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**BEFORE THE PUBLIC  
UTILITIES COMMISSION OF OHIO**

INFOTELECOM, LLC,

Complainant,

v.

OHIO BELL TELEPHONE  
COMPANY, d/b/a AT&T OHIO,

Defendant.

Case No. 11-4887-TP-CSS

**INFOTELECOM LLC'S RESPONSE  
REGARDING THE BANKRUPTCY AUTOMATIC STAY**

Infotelecom, LLC ("Infotelecom") hereby submits this Response Regarding the Bankruptcy Automatic Stay.

Attached as Exhibit 1 is a motion filed on October 21, 2011 by Infotelecom's bankruptcy counsel in Case No. 11-18945 (Bankr. N.D. Ohio) that explains why this proceeding is stayed as the result of the automatic stay in 11 U.S.C. 362. The legal arguments set forth in Exhibit 1 are incorporated herein.

Dated: October 28, 2011

Respectfully submitted,

  
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*Of Counsel for Complainant Infotelecom, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing *Response* was served, via prepaid mail, this 28<sup>th</sup> day of October, 2011, upon:

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Jon F. Kelly, Esq.  
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Lawrence D. Walker

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

In re: : Chapter 11  
:   
INFOTELECOM, LLC, : Case No. 11-18945  
:   
Debtor. : Judge Jessica E. Price Smith

**DEBTOR'S EMERGENCY MOTION FOR ENTRY OF ORDER  
(I) ENFORCING THE AUTOMATIC STAY AGAINST AT&T AND  
(II) AWARDING SANCTIONS FOR AT&T'S WILLFUL STAY VIOLATION**

Infotelecom, LLC, debtor and debtor in possession (the "Debtor"), moves the Court for entry of an order pursuant to Sections 105(a) and 362 of Title 11 of the United States Code (the "Bankruptcy Code") (i) enforcing the automatic stay against AT&T and (ii) awarding to Debtor sanctions in the form of its fees and expenses incurred in connection with and as a result of AT&T's willful stay violations and scheduling a subsequent hearing to consider the appropriate amount of those sanctions. Certain AT&T ILECs (defined below) have taken actions in state public utility commission proceedings that willfully violate the automatic stay imposed by Section 362 of the Bankruptcy Code, and the Debtor anticipates that other AT&T entities with whom it deals may take similar actions in other state proceedings. Additionally, following the commencement of this case, AT&T suspended certain of the Debtor's accounts. Accordingly, the Debtor requests that the Court enforce the automatic stay against AT&T on an emergent basis and award the Debtor sanctions in an amount to be determined at a hearing following an expedited hearing on this Motion.<sup>1</sup>

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<sup>1</sup> Concurrently with the filing of this Motion, the Debtor is filing a motion asking the Court to conduct an expedited hearing on this Motion.



### **Jurisdiction and Venue**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter constitutes a core proceeding under 28 U.S.C. § 157(b)(2). Venue in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

### **Background**

2. On October 18, 2011 (the “Petition Date”), the Debtor filed with this Court its voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor continues to operate its business and manage its affairs as a debtor in possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

3. The Debtor is the communications carrier of choice for some of the nation’s most innovative technologies. The Debtor specializes in voice over Internet Protocol services (“VoIP”), which allow customers to make and receive voice communications over the internet. The Debtor’s Initial Report to the Court filed on the Petition Date (the “Initial Report”) provides a detailed overview of the Debtor’s business and the events leading to the commencement of this case.

### ***The ILEC Proceedings***

4. As discussed in the Initial Report, Infotelecom’s contract with AT&T is an interconnection agreement based on AT&T’s agreement with Level 3 Communications, LLC (as amended, the “ICA”). The ICA requires Infotelecom to pay a rate of \$0.00035 for all VoIP traffic that is delivered to an AT&T incumbent local exchange carrier (“ILEC”) for termination. In addition to paying AT&T at the \$0.00035 rate, on a monthly basis, Infotelecom calculates the amount it would have paid for this traffic had it been subject to higher switched access charges. Infotelecom and AT&T refer to the difference between the ICA rate and the higher traditional

switched access rate as the “Delta.” If a monthly Delta for traffic sent to a particular AT&T ILEC exceeds \$500,000 in any state, the ICA requires Infotelecom to negotiate with AT&T a rate for the traffic covered by the Delta. If these negotiations are unsuccessful, the ICA requires Infotelecom to escrow the Delta until the FCC resolves the long-standing dispute over whether any access charges are owed to AT&T for this traffic.

5. The ICA escrow provision has never been triggered—Infotelecom’s traffic with a particular AT&T ILEC has never exceeded \$500,000 in a single month in any particular state. AT&T, however, interprets the escrow requirement differently and, in February and March of this year, demanded that Infotelecom escrow almost \$3 million for Deltas pertaining to traffic in Texas, California, Illinois, and Ohio. AT&T threatened to terminate the ICA unless Infotelecom gave into AT&T’s demands. Infotelecom attempted to negotiate with AT&T but could not reach a resolution.

6. In an effort to avoid the irreparable harm to its business that disconnection would cause, Infotelecom commenced an action in the United States District Court for the District of Connecticut (the “Connecticut District Court”) on May 5, 2011, seeking, among other things, (1) an order restraining AT&T from terminating the ICA or discontinuing services to Infotelecom and (2) a declaration that Infotelecom has not breached the ICA. On July 15, 2011, the Connecticut District Court granted AT&T’s motion to dismiss Infotelecom’s declaratory judgment claim, holding that it lacked jurisdiction to interpret the ICA.<sup>2</sup> Infotelecom appealed this decision to the United States Court of Appeals for the Second Circuit (the “Second Circuit”), and that appeal remains pending.

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<sup>2</sup> In the same action, Infotelecom asserted a claim against AT&T for discriminating against Infotelecom in violation of federal telecommunications laws by, among other things, demanding escrows of Infotelecom that it does not require from similarly-situated LECs. This claim was not dismissed and remains pending before the Connecticut District Court.

7. In addition to the federal court action, Infotelecom has commenced proceedings against AT&T ILECs with public utility commissions (the “Commissions”) in California, Michigan, Illinois, Texas, Indiana, and Ohio (the “ILEC Proceedings”). In the ILEC Proceedings, Infotelecom has requested determinations that (1) Infotelecom has not breached the ICA escrow provisions and (2) the AT&T ILECs must cease all efforts to terminate the ICA and disconnect Infotelecom.

8. The ILEC Proceedings are purely defensive in nature—brought in response to AT&T’s threats of imminent disconnection which would irreparably harm Infotelecom’s business. Indeed, Infotelecom seeks nothing from the AT&T ILECs except for its fees and costs incurred in connection with having to bring the the ILEC Proceedings.

9. The AT&T ILECs, however, are using the ILEC Proceedings to continue pursuing their interpretation of the ICA and their efforts to extract as much cash as possible from Infotelecom. In their responses to Infotelecom’s complaints, the AT&T ILECs have demanded that Infotelecom immediately escrow several million dollars to avoid disconnection. In its response to Infotelecom’s complaint in the Texas ILEC Proceeding, for example, AT&T candidly states: “[t]o avoid the termination that it asserts as irreparable harm, Infotelecom need only pay into escrow the amounts it is supposed to have paid under the parties’ contract.” *See AT&T Texas’ Response to the Petition of Infotelecom for Post-Interconnection Dispute Resolution and Request for Interim Ruling Regarding Unlawful Escrow Demand* (the “Texas Response”). A true copy of the Texas Response (without attachments) is attached to this Motion as Exhibit A. Additionally, in the Texas ILEC Proceeding, AT&T moved for the Commission to require Infotelecom to post a bond or provide other security in the amount of \$45,162.90.

