallel case in Illinois that AT&T's

[1] Motion at 3.

reading of the disputed provision in the parties' contract (the "ICA") is correct, and that Infotelecom's reading would lead to an absurd result.[2]

2. AT&T Ohio's request for appropriate security is also supported by the Order of the Michigan Public Service Commission, in the parallel case there, requiring Infotelecom to provide security in the amount of $85,000 under precisely the circumstances presented here.[3] (Just as AT&T Ohio has asked for security only in an amount corresponding to the anticipated increase in the Ohio portion of the Delta while this case is being decided, so the Michigan security covers only the Michigan portion of the Delta. There is thus no risk of overlap or duplication).

3. Infotelecom's contention that no bond should be required because the Second Circuit has enjoined AT&T from terminating service to Infotelecom until October 18, 2011[4] is specious. Because Infotelecom has sought duplicative injunctive relief in federal court and in state commissions, AT&T has had no choice but to seek security both in federal court and in the state commissions, with 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. At the same time, AT&T recognizes it is not entitled to $2.00 of security for any $1.00 that is placed at risk by a temporary injunction. Accordingly, AT&T has informed the Second Circuit, and now assures this Commission, that if the Second Circuit extends injunctive relief beyond October 18 and requires Infotelecom to provide appropriate security in

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[2] Exhibit 1 hereto, at 9-15.

[3] Exhibit 2 hereto, at 5, 6.

[4] Infotelecom's Memorandum Contra AT&T's Motion for Security Pending Final Decision ("Mem. Contra"), at 1.

connection with that relief, AT&T will work with Infotelecom to ensure there is no duplication of security.[5]

4. It is irrelevant that Infotelecom "has paid and is paying all undisputed amounts to AT&T Ohio."[6] Infotelecom is not paying into escrow amounts that it should be paying into escrow (what Infotelecom would call disputed amounts), and as Infotelecom continues to not escrow those amounts during the pendency of this case, all those amounts are put at risk, because Infotelecom will not be in a position to pay them at the conclusion of the case. To protect AT&T Ohio against that risk is the purpose of the security requirement that Ohio law (and the law of every other United States jurisdiction) recognizes.[7]

5. There is no reason for concern about possibly "inconsistent or contradictory results."[8] In the first place, it is Infotelecom that created that possibility, by seeking the same relief in federal court and state commissions at the same time. In the second place, inconsistent results–a security requirement imposed by one forum and not the other–would not be the least bit problematic as a practical matter.

6. Infotelecom's suggestion that AT&T Ohio's request for security should be viewed skeptically because AT&T Ohio supposedly sat on its rights[9] is preposterous. AT&T did not "slumber" for two years, as Infotelecom suggests. It tried hard to work with Infotelecom and got nowhere.

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5 *See* Exhibit 3 hereto, at 4 n.4.

6 Mem. Contra at 1.

7 See Motion at 4.

8 Mem. Contra at 2.

9 *Id.*

7. Infotelecom's contention that a denial of AT&T Ohio's request for security would be consistent with Ohio law[10] is dead wrong. In its Motion, AT&T Ohio cited an Ohio Supreme Court decision holding that a security bond is *mandatory* when a court issues a preliminary injunction.[11] In response, Infotelecom cites a case holding that there is an exception "where an injunction simply prevents the party from engaging in some action they could not do in any event *and* would not suffer any additional damages for which a bond would provide security."[12] Here, *neither* of those two prerequisites is met. As for the former, AT&T Ohio has the right, under the parties' ICA, to terminate service to Infotelecom today; the only thing preventing it from doing so is injunctive relief that has been granted not because anyone has determined that Infotelecom's position is correct (or even defensible), but only in order to maintain the status quo until the case is decided. And as for the latter, the fact that AT&T Ohio *may* not be damaged by being restrained from terminating the ICA while the case is litigated (depending on what this Commission decides about the parties' contract and on what the FCC decides about IP-PSTN traffic) is irrelevant. When a security bond is required, it is *always* possible that the party protected by the security *may* not be damaged, in which case the security is returned to the party that provided the security.

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10 *Id.* at 2-3.

11 Motion at 4.

12 Mem. Contra at 2-3 (emphasis added).

October 5, 2011

Respectfully submitted,

AT&T Ohio

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Exhibit 1

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Infotelecom, LLC	:	
-vs-	:	
Illinois Bell Telephone Company	:	
	:	ICC Docket No. 11-0597
Complaint for Interpretation of an	:	
Interconnection Agreement and to	:	
Prevent Disconnection of Service.	:	

INITIAL BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

PUBLIC VERSION

***BEGIN CONF XXX END CONF *** - Denotes confidential information

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September 21, 2011

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The Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, and pursuant to Section 766.300 of the Commission's Rules of Practice, 83 Ill. Adm. Code 766.300, respectfully submits its Initial Brief in the above-captioned matter.

I. Procedural History

On August 24, 2011, Infotelecom, LLC (Infotelecom) filed its Complaint against Illinois Bell Telephone Company d/b/a AT&T Illinois for Interpretation of an Interconnection Agreement and to Prevent Disconnection of Service. *See, generally*, Complaint. The Complaint alleged, in summary, that Infotelecom had adopted in its entirety a Section 252 interconnection agreement (ICA) then in effect in Illinois between the Illinois Bell Telephone Company (AT&T Illinois) and Level 3 Communications, LLC. Complaint, ¶¶23, 33. The ICA contained a First Amendment that in turn contained Section 7.3, the provision at issue here. Id., ¶32. Section 7.3 requires a party delivering IP-PSTN traffic to the other party to pay a modest intercarrier compensation rate to the party receiving the traffic and to escrow a sum equal to the difference between the rates being paid and applicable switched access rates at such time as the Delta – the difference between the rates actually paid and the applicable switched access rates – exceeds $500,000. First Amendment to ICA, Section 7.3 (Complaint, Ex. A).

Infotelecom further alleged that at all times thereafter, AT&T Illinois improperly interpreted Section 7.3 to require that the Delta be calculated on a cumulative, rather than a month-by-month basis, and on a 13-state region wide,

rather than a state-by-state basis. Complaint, ¶¶36, 37. Infotelecom asserted that AT&T Illinois improperly demanded that Infotelecom place substantial sums into escrow and threatened to terminate the ICA if Infotelecom failed to do so. Id., ¶¶37-41. Infotelecom asserted that at no point had the Delta exceeded $500,000 in any one state in any one month. Id., ¶¶36, 40. Infotelecom further asserted that AT&T Illinois was engaging in discriminatory conduct in requiring it to escrow funds, inasmuch as AT&T Illinois was allegedly not requiring Level 3 to do so. Id., ¶43. Infotelecom asserted that it has, and continues to, pay all undisputed AT&T Illinois charges on a timely basis. Id., ¶¶49-50.