10. AT&T's responses in other ILEC Proceedings are consistent with AT&T's approach—the AT&T ILECs persist in their position that Infotelecom must pay up according to AT&T's aggressive interpretation of the ICA or suffer disconnection and termination.

*AT&T's Stay Violations*

11. On the Petition Date, Infotelecom filed a Notice of Bankruptcy Filing and Suggestion of Stay with each of the Commissions. True copies of such notices are attached to this Motion as Exhibit B.

12. Despite this prompt notice, AT&T Texas filed its Opposition to Infotelecom's Assertion that the Bankruptcy Stay under 11 U.S.C. 362 Applies to this Proceeding (the "Texas Opposition") with the Texas Commission on October 19—one day after the Petition Date. AT&T filed the Texas Opposition without seeking relief from this Court.

13. A day later and again without seeking relief from this Court, AT&T Indiana filed similar papers with the Indiana Commission (the "Indiana Opposition").

14. On October 21, AT&T entities filed similar oppositions in Ohio (the "Ohio Opposition") and Illinois (the "Illinois Opposition," and collectively with the Texas Opposition, the Indiana Opposition, and the Ohio Opposition, the "Oppositions"). True copies of the Oppositions (without attachments) are attached to this Motion as Exhibit C.

15. In the Oppositions, AT&T urges the Commissions to ignore the Debtor's bankruptcy filing and adjudicate AT&T's rights vis-à-vis the Debtor. The Debtor anticipates that AT&T will assert that the automatic stay does not apply in all of the ILEC Proceedings and in the Connecticut District Action on appeal.

16. Perhaps more egregiously, on October 20, 2011, AT&T suspended certain of the Debtor's accounts in order to prevent AT&T end-users from porting their phone numbers to new carriers on the Debtor's network.

17. By filing the Oppositions, AT&T is requiring the Debtor to incur unnecessary expense in responding to the Commissions. By suspending certain accounts, AT&T is disrupting the Debtor's business operations and jeopardizing the Debtor's relationships with customers.

#### **Relief Requested**

18. The Debtor respectfully requests entry of an order (i) enforcing the automatic stay against AT&T and (ii) awarding to the Debtor sanctions in the form of its fees and expenses incurred in connection with and as a result of AT&T's willful stay violations and scheduling a subsequent hearing to consider the appropriate amount of those sanctions.

#### **Basis for Relief**

19. Upon the filing of a bankruptcy petition, the automatic stay imposes an immediate, broad injunction that protects the debtor and its property. 11 U.S.C. § 362(a); *In re Hardesty*, 442 B.R. 110, 113 (Bankr. N.D. Ohio 2010) (stating that the "scope of the automatic stay is broad, and will operate to enjoin essentially any act by a creditor, whether the commencement or continuation thereof, to recover on prepetition claims"). The stay is "among the most fundamental debtor protections in bankruptcy law." *In re Cousins*, 404 B.R. 281, 286 (Bankr. S.D. Ohio 2009) (citing legislative history for the proposition that the stay gives debtors a "breathing spell" from all collection efforts and harassment).

20. The automatic stay applies to the ILEC Proceedings. The Court should enter an order enforcing the stay against AT&T and awarding sanctions against AT&T for its willful stay violations.



**A. The automatic stay applies to the ILEC Proceedings.**

21. In the Oppositions, the AT&T ILECs allege that the stay does not apply to the ILEC Proceedings simply because the Debtor initiated such proceedings. Despite courts' consistently expansive interpretation of Section 362's scope, the AT&T ILECs narrowly interpret a particular phrase in a particular subsection of Section 362 to argue that the ILEC Proceedings fall outside the stay's protection.

22. Section 362(a)(1) provides that the filing of a bankruptcy petition stays "the commencement or continuation...of a judicial, administrative, or other action or proceeding **against the debtor** that was or could have been commenced before the commencement of the case under this title, or to recover a claim **against the debtor** that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(1) (emphasis added). The AT&T ILECs assert that the phrase "against the debtor" means that actions brought by a debtor are never subject to Section 362. Texas Opposition ¶ 4; Indiana Opposition ¶ 4. This argument flies in the face of the facts surrounding the ILEC Proceedings, the plain language of Section 362, and binding Sixth Circuit precedent.

23. The Debtor initiated the ILEC Proceedings only to defend against the Hobson's choice offered by AT&T: fund exorbitant escrows or face disconnection. In the ILEC Proceedings, the AT&T ILECs demand that the Debtor escrow several million dollars to avoid termination and disconnection. A cursory review of the dockets in the ILEC Proceedings demonstrates that AT&T is the aggressor. AT&T, however, asks the Commission to ignore this reality and focus solely on the fact that the Debtor's name appears to the left side of the "v."

24. Unlike AT&T, courts in this circuit do not elevate form over substance. The United States Court of Appeals for the Sixth Circuit recognizes that the automatic stay bars the

commencement or continuation of any action “which would inevitably have an adverse impact upon the property of the estate.” *In re Nat’l Century Fin. Enters., Inc.*, 423 F.3d 567, 578 (6th Cir. 2005) (quoting *Licensing by Paolo, Inc. v. Sinatra (In re Gucci)*, 126 F.3d 380, 392 (2d Cir. 1987)). In fact, in *Nat’l Century*, the Court held that the automatic stay applied to an action in which the debtor was not even a party. *Id.* at 575-576 (holding that an action to obtain accounts receivable held in trust for a debtor’s subsidiary was barred by the automatic stay. Although the lawsuit had not been filed against the debtor, it required a determination concerning the debtor’s entitlement to certain property. *Id.* at 578 (recognizing that the “automatic stay of § 362(a) applies by its terms not only to actions against the debtor...but also to actions seeking to obtain property of the bankruptcy estate”) (internal citations omitted).

25. Similarly, in *Cathey v. Johns-Marville Sales Corp.*, the Sixth Circuit looked beyond the caption of an appeal filed by a debtor to determine that the automatic stay barred continued litigation. *See* 711 F.3d 60, 61 (6th Cir. 1983). Because the action in the lower court was prosecuted against the debtor, the appeal, though initiated by the debtor, was stayed. *Id.*

26. Courts routinely consider whether actions taken by creditors are offensive or defensive in nature to determine whether such actions are prohibited by the automatic stay. *See, e.g., In re Bryner*, 425 B.R. 601 (B.A.P. 10th Cir. 2010) (holding that filing a claim objection against a Chapter 7 debtor did not violate the automatic stay because claim objections are defensive in nature). It is only logical for courts to conduct this same inquiry in determining whether the stay applies to actions commenced by a debtor.

27. In the Oppositions, AT&T cites cases involving offensive actions—actions that courts properly held were not stayed because the debtors were actively prosecuting claims that would, if successful, enhance the debtors’ estates. *See, e.g., Matter of U.S. Abatement Corp.*, 39

F.3d 563, 568 (5th Cir. 1994) (debtor's counterclaims in contract dispute were not stayed because debtor sought an award of damages); *In re Merrick*, 175 B.R. 333, 337 (B.A.P. 9th Cir. 1994) (debtor's action to collect \$1 million in fraud damages not stayed); *Carley Capital Group v. Fireman's Fund Ins.*, 889 F.2d 1126 (D.C. Cir. 1989) (debtor's action for damages under insurance contract not stayed). These cases are inapposite to the ILEC Proceedings—defensive proceedings in which the Debtor merely seeks to preserve its contractual rights and protect property of the estate, not to enhance those rights or recover on a damages claim.