Infotelecom alleged that it filed suit in the U.S. District Court for the District of Connecticut, seeking, inter alia, an order enjoining AT&T Illinois (and affiliates) from terminate ICAs in several states. Complaint, ¶44. This suit was dismissed for want of federal subject matter jurisdiction, from which dismissal Infotelecom has taken an appeal. Id., ¶45. Infotelecom alleged that it and its customers, as well as customers whose traffic crosses its network, will be irreparably harmed if AT&T Illinois is permitted to terminate the ICA. Id., ¶46.

Infotelecom sought the following relief: (1) a declaration that Infotelecom has no duty to escrow the amounts demanded by AT&T Illinois; (2) a declaration that AT&T Illinois has violated the ICA by wrongfully terminating the ICA and threatening to discontinue service to Infotelecom; (3) a finding that AT&T Illinois has violated Sections 13-514(6), 13-514(8), 13-514(11) and 13-801 of the Illinois Public Utilities Act, and has impeded competition generally in violation of Section 13-514; (4) an order directing AT&T Illinois to cease and desist from any action

that would terminate the ICA; and (5) an order directing AT&T Illinois to pay Infotelecom's costs and fees associated with this action. Complaint, ¶¶52-72.

On August 31, 2011, AT&T Illinois filed its Answer, denying all allegations of wrongdoing. *See, generally*, Answer. On September 1, 2011, a hearing was convened before a duly-appointed Administrative Law Judge (ALJ) and a procedural schedule set. Tr. at 3-29. The parties agreed to waive hearings and submit their arguments in filed pleadings. Tr. at 7.

II. Statutory Basis for the Complaint

The following statutes and regulations are germane to this proceeding:

Section 10-108 of the Illinois Public Utilities Act, under which, *inter alia*, Infotelecom's claim is brought, provides in relevant part that:

> Complaint may be made by the Commission, of its own motion or by any person or corporation, chamber of commerce, board of trade, or any industrial, commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation by petition or complaint in writing, setting forth any act or things done or omitted to be done in violation, or claimed to be in violation, of any provision of this Act, or of any order or rule of the Commission.
>
> 220 ILCS 5/10-108

Infotelecom also pursues the claim that AT&T has violated Section 13-514 of the Public Utilities Act. Section 13-514 provides in relevant part that:

> A telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market. The following prohibited actions are considered per se impediments to the development of competition; however, the Commission is not limited in any manner to these enumerated impediments and may consider other actions which impede competition to be prohibited:
>
> ...

(6) unreasonably acting or failing to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers

...

(8) violating the terms of or unreasonably delaying implementation of an interconnection agreement entered into pursuant to Section 252 of the federal Telecommunications Act of 1996 in a manner that unreasonably delays, increases the cost, or impedes the availability of telecommunications services to consumers; [and]

...

(11) violating the obligations of Section 13-801[.]

220 ILCS 5/13-514(6), (8), (11)

Section 13-515 Public Utilities Act requires the Commission to rule on such complaints in an expeditious manner – typically 75 days from the date of filing. 220 ILCS 5/13-515(d)(7)-(8). The parties have not agreed to extend the date for decision.

Section 13-516 of the Public Utilities Act authorizes the Commission to order carriers to cease and desist from violating Section 13-514; assess penalties upon violators; and award fees and costs to the prevailing party. 220 ILCS 5/13-516(a).

Section 13-801 provides, in relevant part, that:

> An incumbent local exchange carrier shall provide a requesting telecommunications carrier with interconnection . . . on just, reasonable, and nondiscriminatory rates, terms, and conditions to enable the provision of any and all existing and new telecommunications services within the LATA, including, but not limited to, local exchange and exchange access[.]
>
> 220 ILCS 5/13-801(a)

III. Burden and Standard of Proof

Where a statute does not specifically place any burden of proof, as Section 13-515 does not, courts have uniformly imposed on administrative agencies the common-law rule that the party seeking relief has the burden of proof. Scott v. Dept. of Commerce and Community Affairs, 84 Ill. 2d 42, 53; 416 N.E.2d 1082, 1088; 1981 Ill. Lexis 229 at 14; 48 Ill. Dec. 560 (1981). The term "burden of proof" includes the burden of going forward with the evidence, and the burden of persuading the trier of fact. People v. Ziltz, 98 Ill. 2d 38, 43; 455 N.E.2d 70, 72; 1983 Ill. Lexis 453 at 6; 74 Ill. Dec. 40 (1983). The burden of persuading the trier of fact does not shift throughout the proceeding, but remains with the party seeking relief. Ambrose v. Thornton Twp. School Trustees, 274 Ill. App. 3d 676, 680; 654 N.E.2d 545, 548; 1995 Ill. App. Lexis 614 at 7-8; 211 Ill. Dec. 83 (1st Dist 1995), *app. den.*, 164 Ill. 2d 557 (1995). It is clear, therefore, that Infotelecom, as complainant here, bears the burden of proof.

Section 10-15 of the Illinois Administrative Procedure Act provides that "[u]nless otherwise provided by law or stated in the agency's rules, the standard of proof in any contested case hearing conducted under this Act by an agency shall be the preponderance of the evidence." 5 ILCS 100/10-15. The Commission has observed that the Administrative Procedure Act standard is: "the appropriate standard in all contested cases" before the Commission. *Order* at 4, Illinois Commerce Commission on its Own Motion: Amendment of 83 Ill. Admin. Code Part 200, ICC Docket No. 92-0024 (April 29, 1992). Accordingly, the standard of proof to be applied is the preponderance of the evidence standard.

The Staff notes, however, that Section 13-514 of the Illinois Public Utilities Act, 220 ILCS 5/13-514, states that certain types of conduct, specifically enumerated in subsections (1) through (12) of that Section, constitute *per se* impediments to competition, and consequently proscribed practices within the meaning of that Section. 220 ILCS 5/13-514(1)-(12). Accordingly, if Infotelecom demonstrates that AT&T engaged in any of the enumerated conduct, it is entitled to judgment, regardless of whether it has suffered or might suffer harm as a result of such conduct.