28. In a similar case, the United States District Court for the District of Kansas held that the automatic stay applied to a debtor's declaratory judgment action because the action carried risk for the debtor's estate. *E<sup>3</sup> Biofules-Mead, LLC v. QA3 Financial Corp.*, 384 B.R. 580, 582 (D. Kan. 2008). In *E<sup>3</sup> Biofules-Mead*, the debtor sought a declaration that it was not liable for fraud, breach of contract, misrepresentation, or conversion. *Id.* at 581. The court explained: "The rationale behind Section 362(a)(1)...is to distinguish actions against a debtor from actions by the debtor because actions by the debtor usually produce recovery for the bankruptcy estate." *Id.* at 582. Because the debtor's declaratory judgment action subjected the bankruptcy estate to substantial risk, the automatic stay applied. *Id.*

29. Like the civil action in *Nat'l Century* and the declaratory judgment action in *E<sup>3</sup> Biofules-Mead*, the ILEC Proceedings are actually actions against the Debtor and are stayed by Section 362(a).

30. Moreover, because the Debtor seeks to preserve contractual rights for the estate's benefit, the ILEC Proceedings are stayed by Section 362(a)(3). 11 U.S.C. § 362(a)(3) (providing that the stay bars any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate). It is well-settled that a debtor's contract

rights are property of the estate and that such rights fall within the automatic stay's protection.

*In re Clearwater Natural Resources, LP*, 421 B.R. 392, 400 (Bankr. E.D.K.Y. 2009) (stating that executory contracts are property of the estate and holding that the automatic stay prevented counterparty from declaring a *force majeure* event under an executory contract).

31. The Debtor's rights under the ICA are integral to its ability to protect the value of its business and to formulate a plan of reorganization. The Debtor commenced the ILEC Proceedings precisely to protect these rights.

32. The automatic stay of Sections 362(a)(1) and (3) bars the continuation of the ILEC Proceedings. Therefore, the Debtor requests that the Court enter an order pursuant to Sections 105(a) and 362 of the Bankruptcy Code requiring AT&T to immediately cease all activity in the ILEC Proceedings pending further orders of this Court.

**B. AT&T willfully violated the automatic stay and should be sanctioned.**

33. Section 362(k) provides that debtors injured by willful stay violations "shall recover actual damages, including costs and attorneys' fees."<sup>3</sup> A violation of the automatic stay is willful if the violator knew of the stay and intentionally committed the violative act. *In re WVF Acquisition, LLC*, 420 B.R. 902, 910 (Bankr. S.D. Fla. 2009) (sanctioning internet service provider for terminating debtor's service and "attempting to strong-arm a general release from the [d]ebtor"). Additionally, it is well-settled that courts may award compensatory damages for stay violations as part of their civil contempt power under Section 105 of the Bankruptcy Code. *WVF Acquisition*, 420 B.R. at 913. The Debtor promptly notified AT&T of its bankruptcy filing

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<sup>3</sup> AT&T may question whether corporate debtors are "individuals" entitled to damages under Section 362(k). As a number of courts have noted, "it seems unlikely that Congress meant to give a remedy only to individual debtors against those who willfully violate the automatic stay provisions of the Code as opposed to debtors which are corporations or other like entities. Such a narrow construction of the term would defeat much of the purpose of the section, and we construe the word 'individual' to include a corporate debtor." *In re Howard*, 428 B.R. 335, 339 n. 2 (Bankr. W.D. Pa. 2010) (quoting *Budget Serv. Co. v. Better Homes of Virginia, Inc.*, 804 F.2d 289, 292 (4th Cir. 1986)).

by filing notices in the ILEC Proceedings. AT&T immediately responded by filing the Oppositions, forcing the Debtor to incur the expenses associated with filing this Motion and responding to the Oppositions in the ILEC Proceedings. AT&T tacitly admitted that the Texas Opposition violated the automatic stay by stating in the last sentence of that document that AT&T would not pursue its Motion for Security at this time. Texas Opposition, p. 4.

34. Additionally, AT&T suspended certain of the Debtor's accounts, causing damage to the Debtor.

35. Under Sections 105(a) and 362(k), the Debtor respectfully requests that the Court award the Debtor sanctions in the form of its fees and expenses incurred in connection with AT&T's willful stay violations and scheduling a hearing to consider the appropriate amount of those sanctions.

#### **Conclusion**

36. Just as its pursuit of the Debtor under an aggressive interpretation of the ICA necessitated the Debtor's commencement of the ILEC Proceedings, AT&T's responses to the Debtor's bankruptcy filing based on a narrow, legally incorrect, and self-serving interpretation of Section 362(a)(1) have necessitated prompt action by the Debtor in this Court and in the Commissions. AT&T's interpretation of Section 362 defies reason and is inconsistent with binding precedent. The Court should enforce the stay against AT&T and sanction AT&T for its violation of the stay.

#### **No Prior Request**

37. No prior request for the relief sought by this Motion has been made to this or any other Court.

WHEREFORE, the Debtor respectfully requests that the Court enter an order

(i) enforcing the automatic stay against AT&T, (ii) awarding the Debtor sanctions in the form of its fees and expenses incurred in connection with AT&T's willful stay violations and scheduling a hearing to consider the appropriate amount of those sanctions, and (iii) granting to the Debtor such other relief as is just.

Dated: October 21, 2011

Respectfully submitted,

**TAFT STETTINIUS & HOLLISTER LLP**

/s/ W. Timothy Miller

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**PROPOSED ATTORNEYS FOR INFOTELECOM, LLC**

**CERTIFICATE OF SERVICE**

I certify that on October 21, 2011, I served true copies of the foregoing Motion via electronic mail to Thomas J. Horn (Thomas.horn@att.com), Kathleen S. Hamilton (Kathleen.s.hamilton@att.com), J. Tyson Covey (jcovey@mayerbrown.com), and Dennis G. Friedman (dfriedman@mayerbrown.com), attorneys for AT&T. I also served true copies of the foregoing Motion via the Court's ECF System or overnight mail, postage prepaid, to:

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c/o CT Corporation System  
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Overland Park, KS 66251

XO Communications  
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Paetec Communications  
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Fairport, NY 14450-4212

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RNK Telecom  
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Washington, DC 20554

/s/ W. Timothy Miller



Control Number: 39700



Item Number: 3

Addendum StartPage: 0

EXHIBIT A

**DOCKET NO. 39700**

<b>PETITION OF INFOTELECOM, LLC</b>	<b>§</b>	
<b>AGAINST SOUTHWESTERN BELL</b>	<b>§</b>	
<b>TELEPHONE COMPANY D/B/A AT&amp;T</b>	<b>§</b>	
<b>TEXAS FOR POST-</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>INTERCONNECTION DISPUTE</b>	<b>§</b>	<b>OF TEXAS</b>
<b>RESOLUTION AND REQUEST FOR</b>	<b>§</b>	
<b>INTERIM RULING REGARDING</b>	<b>§</b>	
<b>UNLAWFUL ESCROW DEMAND</b>	<b>§</b>	

**AT&T TEXAS' RESPONSE TO THE PETITION OF INFOTELECOM FOR POST-INTERCONNECTION DISPUTE RESOLUTION AND REQUEST FOR INTERIM RULING REGARDING UNLAWFUL ESCROW DEMAND**

Comes now Southwestern Bell Telephone Company d/b/a AT&T Texas ("AT&T Texas") and files, pursuant to Order No. 1, this Response to the Petition of Infotelecom, LLC ("Infotelecom") for Post-Interconnection Dispute Resolution and Request for Interim Ruling Regarding Unlawful Escrow Demand.<sup>1</sup>

**I.**  
**INTRODUCTION**

Infotelecom has been breaching its interconnection agreement ("ICA") with AT&T Texas for many months by refusing to escrow money that the ICA requires. The purpose of the escrow is to secure funds that will be available for payment to AT&T Texas when the Federal Communications Commission ("FCC") decides how carriers should compensate each other for VoIP traffic. The amount that Infotelecom has refused to escrow for Texas is approximately \$969,477.84 through July of 2011. Infotelecom has ICAs with five other AT&T incumbent local exchange carriers ("ILECs") and is acting in the same way. The multi-state cumulative amount Infotelecom refuses

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<sup>1</sup> AT&T Texas does not waive and reserves the right to file a further Response to the Petition following any hearing and order on the request for Interim Relief, pursuant to PUC PROC. R. 21.125.

to escrow is nearly \$6 million. The longer Infotelecom can maintain the status quo – obtaining service from AT&T Texas without funding the escrow – the more Infotelecom's unwarranted profits, and AT&T Texas' potential losses, continue to grow.