IV. Argument

The sole issue in this proceeding is the proper construction to be placed upon Section 7.3 of the First Amendment to the Interconnection Agreement (ICA) between Complainant and Respondent. AT&T Illinois claims that the term "Delta" as used in Section 7.3 represents a cumulative amount accruing from month to month and across all 13-SBC ILEC states, while Infotelecom asserts that Delta means a monthly and state-specific amount. Complaint, ¶¶31-33, 36, 42, 55-58; Answer, ¶¶31-33, 36, 42, 55-58.

Section 7.3 states that:

> The Party delivering IP-PTSN 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 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 or interstate

> switched access tariffs based upon originating and terminating NPA-NXX ("Delta"). By the first day of the following month, the Parties will agree on the amount of the 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 (11) 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.
>
> First Amendment to ICA, Section 7.3 (Complaint, Ex. A)

The questions presented for adjudication are as follows: (1) whether the ICA is properly construed such that the Delta accumulates from month to month; and (2) whether the Delta is properly calculated on a multistate as opposed to a state-by-state basis. Complaint, ¶¶31-33, 36, 42, 55-58; Answer, ¶¶31-33, 36, 42, 55-58. In short, the questions presented require pure contract interpretation.

Further, the claim is advanced under state law. Complaint, ¶¶12, 24-26, 47, 59-64. Accordingly, the claim is properly construed under Illinois law.

The primary rule of contract interpretation is to determine the parties' intent from the contract language itself. Farmers Auto Insurance Ass'n v. Wroblewski, 382 Ill. App. 3d 688, 696; 887 N.E.2d 916, 923 (4th Dist. 2008). In construing a contract, words are given their plain, ordinary meaning. Fan v. Auster Co., 389 Ill. App. 3d 633, 648; 906 N.E.2d 553, 676 (1st Dist. 2009). Likewise, a contract is to be construed as a whole so as to give effect to all of its provisions, Auster Co., 389 Ill. App. 3d at 649; 906 N.E.2d at 676, and its meaning should not be determined from an individual clause or detached portion. In re Marriage of Karafotas, 402 Ill. App. 3d 566, 571; 932 N.E. 2d 510, 515 (1st Dist. 2010).

Where the contract language is unambiguous, the parties' intent is to be determined solely from the terms of the contract itself. Regency Commercial Assocs., LLC v. Lopax, Inc., 373 Ill. App. 3d 270; 869 N.E.2d 310 (4th Dist. 2007). Contract language is ambiguous where it is: '"susceptible to more than one meaning or is obscure in meaning through indefiniteness of expression.'" Fleet Business Credit v. Entrasys Networks, 352 Ill. App. 3d 456, 469; 816 N.E. 2d 619, 629 (1st Dist. 2004), *quoting* Wald v. Chgo. Shippers Ass'n, 175 Ill. App. 3d. 607, 617; 529 N.E.2d 1138 (1st Dist. 1988). A contract is not ambiguous merely because the parties cannot agree regarding its meaning. Marriage of Karafotas, 402 Ill. App. 3d at 571; 932 N.E. 2d at 515.

In construing contracts, Illinois court follow a so-called "four corners" rule[1], which in summary provides that a contract, when in writing, is presumed to reflect the parties' intentions, which must be determined from the contract language, and which cannot be changed by extrinsic evidence. Lease Mgmt. Corp. v. DFO Partnership, 392 Ill. App. 3d 678, 685, 910 N.E.2d 709, 715 (1st Dist. 2009); Fleet Business Credit, 352 Ill. App. 3d at 469-70; 816 N.E. 2d at 630. Extrinsic evidence may be considered initially and provisionally only to determine whether an ambiguity exists; the existence of an ambiguity is a question of law to be

[1] The Illinois Supreme Court has observed that some Illinois Appellate courts have followed the so-called "provisional admission approach" to contract construction, pursuant to which, in the case of an otherwise facially unambiguous contract, a party may proffer parol evidence to the trial judge for the purpose of showing that an ambiguity exists which can be found only by looking beyond the clear language of the contract. Air Safety, Inc. v. Teachers Realty Corp.,185 Ill.2d 457, 463; 706 N.E.2d 882, 885 (1999). The Court observed, however, that it had never formally adopted the provisional admission approach, and elected not to do so in Air Safety, on the basis that the contract at issue contained an integration clause. Air Safety, 185 Ill.2d at 464; 706 N.E.2d at 885. As the ICA at issue contains an integration clause, *see* ICA, *General Terms and Conditions*, Section 2.2.2 (Complaint, Ex. A), adherence to the "four corners" rule appears to be required here. In any case, as the ALJ is the trier of fact in this case, application of the four corners rule and provisional admission approach will likely yield the same result.

determined by the court. Fleet Business Credit, 352 Ill. App. 3d at 470; 816 N.E. 2d at 630; Pioneer Trust & Savings v. Lucky Stores, Inc., 91 Ill. App. 3d 573, 575; 414 N.E. 2d 1152, 1154 (1st Dist 1981). Only if the court finds an ambiguity to exist as a matter of law may extrinsic evidence be considered as an aid to construction of the contract. Country Service & Supply Co. v. Harris Trust, 103 Ill. App. 3d 161, 165-66; 430 N.E.2d 631, 635 (2nd Dist. 1981).

Further, Illinois courts adhere to a so-called "reasonable construction" rule, pursuant to which a contract will be given a fair and reasonable interpretation based on a review of all of its language and provisions. Tatar v. Maxon Construction Co., 54 Ill. 2d 64, 67; 294 N.E.2d 272, 274 (1973). Likewise, a court will not give contract language a ridiculous construction, Epstein v. Yoder, 72 Ill. App. 3d 966, 972; 391 N.E.2d 432, 437 (1st Dist. 1979), or one that yields an absurd result. Rubin v. Laser, 301 Ill. App. 3d 60, 67; 703 N.E.2d 453, 457 (1st Dist.1998).

Accordingly, the ALJ's and Commission's initial task is to determine whether Section 7.3 of the First Amendment is ambiguous as a matter of law. In the Staff's opinion, it is not.