Infotelecom bases its refusal to make the required escrow deposits on a self-serving misapplication of the parties' ICA. Infotelecom's interpretation has no basis in the language of the ICA, and is contrary to the intent of the contracting parties. Infotelecom has no prospect of success on the merits of its claim. Infotelecom's requested relief would cause substantial harm to AT&T Texas and denial of the requested relief would not irreparably harm Infotelecom. The Commission should deny Infotelecom's request for injunctive relief.

In the balance of this Response, AT&T Texas explains why the requested interim relief is not appropriate, and provides background explaining the parties' ICA which was originally negotiated between Level 3 Communications, LLC ("Level 3") and SBC (now AT&T).

## **II. STATEMENT OF FACTS AND THE ISSUE**

Infotelecom and AT&T Texas are parties to an ICA that establishes terms and conditions for the exchange of communications traffic.<sup>2</sup> Several other AT&T incumbent local exchange carriers in other states (collectively the "AT&T ILECs" or "AT&T") are also parties to similar agreements. Infotelecom obtained its contract with the AT&T ILECs by adopting, as permitted by section 252(i) of the Telecommunications Act of 1996 Act, the ICA that AT&T previously negotiated with another competing carrier,

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<sup>2</sup> *Petition of Infotelecom, LLC Against Southwestern Bell Telephone Company d/b/a AT&T Texas for Post-Interconnection dispute Resolution and Request for Interim Ruling Regarding Unlawful Escrow Demand ("Petition")* ¶ 3, (filed on Aug. 24, 2011).

Level 3.<sup>3</sup> By adopting the Level 3 agreement, Infotelecom assumed the same set of obligations that were negotiated and agreed to by Level 3.<sup>4</sup>

When Level 3 and SBC negotiated the ICA in 2004-2005, they disagreed about the intercarrier compensation that should apply to IP-PSTN traffic.<sup>5</sup> SBC maintained that unless and until the FCC issued a ruling concerning intercarrier compensation for IP-PSTN traffic, such traffic should be treated the same as all other traffic – subject to reciprocal compensation if it originated and terminated in a single local exchange area. The IP-PSTN traffic should be subject to access charges (interstate or intrastate) at SBC's tariffed rates, which are higher than reciprocal compensation rates. Level 3, on the other hand, contended that all IP-PSTN traffic should be treated the same as local traffic, subject to reciprocal compensation rates which are lower than access charges.

Level 3 and SBC arrived at a compromise, which is set forth in section 7.3 of the First Amendment to the ICA.<sup>6</sup> In section 7.3, the parties agreed that Level 3 would pay SBC reciprocal compensation on all IP-PSTN traffic, but that Level 3 would calculate the difference between what it paid at that rate and what it would have paid at SBC's higher tariffed access rates. Level 3 would deposit that difference – the “delta” – in an escrow account. When the FCC decided how carriers should compensate each other for IP-PSTN traffic, the outcome of the FCC's decision would be applied to the escrowed

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<sup>3</sup> *Id.* ¶ 19. AT&T's predecessor, SBC negotiated the ICA with Level 3. SBC subsequently acquired legacy AT&T Corp. and changed its name to “AT&T Inc.”

<sup>4</sup> Docket No. 34643, *Joint Application of Southwestern Bell Telephone Company dba AT&T Texas and Infotelecom, LLC for Approval of Interconnection Agreement Under PURA and the Telecommunications Act of 1996* (approved Sept. 4, 2007).

<sup>5</sup> IP-PSTN traffic is voice traffic that originates with the calling party in IP (Internet Protocol) format and that is later converted to traditional circuit switched format in order to be terminated to an end user on the Public Switched Telephone Network.

<sup>6</sup> Exhibit B to Infotelecom's Petition. The “First Amendment Superseding Certain Intercarrier Compensation, Interconnection and Trunking Provisions” (“First Amendment”) was executed at the same time as the underlying ICA that it amended.

funds to be disbursed accordingly – to SBC if the FCC subjected interexchange IP-PSTN traffic to access charges, and to Level 3 if the FCC subjected that traffic to reciprocal compensation. The parties agreed that Level 3's obligation to escrow the delta would not be triggered until the total delta exceeded \$500,000. Thus, section 7.3 provided:

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 15<sup>th</sup> 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.

The \$500,000 figure in section 7.3 is a cumulative total, for the term of the agreement as opposed to a month to month trigger.<sup>7</sup>

Infotelecom adopted the Level 3 ICA in September of 2007 and has inaccurately interpreted section 7.3 in a manner that would excuse it from depositing any amounts into escrow. In October 2009, AT&T Texas invoked its rights under the ICA and informed Infotelecom that it was initiating the 11-day negotiation period required by

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<sup>7</sup> It is also an aggregate number that comprises the deltas for all states to which the ICA pertains – although that interstate aggregation is irrelevant for Texas, where the delta far exceeds \$500,000 without even considering deltas associated with other states.

section 7.3.<sup>8</sup> The parties' disagreement persisted, and since Infotelecom refused to negotiate, AT&T Texas sent Infotelecom a letter demanding that Infotelecom establish an escrow account for the full amount of the delta within 14 business days. Infotelecom refused.<sup>9</sup>

On January 14, 2011, AT&T Texas wrote to Infotelecom, informing it that the multi state delta now exceeded \$2 million. By that point, the delta for Texas and California each exceeded \$500,000. Accordingly, AT&T Texas stated it was commencing an 11-day negotiation period to seek a resolution for Texas and California. Following impasse with Infotelecom, AT&T Texas notified Infotelecom that it was in material breach of the ICA and that pursuant to the ICA, Infotelecom had 45 days to cure the material breach by escrowing the total delta.<sup>10</sup> That letter also stated that if Infotelecom did not cure the material breach, AT&T Texas would pursue any and all rights and remedies including termination of the ICA.

On May 5, 2011, Infotelecom filed a federal court complaint in Connecticut against AT&T Texas and the other AT&T ILECs with which it exchanges traffic, seeking declaratory relief and asking the federal court to enjoin AT&T from terminating the ICA.<sup>11</sup> On July 15, 2011, the federal court dismissed for lack of jurisdiction Infotelecom's claim regarding the interpretation of the ICA, and also dismissed

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<sup>8</sup> Kitty Drennan's Affidavit ("Drennan Aff.") at ¶ 4. Ms. Drennan's affidavit is attached hereto as Attachment A. The Exhibits attached to her affidavit are voluminous and for that reason are not attached. AT&T Texas will provide the exhibits upon request by the Arbitrators. Ms. Drennan's affidavit was originally filed in the federal lawsuit.

<sup>9</sup> *Id.* ¶¶ 7-8.

<sup>10</sup> *Id.* ¶¶ 6-11.

<sup>11</sup> *Infotelecom, LLC vs Illinois Bell Telephone Company, et al.*, Civil Action No. 3:11-CV-739 (JCH), U.S. District Court Connecticut ("Infotelecom v Illinois Bell").

Infotelecom's request for injunctive relief.<sup>12</sup> On August 17, 2011, AT&T Texas sent Infotelecom a notice informing it that the ICA would be terminated on September 1, 2011 unless Infotelecom escrows the funds it is required to escrow under the agreement. On August 24, 2011, Infotelecom filed the instant complaint at the Texas Public Utility Commission. AT&T ILECs and Infotelecom are parties to parallel state commission proceedings in five other states – California, Illinois, Indiana, Michigan, and Ohio. In this Response, AT&T Texas, addresses Infotelecom's Texas obligations.

### **III.** **ARGUMENT**

#### **A. Infotelecom's Prospects on the Merits of its Claim are Nil.**

The delta amount for Texas alone is nearly double the \$500,000 trigger described in section 7.3, and Infotelecom is obligated to pay the full amount of the delta into escrow. By refusing to do so, Infotelecom has materially breached the parties' ICA, resulting in AT&T Texas terminating the ICA. Infotelecom does not dispute that AT&T Texas is entitled to terminate the ICA in the event of a material breach. Thus, the only way Infotelecom could avoid termination – other than by depositing the delta amount in escrow – is by arguing that the delta amount does not accumulate from month to month.<sup>13</sup> As demonstrated below, Infotelecom cannot prevail, because the \$500,000 trigger amount in section 7.3 is clearly a cumulative amount. Infotelecom's agreement is self serving and a transparent attempt to avoid payment.

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<sup>12</sup> *Id.* ¶ 38.

<sup>13</sup> While the parties also disagree about whether the delta is an aggregate number that encompasses all the states in which AT&T and Infotelecom exchange traffic, that disagreement makes no difference in Texas, because the Texas delta on its own exceeds \$500,000. Because Infotelecom's contention that the delta does not aggregate across states does not apply here, AT&T Texas does not address it in this submission and the Commission need not rule on it.



"[A] contract's overriding purpose is to capture the parties' intent," so a court or agency "must construe it in light of how the parties meant to construe it."<sup>14</sup> The focus is "on the language used in the contract because it is the best indication of the parties' intent."<sup>15</sup> Contractual language "should be given its plain grammatical meaning unless it definitely appears that the intention of the parties would thereby be defeated."<sup>16</sup> The contract is to be interpreted "in light of the circumstances at the time the contract was drafted."<sup>17</sup>

The entire contract must be examined "in an effort to harmonize and effectuate all of its provisions so that none are rendered meaningless."<sup>18</sup> "No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument."<sup>19</sup> The court or agency "should avoid a construction that is unreasonable, oppressive, inequitable, or absurd."<sup>20</sup>

Applying those principles here, the only possible conclusion is that the trigger amount for the negotiation/escrow provision in section 7.3 is a cumulative amount that grows from month to month over the term of the ICA. The only language in section 7.3,

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<sup>14</sup> *Intercontinental Group Partnership v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 657-58 (Tex. 2009).

<sup>15</sup> *Reliance Ins. Co. v. Hibdon*, 333 S.W.3d 364, 369 (Tex. Ct. App. 2011) (citing *Perry Homes v. Cull*, 258 S.W.3d 580, 606 (Tex. 2008)).

<sup>16</sup> *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 529 (Tex. 1987).

<sup>17</sup> *MJCM, LLC v. First Georgia Bank, Inc.*, 392 F. Supp. 2d 901, 904 (S.D. Tex. 2005) (citing *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996)).

<sup>18</sup> *Reliance Ins. Co.*, 333 S.W.3d at 369 (citing *Seagull Energy E & P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 345 (Tex. 2006)).

<sup>19</sup> *Seagull Energy*, 207 S.W.3d at 345.

<sup>20</sup> *Pavecon, Inc. v. R-Cor, Inc.*, 159 S.W.3d 219, 222 (Tex. Ct. App. 2005).

clearly states that the obligation to escrow is triggered. "*At such time as the Delta exceeds \$500,000, . . .*"<sup>21</sup>

There is ample evidence to support this meaning consistent with Level 3 and SBC intentions when they negotiated section 7.3. And *all* the evidence – including the negotiation documents and the testimony of SBC and Level 3 negotiators – makes clear that Level 3 and SBC intended the delta amount to be cumulative. This evidence includes the Affidavit of SBC negotiator Brian K. Van Hoof<sup>22</sup> as well as the deposition of the principal negotiator for Level 3, Rogier Ducloo.<sup>23</sup> Mr. Van Hoof's Affidavit recounts in detail the negotiation of section 7.3 over a period of several months, and the excerpts from Mr. Ducloo's deposition confirms Mr. Van Hoof's account.

The testimony of both witnesses, and the negotiation documentation, conclusively show that the \$500,000 trigger amount for the escrow originated in a proposal by Level 3.<sup>24</sup>

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<sup>21</sup> Infotelecom states that section 7.3 of the ICA "will be interpreted in Infotelecom's favor." Petition ¶ 53. To the extent Infotelecom suggests the ICA should be construed against AT&T, that contention fails for two reasons. *First*, the legal principle on which it relies is that an ambiguous contract is construed against the *drafter*. Here, there is no evidence that AT&T (or SBC), rather than Level 3, drafted the disputed language. *Second*, the First Amendment expressly provides (in § 9.4) 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 either Party." When Infotelecom adopted Level 3's ICA, it took the whole agreement. Infotelecom stands in *exactly* the same shoes as Level 3 under the contract, and it knew it was stepping into those shoes when it adopted the agreement. Under Infotelecom's absurd view, the contract could mean one thing with respect to Level 3, and quite another thing with respect to Infotelecom. That is not the way section 252(i) of the 1996 Act works.

<sup>22</sup> Mr. Van Hoof's Affidavit ("Van Hoof Aff.") is attached hereto as Attachment B (redacted version). The Confidential Version of Mr. Van Hoof's affidavit is filed under seal. The Exhibits attached to his affidavit are voluminous and for that reason are not attached. AT&T Texas will provide the exhibits upon request by the Arbitrators. Mr. Van Hoof's affidavit was originally filed in the federal lawsuit.

<sup>23</sup> Attachment C are Excerpts of Rogier Ducloo's Confidential Deposition, dated June 24, 2011 ("Ducloo Dep.") and are filed under seal.

<sup>24</sup> Ducloo Dep. at 118, l. 14 – 120, l. 24.

Based on Mr. Ducloo's explanation of the reason for the change, SBC agreed to increase the escrow trigger from \$50,000 to \$500,000.<sup>25</sup> Subsequently, Level 3 sent SBC revisions to a term sheet from which the parties were working. The term sheet, as marked up by Level 3, states, "The escrow account will be established once the **cumulative** difference in amounts described above exceeds \$500K. The **cumulative** difference will be deposited into the escrow account."<sup>26</sup>

Thus, it was Level 3's and SBC's shared understanding and intent from the first mention of the \$500,000 trigger amount that it was a cumulative number, increasing from month to month.<sup>27</sup> That understanding and intent never changed.<sup>28</sup>

Indeed, SBC would never have agreed to section 7.3 if it meant what Infotelecom now claims. Under Infotelecom's claim, the whole purpose of the escrow requirement would be defeated. Given the relatively low volume of IP-PSTN traffic at the time, SBC did not expect Level 3's delta to hit \$500,000 in a single month in a single state.<sup>29</sup> Employing Infotelecom's reading, unfairly results in no meaningful escrow requirement. In such a scenario AT&T Texas would have no protection at all in the event Level 3 became insolvent.<sup>30</sup> Thus, the reading advocated by Infotelecom produces an absurd result, implicates millions of dollars in dispute, and affords no escrow protection – a

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<sup>25</sup> Van Hoof Aff. ¶¶ 13-14.

<sup>26</sup> Van Hoof Aff. ¶ 12.

<sup>27</sup> Van Hoof Aff. ¶¶ 13, 14, 20.

<sup>28</sup> *Id.* ¶¶ 13, 14, 20; Ducloo Dep. at 120, l. 13 – 121, l. 9.

<sup>29</sup> Van Hoof Aff. ¶ 22.