First, it is significant that Section 7.8 of the First Amendment provides that:

> This Section 7.0 shall remain in effect until the effective date of an FCC Order of addressing compensation for IP-PSTN/PSTN-IP traffic, at which time **the Parties agree to allocate the Delta identified in Section 7.3 in a manner consistent with such Forbearance Petition or FCC order** and the affected provisions shall be immediately invalidate, modified, or stayed, consistent with the action of the legislative body, court or regulatory agency upon the written request of either party. In such event, the Parties shall amend this First Amendment within forty-five (45) days to incorporate appropriate conforming modifications to the Agreement.

> If negotiations fail, disputes between the Parties concerning the interpretation of the actions required or provisions affected by such governmental actions shall be resolved pursuant to the dispute resolution process provided for in this Agreement. (Emphasis added)
>
> First Amendment to ICA, Section 7.3 (Complaint, Ex. A)(emphasis supplied)

In Section 7.8, the term "Delta" is used in the singular, indicating that the parties intended one cumulative Delta, rather than a series of monthly Deltas. Furthermore, Section 7.8 provides that the parties intended that the escrowed Delta would be allocated and disbursed consistent with the FCC's ultimate determination of the manner in which intercarrier compensation for IP-PSTN traffic would be treated. This indicates that the escrow of the Delta was intended to make certain that, on the one hand AT&T Illinois would be made whole in the event that the FCC determined IP-PSTN traffic to be subject to switched access charges, and for Infotelecom to be in a position to recoup payments in the event that the FCC determined that IP-PSTN traffic was subject to some other compensation structure.

The use of the term "escrow" in Section 7.3 further confirms this. Illinois courts have defined "escrow" to mean: "a written instrument that, by its terms, imports a legal obligation, and that is deposited by the grantor with a third party to be kept until the performance of a condition or happening of an event, at which time it is to be delivered to the grantee." Albrecht v. Brais, 324 Ill. App. 3d 188, 191; 754 N.E.2d 396, 399 (3rd Dist. 2001). The function of an escrow is to give security to both parties to an existing transaction. Hakala v. Illinois Dodge City Corp., 64 Ill. App. 3d 114, 121; 380 N.E.2d 1177, 1182 (2nd Dist. 1978). Clearly,

the parties intended that the escrow of funds would be used to make whole whichever of the parties overpaid or was underpaid based upon FCC action on IP-PSTN intercarrier compensation.

Further, and related, construing Section 7.3 so that the Delta is not cumulative will lead to an absurd result. As noted above, Section 7.3 provides that the Delta is the disputed amount of intercarrier compensation for IP-PSTN traffic. Assuming for the sake of the argument that the Delta defined in Section 7.3 is a state specific and monthly amount, as Infotelecom alleges, Infotelecom would not be required to pay any funds into escrow for a state in a given month if the state-specific monthly Delta in the month does not exceed $500,000. Under this theory, Infotelecom would not be required to pay any funds into an escrow account in a month even when the total disputed amount for the month (i.e., the sum of all state-specific Deltas for the month) reaches $6.5 million ($500,000 x 13 states).

Similarly, Infotelecom would not be required to pay any funds into escrow in a given year even when the total disputed amount for the year (i.e., the sum of all state-specific, monthly Deltas for the year) reaches $78 million ($500,000 x 12 months x 13 states). Put differently, Infotelecom would be able to accumulate up to $6.5 million per month or $78 million per year in disputed amounts without triggering an escrow provision. Even if one only considers Illinois, Infotelecom would be permitted to accumulate disputed yearly amounts of $6 million before it was required to escrow any funds at all.

This clearly is not a reasonable interpretation of the ICA, and the result is absurd. The parties included an escrow provision for a purpose, and that purpose was, based upon the legal purpose for escrows, to give security to both parties to a transaction. If Infotelecom's construction of the ICA is accepted, at least one of the parties to the transaction – AT&T Illinois – will be afforded no security whatever as a result of the escrow requirement, since Infotelecom will be permitted to accumulate $6 million per state per year in disputed charges, or $78 million in total per year, before Infotelecom is required to escrow anything. Indeed, the escrow requirement will be rendered effectively nugatory, in violation of any of several rules of contract interpretation described above.

Should the ALJ or Commission determine that Section 7.3 is in fact ambiguous, and the consideration of extrinsic or parol evidence regarding the parties' intent with respect to the meaning of Section 7.3 therefore warranted, the result is the same. It should be remembered that Infotelecom elected, as is its right, to adopt an existing ICA between AT&T Illinois and another carrier, in this case Level 3. Complaint, ¶¶23, 28, 29, 33; Answer, ¶¶23, 28, 29, 33. Accordingly, Infotelecom was not, as it concedes, a party to or present at the time of contract formation, or of formation of the First Amendment. Complaint, ¶30. This means that extrinsic evidence likely to make plain the intent of the parties is the course of negotiations and dealing between AT&T and Level 3.

A significant and reliable piece of evidence regarding the intent of AT&T and Level 3 as to the meaning of Section 7.3 is the deposition testimony of Rogier DuCloo. Mr. DuCloo was Level 3's representative in negotiating the First

Amendment. *See* Ex. 1 (AT&T Illinois Response to Staff Data Request OGC 1.01). The transcript of Mr. DuCloo's deposition, excerpts of which are attached hereto as Ex. 2, was provided in response to Staff Data Request OGC 1.01, and is confidential. Id. *** BEGIN CONF XXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXX END CONF ***

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In short, the most reliable and disinterested evidence available confirms that the parties, AT&T and Level 3, intended the Delta to be cumulative.

The parties are, of course, also at loggerheads regarding whether the Delta should be calculated on a state-by-state basis or across the entire 13-state region. This is a somewhat more difficult question for this Commission to resolve, although not because construction of the ICA is more difficult.

It is undisputed that Infotelecom adopted the Level 3 ICA. However, the ICA in question is a contract between AT&T Illinois and Infotelecom. *See* Order, Illinois Bell Telephone Company and Infotelecom, LLC: Joint Petition for Approval of Interconnection Agreement dated October 12, 2007 pursuant to 47 U.S.C. §252, ICC Docket No. 07-0515 (November 28, 2007). The Commission has the authority to construe this agreement, which is in any case the one before it.

However, if it elects to determine whether the Delta described in Section 7.3 is cumulative across the 13-state region – or for that matter, is not cumulative across the 13-state region – the Commission will be ruling in a manner that affects the parties' (or in this case, their affiliates') rights under other ICAs in effect in other states. The Staff has misgivings regarding whether the Commission can, or should, do so. A ruling that the Illinois Delta is cumulative, in contrast, affects only the parties' rights under the Illinois ICA.

In the event that the Commission elects to reach the issue of whether the Delta is cumulative across the 13-state region, the Staff recommends that the Commission conclude that it is. The Staff's arguments as set forth above regarding the cumulative nature of the Illinois Delta are applicable with equal force to the question of whether the 13-state region Delta is cumulative.

V. Conclusion

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

Respectfully submitted,

_____

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Illinois Commerce Commission

September 21, 2011

Exhibit 2

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of the complaint and request for emergency relief filed by **INFOTELECOM, LLC**, against **MICHIGAN BELL TELEPHONE COMPANY, D/B/A AT&T MICHIGAN**	)))))	Case No. U-16858

At the September 13, 2011 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Orjiakor N. Isiogu, Chairman
Hon. Greg R. White, Commissioner

ORDER DENYING EMERGENCY RELIEF

On August 24, 2011, Infotelecom, LLC, filed a complaint and request for emergency relief against AT&T Michigan, requesting that the Commission prevent AT&T Michigan from terminating service under the parties' interconnection agreement (ICA).

On August 31, 2011, AT&T Michigan filed a response to the complaint.

On September 7, 2011, Infotelecom filed a letter requesting that the Commission find that the $150,000 deposit into escrow in a related federal case is sufficient security for the pendency of this case.

Background

The complainant asserts that it is a competitive provider of communications services, specializing in voice over Internet protocol (VoIP) traffic that terminates on the public switched network (PSTN). To provide its service, Infotelecom states that it enters into ICAs with other

providers to receive the communications traffic that it carries for its customers. One such ICA is with AT&T Michigan. These parties' ICA is a part of a 13-state contract that includes AT&T Michigan's sister companies, such as AT&T Illinois.

The parties' ICA is one that Infotelecom adopted under 47 USC 252(i), which provides for adoption of a contract negotiated between the incumbent and another competitive local exchange carrier, in this case Level 3 Communications, LLC (Level 3), and approved by a state Commission. The Commission approved that agreement and the first amendment, which relates to intercarrier compensation, in its February 24, 2005 order in Case No. U-14152. Following that amendment, Level 3 and AT&T Michigan, f/k/a SBC Michigan, agreed to Amendments two through five, all of which have been approved by the Commission. In Case No. U-15431, Infotelecom adopted the ICA, including all five amendments, which the Commission approved in its October 25, 2007 order in that case.

At its heart, this case involves interpreting the meaning of the first amendment to the ICA. That amendment provides for intercarrier compensation of VoIP traffic during the period in which the parties await a decision of the Federal Communications Commission (FCC) as to whether that traffic should be charged at the rate that would be applicable to other traffic (local termination rate for local origin and termination, or access service for calls originating in a calling area different than its termination). Typically, access rates are higher than local termination rates. As a compromise during the period before the FCC rules on the issue, Level 3 and AT&T agreed that the competitive local exchange carrier would pay a rate of $0.00035 per minute of use, and each month provide a calculation of the difference between the amount of intercarrier compensation actually paid and what it would have paid if the traffic were treated as access service rather than local termination for purposes of intercarrier compensation. This difference is referred to as the

Delta. When the Delta reaches $500,000, Level 3 was to pay the entire difference into escrow, to provide assurance that AT&T Michigan will be able to collect that difference if the FCC rules in its favor on the issue. As noted above, Infotelecom adopted this ICA with all of its terms and conditions.

Infotelecom asserts that AT&T Michigan has threatened to cease providing service under the ICA if Infotelecom does not begin escrowing the Delta. It asserts that it has not reached the threshold in any month for any state that would trigger the requirement to escrow the Delta. Infotelecom seeks a Commission order preventing AT&T Michigan from terminating service under the contract until further order of the Commission. It argues that discontinuing service under the ICA would be against the public interest as it would impair Infotelecom's ability to serve its customers.

In its response, AT&T Michigan asserts that the $500,000 threshold has definitely been met, as the cumulative Delta over the 13-state region is now in excess of $4 million. It argues that the disputed provision was added to protect AT&T Michigan and its sister companies from losing millions of dollars as it experienced when several companies that owed significant disputed amounts filed for bankruptcy.

AT&T Michigan argues that the Commission should deny the request for emergency relief because Infotelecom cannot meet the four findings necessary under the statute. As evidence of its need for protection from loss, it points to the decision of the United States District Court for the District of Connecticut in Civil Action No. 3:11-CV-0739 (JCH) issued August 30, 2011. That decision denied Infotelecom's motion for a stay pending appeal, based on the availability of a remedy in the approving states, and potential injury to AT&T by virtue of the accruing Delta with

no escrow, particularly when Infotelecom had admitted it could not escrow the amount AT&T had calculated was due without substantially affecting its finances.

Discussion

Pursuant to MCL 484.2203(2), after receipt of a request for an emergency relief order and the response thereto, the Commission shall either deny the request or set the matter for a hearing. Thereafter, MCL 484.2203(3) provides that the Commission may issue an order granting emergency relief if it finds all of the following: (a) that the party has demonstrated exigent circumstances that warrant emergency relief, (b) that the party seeking relief will likely succeed on the merits, (c) that the party will suffer irreparable harm in its ability to serve customers if emergency relief is not granted, and (d) that the order is not adverse to the public interest. Under MCL 484.2203(4), the Commission may require the complainant to post a bond in an amount sufficient to make whole the respondent in the event that the order for emergency relief is later found to have been erroneously granted.

The Commission further notes that MCL 484.2203(13) prohibits a provider from discontinuing service while a complaint is pending before the Commission, if the complainant has provided adequate security in an amount determined by the Commission.

AT&T argues that the Commission should deny the request for emergency relief because Infotelecom cannot meet the four statutory findings. Particularly, AT&T Michigan argues that Infotelecom has no chance of succeeding on the merits of its complaint. It argues that, although the contract language is perhaps not as clear as it could be, there is no doubt that the Delta amount triggering the need to make escrow deposits is a cumulative amount over the 13-state region. AT&T Michigan attaches to its response affidavits and testimony to support its position on this

issue. Based on that evidence, AT&T Michigan argues that the Commission should deny the request for emergency relief.

The Commission finds that there is no need to grant the emergency relief requested by the complainant. To do so would be to grant a remedy the effect of which is already available under the statute. As noted above, MCL 484.2203(13) prohibits a provider from discontinuing service while a complaint is pending before the Commission, if the complainant has provided adequate security in an amount determined by the Commission. Because by operation of law Infotelecom can receive the protection it needs, there are no exigent circumstances present during the pendency of this contested case proceeding.