<sup>30</sup> *Id.* ¶¶ 21-22.

fundamental requirement of the ICA. Section 7.3 cannot properly be read to yield such a result.<sup>31</sup>

For misplaced support, Infotelecom focuses on the sentence in section 7.3 that requires the delta to be reported every month.<sup>32</sup> But that sentence sheds no light on whether the delta is cumulative. Even a cumulative delta would be reported periodically; otherwise, the parties would have no way to know when the trigger was reached.

The sentence on which Infotelecom relies simply gives no indication whether the delta is a monthly number or a cumulative number. Again, the only language in section 7.3 that sheds light on that question is the trigger language itself – “At such time as the Delta exceeds \$500,000” – and that phrase clearly anticipates accumulation.

In sum, the language of section 7.3 communicates with adequate clarity that the delta grows from month to month; nothing in section 7.3 suggests otherwise. Not only is the contract language clear enough, the negotiation history is conclusive. Because Infotelecom can not prevail on its argument that the delta does not accrue month to month, and because the state-specific delta for the state of Texas has exceeded \$500,000, Infotelecom's arguments are unfounded. For that reason alone, Infotelecom's Request for Interim Relief must be denied.

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<sup>31</sup> *E.g., Newmont Mines Ltd. v. Hanover Ins. Co.*, 784 F.2d 127, 135 (2d Cir. 1986) (in construing contracts, “absurd results should be avoided”); *Pavecon, Inc.*, 159 S.W.3d at 222 (courts and agencies “should avoid a construction that is unreasonable, oppressive, inequitable, or absurd”).

<sup>32</sup> Petition ¶¶ 24, 29, 32, 42-43, 53.

**B. Infotelecom's purported showing of irreparable harm to itself and lack of harm to AT&T Texas does not justify the entry of the interim relief Infotelecom requests.**

For all the reasons discussed above, Infotelecom cannot demonstrate a likelihood of success on the merits. Consequently, its request for interim relief would properly be denied even if that meant Infotelecom would suffer an irreparable harm.<sup>33</sup>

Infotelecom's claim of harm is of its own making. Courts have long recognized that self-inflicted harm is not "irreparable" and thus will not support a request for injunctive relief.<sup>34</sup> Here, any harm that Infotelecom may suffer if the Commission denies its request for injunctive relief would be self-inflicted. To avoid the termination that it asserts as irreparable harm, Infotelecom need only pay into escrow the amounts it is supposed to have paid under the parties' contract. If Infotelecom deposited the delta into escrow and the Commission were to ultimately agree with Infotelecom's reading of section 7.3, the escrowed funds would be returned to Infotelecom, and the only harm Infotelecom would have suffered would be the cost of establishing and maintaining the escrow. If Infotelecom needs to borrow to pay the delta into escrow, so be it – the interest is measurable and becomes another element of what AT&T Texas would have to pay Infotelecom in the hypothetical event that Infotelecom were to prevail on the

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<sup>33</sup> *E.g., Long John Silver's Inc. v. Martinez*, 850 S.W.2d 773, 775 (Tex. Ct. App. 1993) ("To warrant the issuance of a temporary injunction, the movant must show: (1) probable right to recovery; (2) that imminent and irreparable harm will occur in the interim if the request is not granted; and (3) that no adequate remedy at law exists.") (emphasis added) (citing *Sun Oil Co. v. Whitaker*, 424 S.W.2d 216, 218 (Tex. 1968)).

<sup>34</sup> *E.g., Crestview, Ltd. v. Foremost Ins. Co.*, 621 S.W.2d 816, 829-30 (Tex. Ct. App. 1981) (finding no irreparable harm and denying request for injunction where any injury would be "self-inflicted"); *K.D. v. Oakley Union Elementary School Dist.*, No. C 07-00920, 2008 WL 360460, at \*11 (N.D. Cal. Feb. 8, 2008) ("harm is not irreparable if self-inflicted"); *Bristol Technology, Inc. v. Microsoft Corp.*, 42 F. Supp. 2d 153, 162 (S.D. Conn. 1998) (same); see generally 11A Charles A. Wright et al., *Federal Practice & Procedure* § 2948.1 (2d ed. 1995) ("FPP") ("Not surprisingly, a party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted.").

merits. Infotelecom is not entitled to an emergency injunction unless it demonstrates that it would suffer irreparable harm by escrowing the delta that it is obliged to escrow. Infotelecom cannot make that showing.

Another mandatory showing that Infotelecom cannot make is that its requested relief would not cause harm to AT&T Texas that would outweigh any harm to Infotelecom in the absence of interim relief. According to Infotelecom, AT&T Texas will not be harmed if the Commission issues the relief Infotelecom requests.<sup>35</sup> But AT&T Texas indeed faces substantial harm from the requested relief, as a federal court ruled just days before the filing of this Response.<sup>36</sup>

On August 30, 2011, the United States District Court for the District of Connecticut, which had previously terminated as moot Infotelecom's request that it enjoin the AT&T ILECs from terminating Infotelecom's ICAs, entered an Order denying Infotelecom's motion for preliminary injunction pending Infotelecom's appeal of the court's earlier decision.<sup>37</sup> In that Order, the district court soundly rejected Infotelecom's argument – the same argument it makes here – that the AT&T ILECs would not be harmed by the granting of the relief Infotelecom requested. The court explained:

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." . . . 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." . . .

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<sup>35</sup> Petition ¶ 52.

<sup>36</sup> *Infotelecom v Illinois Bell*; Ruling Re: Plaintiff's Motion to Stay and for Preliminary Injunction [Doc. No. 82] (Aug. 30, 2011); attached hereto as Attachment D.

<sup>37</sup> *Id.*

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.

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 interpretation of the Interconnection Agreement. . . . 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." . . . Such circular statements provide no assurance that Infotelecom could produce the disputed funds if AT&T prevailed in its interpretation of the Interconnection Agreement. 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. (Citations omitted.)

The court was correct. SBC specifically insisted upon the delta and escrow provisions in the ICA to provide a source of recoverable funds in the event Level 3 became insolvent, as other competing carriers had.<sup>38</sup> When Infotelecom adopted the Level 3 ICA, it became bound by the same delta and escrow provisions. As the district court concluded, if Infotelecom were allowed to avoid its obligations under those provisions while still receiving service from AT&T Texas, the delta, and AT&T Texas' potential losses, would continue to grow. And Texas courts have long held that a party may be substantially harmed if it is unable to collect on a judgment entered in its favor,

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<sup>38</sup> Van Hoof Aff. ¶¶ 8, 22.

including where the opposing party would be "judgment proof" due to insolvency.<sup>39</sup> Infotelecom is thus unable to show that the balance of harms favors its position, as required by PUC PROC. R. § 21.129(g), and it is therefore not entitled to the requested interim ruling.

**C. If the Commission grants the requested interim ruling, it should require a bond sufficient to protect AT&T Texas against loss.**

Finally, while the Commission should never reach this step, any injunctive relief it considers must be conditioned on Infotelecom providing a bond sufficient to secure AT&T Texas' rights. Specifically, the Commission should require Infotelecom to pay into escrow all new delta dollars that accrue while any interim relief is in effect.<sup>40</sup> The purpose of requiring security upon the issuance of a temporary injunction is to afford compensation to the party wrongly enjoined or restrained.<sup>41</sup>

As discussed above, the harm that AT&T Texas will suffer if it is enjoined from disconnecting service to Infotelecom is both concrete and substantial. Any additional services provided by AT&T Texas to Infotelecom will only increase the amount of the un-escrowed delta. Accordingly, any injunctive relief this Court considers should be conditioned on a requirement that Infotelecom pay into escrow all new delta dollars as

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<sup>39</sup> *E.g., In re Estate of Minton*, No. 13-11-00062-CV, 2011 WL 2475394, at \*4 (Tex. Ct. App. June 23, 2011) (affirming a finding of irreparable injury where source of potential funds for satisfaction of money damages was at risk) (citing *Surko Enters. v. Borg-Warner Acceptance Corp.*, 782 S.W.2d 223, 225 (Tex. Ct. App. 1989)); *see generally* FPP § 2948.1 ("Even if a loss is fully compensable by an award of money damages, however, extraordinary circumstances, such as a risk that the [opposing party] will become insolvent before a judgment can be collected, may give rise to . . . irreparable harm").