However, the Commission is sympathetic to AT&T Michigan's concern about the solvency of Infotelecom, and finds that the complainant should establish security to invoke the protections of MCL 484.2203(13). Contrary to the request of Infotelecom, the Commission does not consider the $150,000 escrow account established for a different proceeding to be sufficient. That amount was deposited for surety in the federal case, which involved several of AT&T Michigan's sister companies, with varying claims that add to over $4 million. In the Commission's view, that provides little to no protection to AT&T Michigan for its service related to Michigan. Therefore, the Commission finds that Infotelecom shall establish a bond, letter of credit, or escrow deposit in the amount of $85,000 to invoke the protections of MCL 484.2203(13).

Having determined that there is no legitimate claim for emergency relief, the Commission finds that MCL 484.2203(14) should be invoked and the parties should be directed to engage in alternative dispute resolution as provided in MCL 484.2203a.

THEREFORE, IT IS ORDERED that:

A. Infotelecom, LLC's request for emergency relief should be denied, and the parties should engage in an alternative dispute resolution process.

B. Infotelecom, LLC shall establish a bond, letter of credit, or escrow in the amount of $85,000 in order to enjoy the protection of MCL 484.2203(13).

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so by the filing of a claim of appeal in the Michigan Court of Appeals within 30 days of the issuance of this order, under MCL 484.2203(12).

MICHIGAN PUBLIC SERVICE COMMISSION

_____

Orjiakor N. Isiogu, Chairman

_____

Greg R. White, Commissioner

By its action of September 13, 2011.

_____

Mary Jo Kunkle, Executive Secretary

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of the complaint and request for emergency relief filed by **INFOTELECOM, LLC**, against **MICHIGAN BELL TELEPHONE COMPANY, d/b/a AT&T MICHIGAN.**	)))))	Case No. U-16858

At the October 4, 2011 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Orjiakor N. Isiogu, Chairman
Hon. Greg R. White, Commissioner

ORDER DENYING REHEARING

On September 13, 2011, the Commission issued an order (September 13 order) in this proceeding denying the request of Infotelecom, LLC, for emergency relief, and finding that in this proceeding, adequate security within the meaning of that term used in MCL 484.2203(13) is $85,000. Therefore, the Commission directed Infotelecom to provide a bond, letter of credit, or escrow deposit in the amount of $85,000 to obtain the protections of MCL 484.2203(13), which prohibits a provider from discontinuing service during the pendency of a complaint once the complainant has posted adequate security.

On September 14, 2011, Infotelecom filed a petition for rehearing of the September 13 order, requesting that the Commission reverse its determination that the $85,000 security is needed for the protections available under MCL 484.2203. It states that the petition for rehearing is based on

newly discovered evidence, facts or circumstances arising subsequent to the close of the record, and unintended consequence resulting from compliance with the Commission's order.

The complainant states that on September 9, 2011, the Second Circuit United States Court of Appeals (Second Circuit Court) in the related federal proceeding issued an order enjoining AT&T Michigan from disconnecting services to Infotelecom until the motions panel of the Court rules on Infotelecom's motion seeking the same relief that the complainant seeks in Michigan. It asserts that an hour or so before the Commission issued the September 13 order, Infotelecom filed a copy of the Second Circuit Court's September 9 order. It notes that the decision was not mentioned in the Commission's order, leading the complainant to conclude that the federal decision should now be treated as "newly discovered evidence or facts and circumstances arising after the close of a record, within the meaning of Rule 403." Petition, p. 4. It states that the Second Circuit Court did not require Infotelecom to post security to obtain the relief stated in the order. It argues that requiring it to post $85,000 in Michigan creates an unintended consequence of differing requirements in different states. Moreover, it argues that AT&T Michigan "feels empowered to violation [sic] the Second Circuit [Court's] Order and Injunction." *Id.* Infotelecom argues that the Commission should avoid creating a situation in which Infotelecom may be subject to overlapping or conflicting security requirements. Infotelecom therefore asks the Commission to reverse its determination that security in the amount of $85,000 is required to enjoy the protections of MCL 484.2203(13).

Infotelecom next moves for a stay of this proceeding, based on its theory that if the Second Circuit Court rules in its favor, this matter may be dismissed without need for a decision. Infotelecom insists that it expects a decision within 5 to 6 weeks. Thus, it argues, a short stay of this proceeding to await a determination by the Second Circuit Court is appropriate.

On September 21, 2011, AT&T Michigan filed a response opposing both the lifting of the security posting requirement for the protections under MCL 484.2203 and staying the present proceeding. It argues that Infotelecom has been in breach of the Interconnection agreement (ICA) for nearly two years by refusing to deposit amounts that the ICA requires that it escrow. AT&T Michigan further states that currently, the amount that should be in escrow for AT&T Michigan alone is $265,000, and grows by about $27,000 per month. AT&T Michigan states that it likely will never collect the shortfall because Infotelecom does not have the funds to pay. It argues that the Commission should have set the amount at $225,000 to secure the amount accruing over the eight months that it will take to complete this case. It argues that this is particularly true given Infotelecom's indication that if it wins its Second Circuit Court motion, it will seek a further stay while that Court resolves the appeal, a period that is likely to last up to a year.

AT&T Michigan argues that Infotelecom seeks to delay the proceeding because the longer it can maintain the *status quo,* the larger its "wrongful profits, and the greater the financial harm suffered by AT&T." Response, p. 2. AT&T Michigan argues that the 60-day mediation process is not a heavy burden for the parties to complete, no contested case proceedings will occur, while the parties await a decision from the Second Circuit Court.

AT&T Michigan argues that under the federal Telecommunications Act of 1996, it is the responsibility of the state commissions to interpret the ICA, with an appeal available to the appropriate federal district court. It argues that Congress created a cooperative federalism in which the state commissions make the initial decisions concerning interconnection agreements and federal district courts review those decisions. Citing *Budget Prepay, Inc.*, v *AT&T Corp*, 605 F 3d 273, 281(CA5, 2010); *Puerto Rico Tel.Co.* v *Telecomm Regulatory Bd of Puerto Rico*, 189 F 3d 1, 8 (CA1, 1999).

On September 26, 2011, Infotelecom filed a "Reply in Support of Petition for Rehearing and Motion for Stay." The Commission notes that its Rules of Practice and Procedure do not contemplate a response to a reply to a petition for rehearing. The Commission has not used the information or arguments in Infotelecom's September 26 filing in rendering its decision on the rehearing petition. However, after reviewing the filing, the Commission finds that it would not have altered the outcome had the Commission addressed that filing.

On September 28, 2011, AT&T responded with "Supplemental Authority in Opposition to Motion for Stay." The additional authority is a September 27, 2011 decision by an administrative law judge for the Illinois Commerce Commission denying Infotelecom's request for stay of the related proceedings in that case. Although the Commission appreciates the effort to keep the information up to date in this proceeding, the administrative law judge's decision does not provide binding precedent for the Commission.

The Commission finds that Infotelecom's motion to stay the proceedings in Michigan should be denied, and the case should proceed as scheduled for mediation. As AT&T Michigan points out, by then a determination on the motion in the federal appellate court should be issued. If that court grants the motion for stay, Infotelecom may petition the Commission once again for a suspension of the proceeding. It is always difficult to predict with any certainty the outcome of litigation in another forum. The Commission understands that if the Second Circuit Court determines that a stay is appropriate and thereafter resolves the appeal in Infotelecom's favor, proceedings here could be preempted.

The Commission finds that the petition for rehearing to reduce the amount of security required for protections under MCL484.2203(13) should be denied. There is no conflict or overlapping here with the federal case. The Commission did not require Infotelecom to post security if it did

not want the protection against disconnection under the Michigan statute. If the company is protected by the federal court order, perhaps it need not avail itself of the state protections. The Commission further notes that this security becomes more important than ever, should the proceeding be delayed in order for the Second Circuit Court to rule on the merits of the appeal. During such a possible delay, AT&T Michigan is prohibited from disconnection, but is not protected from the financial losses that may result. Because of the likelihood of mounting liability, the Commission finds that should Infotelecom move to delay this proceeding pending resolution of the appeal, the amount of adequate security will be reexamined at that time. An appropriate motion may be filed in conjunction with a response to additional requests for stay of the pending proceedings.

THEREFORE, IT IS ORDERED that:

A. The petition for rehearing of the Commission's September 13, 2011 order filed by Infotelecom, LLC, is denied.

B. The request for stay of these proceedings pending a decision of the United States Second Circuit Court of Appeals on the motion for stay is denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party aggrieved by this order may file an action in the appropriate federal District Court under 47 USC 252(e)(6).

MICHIGAN PUBLIC SERVICE COMMISSION

Orjiakor N. Isiogu, Chairman

Greg R. White, Commissioner

By its action of October 4, 2011.

Mary Jo Kunkle, Executive Secretary

Exhibit 3

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INFOTELECOM, LLC,	)	
	)	
Appellant,	)	
	)	No. 11-2916
v.	)	
	)	
ILLINOIS BELL TELEPHONE COMPANY D/B/A AT&T ILLINOIS, et al.,	)	
	)	
Appellees.	)	
	)	

SUPPLEMENTAL SUBMISSION CONCERNING QUANTIFICATION OF BOND IN THE EVENT COURT GRANTS INJUNCTION

Appellant Infotelecom, LLC ("Infotelecom") filed its Motion for Stay Pending Appeal on an emergency basis, on September 6, 2011 (the "Motion"). The requested "stay" would actually be an injunction prohibiting Appellees Illinois Bell Telephone Company *et al.* ("AT&T") from terminating service to Infotelecom, as the parties' contract permits AT&T to do in light of Infotelecom's material breaches, until this Court decides the appeal.. AT&T filed its Response to Motion for Stay Pending Appeal on September 8, 2011 (the "Response"). The next day, the Court issued an Order stating that the Motion would be submitted to a panel as soon as possible, and enjoining AT&T in the interim from disconnecting services to Infotelecom. Thereafter, Infotelecom filed a reply in support of the Motion, and AT&T filed a surreply.

Notwithstanding that a bond is the norm under FRAP 8(a)(2)(E), Infotelecom argued in the Motion that the Court should enjoin AT&T from terminating service to Infotelecom pending the Court's decision on appeal without requiring Infotelecom to provide a bond. Doc. 34-2 at 19. AT&T refuted that argument in its Response, explaining that in the unlikely event that the

requested injunction were granted, a bond would be necessary to secure AT&T against the loss it would otherwise suffer during the pendency of the appeal. Doc. 37-1 at 19-20.

AT&T does not anticipate that the Court will reach the question of a bond in this case, but wishes to inform the Court how it believes such a bond would be quantified in case the Court reaches that point.[1]

As we have explained (Response at 1), Infotelecom has been breaching its contract with AT&T by refusing to escrow funds that the contract requires Infotelecom to escrow so they will be available for payment to AT&T. The amount that Infotelecom has wrongfully failed to escrow and that AT&T is therefore at risk of losing was approximately $6.4 million as of August 31, 2011 (complete September numbers are not yet available), and it increases every month. The amount due the escrow is called the "Delta," and it is a function of the volume of telecommunications traffic Infotelecom delivers to AT&T. See Response at 4-6. As the traffic continues to flow, the Delta increases. Thus, if this Court were to enjoin AT&T from terminating service to Infotelecom and Infotelecom does not ultimately prevail on its claim against AT&T, the injunction issued by this Court pending its decision will have injured AT&T by increasing the amount Infotelecom owes the escrow, but has not paid – and the quantum of that injury will be the amount by which the Delta increases during the time the injunction is in effect.[2] For example, if the Delta is now $6.4 million and it increases to $11.4 million by the

[1] The Motion is without merit, for the reasons set forth in the Response. In the event that the Court were to grant the Motion, however, the Court should, in addition to requiring appropriate security, make clear that it is enjoining AT&T from discontinuing service to Infotelecom only on the grounds that were the subject of Infotelecom's Complaint, *i.e.*, the parties' disagreement concerning Infotelecom's obligation to escrow the "Delta," as defined in the parties' contract. Infotelecom is breaching other contractual obligations to AT&T, and must cure those breaches or face termination for its failure to do so. Infotelecom may initiate proceedings to prevent such a termination, but any injunction that the Court might issue in this case would pertain only to the threatened termination that was the subject of the Complaint.