<sup>40</sup> Texas R. Civ. P. § 684 (conditioning the availability of temporary injunctive relief on the requirement that an injunction applicant "execute and file with the clerk a bond to the adverse party . . . conditioned that the applicant will abide the decision which may be made in the cause, and that he will pay all sums of money and costs that may be adjudged against him if the restraining order or temporary injunction shall be dissolved in whole or in part.").

<sup>41</sup> *Montemayor v. Ortiz*, 208 S.W.3d 627, 650 n.13 (Tex. Ct. App. 2006) (purpose of injunction bond is to protect defendant from harm he may sustain as result of temporary relief).



they accrue while any emergency relief is in effect. Only such a bond would provide any assurance that AT&T Texas would be made whole if the Commission were to grant injunctive relief now and later conclude, as it inevitably would, that AT&T Texas' reading of the ICA is correct.

Infotelecom notes that it agreed to deposit \$150,000 into escrow against the nationwide delta in exchange for AT&T's agreement not to disconnect service to Infotelecom until the Connecticut federal court ruled on Infotelecom's motion for preliminary injunction.<sup>42</sup> That is irrelevant, because Infotelecom has already received the full benefit it bargained for when it agreed to deposit that \$150,000 – namely, AT&T's forbearance from termination through July 15, 2011, when the district court dismissed Infotelecom's motion for preliminary injunction. The relative pittance that Infotelecom deposited in escrow in order to obtain AT&T's agreement not to terminate the various AT&T ILECs' ICAs with Infotelecom is no substitute for a bond to secure AT&T Texas against the loss to which it would be exposed by *further* delay resulting from emergency relief.

In short, if the Commission finds that Infotelecom's extraordinary request for interim relief is well-taken (and it should not), then an injunction should issue only on the condition that Infotelecom pay into escrow all new delta dollars as they accrue while any interim relief is in effect.

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<sup>42</sup> Petition ¶ 37.

**IV.**  
**CONCLUSION**

The Commission should deny Infotelecom's request for interim relief. Infotelecom's prospects on the merits of its claim are nil. The state-specific Texas delta alone totals much more than \$500,000 and Infotelecom will not succeed on its argument that the delta is not calculated cumulatively on a month to month basis. Both the plain language of the contract and the undisputed evidence of SBC and Level 3's intent support AT&T Texas' position. Additionally, Infotelecom does not meet its burden to show that the balance of harms favors its position. The Commission should therefore deny the request for interim relief, or in the alternative, require a bond sufficient to protect AT&T Texas against loss.

Respectfully submitted,

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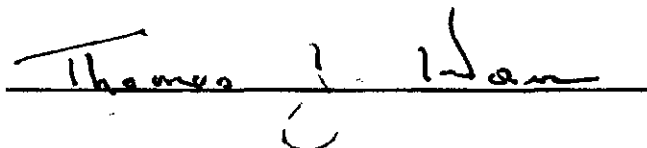
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**CERTIFICATE OF SERVICE**

I, Thomas J. Horn, General Attorney for AT&T Texas, certify that a true and correct copy of this document was served to all parties hereto on September 2, 2011, in the following manner, via: U.S. Mail, electronic mail, facsimile, or overnight delivery.



**FILED**  
October 18, 2011  
**INDIANA UTILITY  
REGULATORY COMMISSION**

**STATE OF INDIANA**

# INDIANA UTILITY REGULATORY COMMISSION

**INFOTELECOM, LLC**

**Complainant,**

**V.**

Case No. 41268 INT 260 RD 01

Indiana Bell Telephone Company  
D/B/A AT&T Indiana

**Defendant.**

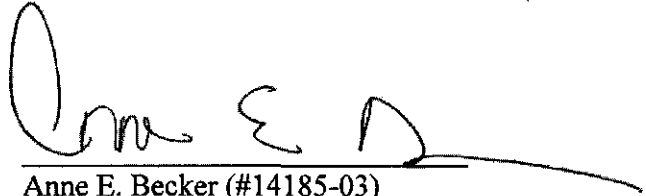
## **NOTICE OF BANKRUPTCY FILING AND SUGGESTION OF STAY**

Plaintiff Infotelecom, LLC (“Infotelecom” or “Complainant”) hereby notifies the Commission that on October 18, 2011, Infotelecom filed a petition for bankruptcy in the United States Bankruptcy Court for the Northern District of Ohio, being Case No. 11-18945. As a result of the filing of this bankruptcy action, the above-captioned case is subject to an automatic stay pursuant to the United States Bankruptcy Code.

EXHIBIT B

Dated: October 18, 2011

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Anne E. Becker', with a long horizontal line extending to the right.

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Richard E. Aikman Jr. (#2344-49)  
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*Counsel for Infotelecom, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been served upon the following counsel and parties of record, this 18<sup>TH</sup> day of October, 2011, via first class United States mail, postage prepaid.

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Fax: (317) 632-1319

**STATE OF ILLINOIS  
BEFORE THE ILLINOIS COMMERCE COMMISSION**

INFOTELECOM, LLC	)	
	)	
	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 11-0597
	)	
Illinois Bell Telephone Company	)	
D/B/A AT&T Illinois	)	
	)	
	)	
Defendant.	)	
	)	

**NOTICE OF BANKRUPTCY FILING AND SUGGESTION OF STAY**

Plaintiff Infotelecom, LLC ("Infotelecom" or "Complainant") hereby notifies the Commission that on October 18, 2011, Infotelecom filed a petition for bankruptcy in the United States Bankruptcy Court for the Northern District of Ohio, being Case No. 11-18945. As a result of the filing of this bankruptcy action, the above-captioned case is subject to an automatic stay pursuant to the United States Bankruptcy Code. See 11 U.S.C. Sec. 362.

Dated: October 18, 2011

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been served upon the parties listed on the service list maintained by the Clerk's Office of the Illinois Commerce Commission, this 18<sup>th</sup> day of October, 2011, via e-mail.

Thomas H. Rowland  
Attorney for Infotelecom, LLC

FILE

3

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF OHIO

INFOTELECOM, LLC

Complainant,

v.

Ohio Bell Telephone Company  
D/B/A AT&T Ohio

Respondent.

PUCO

2011 OCT 18 PM 4:57

RECEIVED-DOCKETING DIV


Case No. 11-4887-TP-CSS

NOTICE OF BANKRUPTCY FILING AND SUGGESTION OF STAY

Infotelecom, LLC ("Infotelecom" or "Complainant") hereby notifies the Commission that on October 18, 2011, Infotelecom filed a petition for bankruptcy in the United States Bankruptcy Court for the Northern District of Ohio, being Case No. 11-18945. As a result of the filing of this bankruptcy action, the above-captioned case is subject to an automatic stay pursuant to the United States Bankruptcy Code.

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business  
Date Processed 10/18/2011

Respectfully submitted,

  
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agertsburg@infotelecom.us

*Counsel for Pre-Petition Entity Infotelecom,  
LLC*

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing document was served by electronic mail on the following persons this 18<sup>th</sup> day of October, 2011.