[2] Even if Infotelecom were to prevail on its appeal. AT&T would still suffer the injury if Infotelecom does not ultimately prevail on its claim against AT&T. That is, if this Court were to reverse the district court's dismissal for

time the Court issues a decision affirming the district court, an injunction would have cost the escrow (and thus AT&T when it becomes entitled to the escrow) $5.0 million. On those assumed facts, an appropriate bond would be $5.0 million.[3]

Often, the amount to be secured by an appeal bond is certain. Here, it is not, because the amount at risk is a function of two unknowns: the duration of the (assumed) injunction and the volume of traffic during the period of the injunction. Nonetheless, there is a fair and reasonable method for setting a bond in this case. If the Court holds that AT&T should be enjoined from enforcing its contractual termination right while the Court considers Infotelecom's appeal (which it should not), AT&T suggests that the Court adopt the following approach:

1. The bond should cover the increment in the Delta for the period starting with the Court's September 8, 2011, Order and ending when the injunction is dissolved.

2. If the Court rules on the Motion in October and grants the requested injunction, Infotelecom should provide an initial bond on November 1, 2011. That initial bond would secure AT&T for the period between September 8, 2011, and November 30, 2011. The amount to be secured would be based on the average increase in the Delta during the last four months for which data is currently available, namely, the period between May 1, 2011, and August 31, 2011. The average monthly increase in the Delta during that period was $507,359.17, and the average daily increase was $16,499.48. See Affidavit of Janice Mullins, Exhibit 1 hereto. Applying the latter figure to the 83-day

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lack of jurisdiction but AT&T then prevailed on the merits – which would mean AT&T was entitled to terminate its contract with Infotelecom from the outset – the (hypothetical) injunction will have injured AT&T notwithstanding Infotelecom's win on appeal. That is one reason that Infotelecom must show it is likely to prevail on the merits of its claim, not just in this appeal, in order to obtain the injunction it requests. See Response at 12-13.

[3] An appropriate bond is particularly important in this case, because Infotelecom admitted in discovery that it was unable to pay even the approximately $5 million it owed the escrow at that time. See Response at 19.

period between September 8 and November 30, the initial bond amount to cover that period would be $1,369,456.84.

3. On the first day of each succeeding month during which the injunction is in effect, Infotelecom should provide an additional bond in an amount equal to $507,359.17 (the average monthly increase in the Delta), subject to paragraph 4 below.

4. Because the bond amounts are projections of increases in the Delta based on historical data, the amounts should be "trued up" as actual data becomes available. For example: The third bond would be due January 1, 2012. (the second having been provided on December 1, 2011.) The amount of that bond would be the standard monthly amount, $507,359.17, plus or minus an amount that "trues up" the November 1 bond amount in light of the actual increase in the Delta during the period from September 8 to November 30. Assume, for example, that an examination of actual data performed in mid-December shows that the real increase in the Delta between September 8 and November 30 was $1,200,000.00. That would mean that the $1,369,456.84 security provided on November 1, based on projections, was $169,456.84. higher than needed, based on the actual data. Consequently, on January 1, 2012, Infotelecom would provide a bond in the amount of $507,359.17 (to cover the upcoming month) minus $169,456.84 (the true-up).

5. As soon as practicable after the injunction is dissolved, a final true-up would be done in order to reconcile the amount of the final bond against actual data for the last period covered by the bond.[4]

[4] As the Court is aware, Infotelecom and AT&T are engaged in proceedings in state utility commissions in which Infotelecom asserts the same claim that the district court dismissed, and seeks the same injunctive relief it sought in the district court and now seeks, on an interim basis, in this Court. See Response at 9-10. Some of those state commissions have temporarily enjoined AT&T from terminating service to Infotelecom in their states. One state

Dated: September 28, 2011

Respectfully submitted,

/s/ Dennis G. Friedman

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commission required Infotelecom to post a bond that would secure approximately a three-month increment in the Delta *as it pertains to just that one state*, and other state commissions may also require Infotelecom to provide a bond. AT&T recognizes it is not entitled to duplicate bonds covering the same dollars, and assures the Court that it will work with Infotelecom to avoid any such duplication if this Court imposes a bond requirement,

EXHIBIT 1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INFOTELECOM, LLC,	)	
	)	
Appellant,	)	
	)	No. 11-2916
v.	)	
	)	
ILLINOIS BELL TELEPHONE COMPANY D/B/A AT&T ILLINOIS, et al.,	)	
	)	
Appellees.	)	
	)	

AFFIDAVIT OF JANICE MULLINS

County of Lucas	)	
	)	ss.
State of Ohio	)	

1. My name is Janice Mullins. I am employed by AT&T Services, Inc. as a Senior Carrier Account Manager. My business address is 13630 Lorain Ave., Cleveland, Ohio 44111. I have held this position under various titles for eleven years. As a Senior Carrier Account Manager, my responsibilities include providing support for competing local exchange carriers ("CLECs"), including Infotelecom, LLC ("Infotelecom"), that purchase services from various subsidiaries of AT&T Inc. Pursuant to section 7.3 of the First Amendment to the interconnection agreement negotiated between Infotelecom and a thirteen-state group of AT&T incumbent local exchange carriers ("ILECs"), Infotelecom submits a monthly calculation of the Delta (as that term is defined in section 7.3 of the First Amendment) that has accumulated across each of its billing account numbers ("BANs") during the previous billing period.

2. As of August 31, 2011, the last date for which complete data is available, AT&T calculated the total Delta subject to escrow pursuant to section 7.3 of the First Amendment at $6,442,031.80.

3. The increase in the Delta in each of the four months ending on August 31, 2011, was:

May:	$562,199.70
June:	$496,071.30
July:	$530,052.80
August:	$441,112.91

4. The average of those monthly figures is $507,359.17.

5. The average daily increase in the Delta during those four months (123 days) was $16,499.48.

6. This concludes my affidavit.

Janice Mullins
AT&T Services, Inc.

Subscribed and sworn to before me this 26 day of September, 2011

Sharon E. Graybill
Notary Public

SHARON E. GRAYBILL
NOTARY PUBLIC • STATE OF OHIO
Recorded in Medina County
My commission expires April 27, 2014

My commission expires _____

Certificate of Service

I hereby certify that a copy of the foregoing has been served this 5th day of October, 2011 by e-mail on the parties shown below.

/s/ Mary R. Fenlon
Mary R. Fenlon

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Summary: Reply to Infotelecom's Memo Contra AT&T's Motion for Security electronically filed by Ms. Mary K. Fenlon on behalf of AT&T Ohio