  
\_\_\_\_\_  
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Mary Ryan Fenlon  
Jon F. Kelly  
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# CLARK HILL

---

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October 18, 2011

Ms. Mary Jo Kunkle  
Executive Secretary  
Michigan Public Service Commission  
6545 Mercantile Way  
Lansing, MI 48911

Re: In the matter of the Complaint and Request for Emergency Relief of Infotelecom,  
LLC against Michigan Bell Telephone Company d/b/a AT&T Michigan  
MPSC Case No. U-16858

Dear Ms. Kunkle:

Attached please find Infotelecom, LLC's Notice of Bankruptcy Filing and Suggestion of Stay, in the above-captioned proceeding. Proof of Service upon the Parties of Record is also attached.

Very truly yours,

CLARK HILL PLC

Haran C. Rashes

HCR:pat  
Attachment

cc: Parties of Record

**BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION**

Case No. U-16858

Complainant Infotelecom, LLC (“Infotelecom”) hereby notifies the Michigan Public Service Commission that on October 18, 2011, Infotelecom filed a petition for bankruptcy in the United States Bankruptcy Court for the Northern District of Ohio, being Case No. 11-18945, pending before Judge Jessica E. Price Smith. As a result of the filing of this bankruptcy action, the above-captioned case is subject to an automatic stay pursuant to the United States Bankruptcy Code.

By:

Roderick S. Coy (P12290)  
Haran C. Rashes (P54883)  
CLARK HILL PLC  
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hrashes@clarkhill.com

Attorneys For Infotelecom, LLC

**STATE OF MICHIGAN**  
**BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION**

\* \* \* \* \*

In the matter of the Complaint and                     )  
Request for Emergency Relief of                     )  
Infotelecom, LLC against Michigan Bell                     )  
Telephone Company d/b/a AT&T Michigan                     )

Case No. U-16858

**PROOF OF SERVICE**

STATE OF MICHIGAN        )  
                                      ) ss.  
COUNTY OF INGHAM        )

Leland R. Rosier, being duly sworn, deposes and says that he is an employee of Clark Hill PLC, and that on October 18, 2011, copies of Infotelecom, LLC's Notice of Bankruptcy Filing and Suggestion of Stay, in the above-captioned proceeding, was served on those persons listed on the attached sheet via Electronic and US Postal Service First Class Mail.

\_\_\_\_\_  
Leland R. Rosier

Subscribed and sworn to before me  
this 18<sup>th</sup> day of October, 2011

\_\_\_\_\_  
Haran C. Rashes  
Notary Public, Washtenaw County, Michigan  
Acting in Ingham County, Michigan  
My Commission expires: September 18, 2013

**Service List**  
**MPSC Case No. U-16858**

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Administrative Law Judge  
Michigan Public Service Commission  
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Lansing, MI 48909

Richard A. Patterson  
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BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



**FILED**

10-19-11  
04:59 PM

Infotelecom, LLC (U6946C)

Complainant,

v.

Pacific Bell Telephone Company d/b/a AT&T  
California (U1001C),

Defendant.

C.11-07-021

**INFOTELECOM, LLC'S MOTION FOR STAY OF ALL PROCEEDINGS;  
NOTICE OF COMPLAINANT OF INSTITUTE OF BANKRUPTCY  
PROCEEDING**

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Attorneys for Complainant  
Infotelecom, LLC

Dated: October 19, 2011

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Infotelecom, LLC (U6946C)

Complainant,

v.

Pacific Bell Telephone Company d/b/a AT&T  
California (U1001C),

Defendant.

C.11-07-021

**INFOTELECOM, LLC'S MOTION FOR STAY OF ALL PROCEEDINGS;  
NOTICE OF COMPLAINANT OF INSTITUTE OF BANKRUPTCY  
PROCEEDING**

Infotelecom, LLC ("Infotelecom" or "Complainant") hereby notifies the Commission that on October 18, 2011, Infotelecom filed a petition for bankruptcy in the United States Bankruptcy Court for the Northern District of Ohio, being Case No. 11-18945. As a result of the filing of this bankruptcy action, the above-captioned case is subject to an automatic stay pursuant to the United States Bankruptcy Code.

Accordingly, pursuant to Rule 11.1 of the Commissions Rules of Practice and Procedure, Complainant Infotelecom, LLC hereby moves that all proceedings in this docket be stayed until further order of the Commission.

## **BACKGROUND**

On July 25, 2011, Infotelecom, LLC's ("Infotelecom") instituted the above-captioned proceeding to (1) seek resolution of disputes between, Infotelecom and Pacific Bell Telephone Company d/b/a/ AT&T California ("AT&T") and (2) enjoin AT&T from taking any action to disconnect service to Infotelecom pending resolution of that dispute. No hearings have been held in this matter nor has a scoping memo been issued.

## **BANKRUPTCY PROCEEDINGS**

On October 18, 2011, , Infotelecom filed a petition seeking protection under Chapter 11 of the Bankruptcy Act 11 U.S.C.A. Section 1101 *et seq.* Pursuant to Section 362 of the Bankruptcy Code (5 U.S.C.A 362) all actions to recover sums allegedly due from the bankruptcy petitioner are stayed.

While Infotelecom is the Complainant rather than the Defendant herein, continued proceedings before this Commission place burdens on Infotelecom of the nature precluded by Section 362. Accordingly, Infotelecom requests that all activity in this docket be stayed until further order of the Commission.

## **CONCLUSION**

Because of the pendency of the proceedings in the Bankruptcy Court, it is appropriate for the Commission to stay any further action in this matter. Infotelecom will apprise the assigned Administrative Law Judge of the status of the bankruptcy proceeding within sixty (60) days.

Respectfully submitted this 19th day of October 2011, at San Francisco,

California.

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By /s/ Thomas J. MacBride, Jr.

Thomas J. MacBride, Jr.

Attorneys for Complainant Infotelecom,  
LLC

3486/001/X132785.v1



Control Number: 39700

Item Number: 33

Addendum StartPage: 0



INFOTELECOM, LLC  
OCTOBER 18, 2011

DOCKET NO. 39700

RECEIVED  
11 OCT 18 PM 4:30  
PUBLIC UTILITY COMMISSION  
FILING CLERK

PETITION OF INFOTELECOM, LLC	§	
AGAINST SOUTHWESTERN BELL	§	BEFORE THE
TELEPHONE COMPANY D/B/A	§	
AT&T TEXAS FOR POST-	§	PUBLIC UTILITY COMMISSION
INTERCONNECTION DISPUTE	§	
RESOLUTION AND REQUEST FOR	§	OF TEXAS
INTERIM RULING REGARDING	§	
UNLAWFUL ESCROW DEMAND	§	

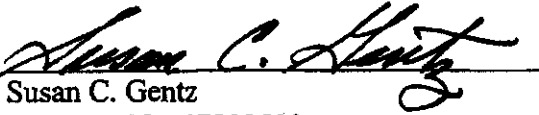
**NOTICE OF BANKRUPTCY FILING AND SUGGESTION OF STAY**

**TO THE HONORABLE ARBITRATORS:**

Petitioner Infotelecom, LLC ("Infotelecom") hereby notifies the Arbitrators that on October 18, 2011, Infotelecom filed a petition for bankruptcy in the United States Bankruptcy Court for the Northern District of Ohio to reorganize under Chapter 11, being Case No. 11-18945. As a result of the filing of this bankruptcy action, the above-captioned case is subject to an automatic stay pursuant to the United States Bankruptcy Code.

Accordingly, the procedural schedule is stayed and Infotelecom asks that the Arbitrators issue an order abating this proceeding.

Respectfully submitted,

By: 

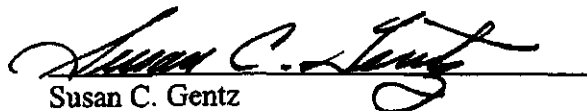
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*Counsel for Infotelecom, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Notice has been served electronically on counsel for AT&T Texas on this 18th day of October, 2011.

  
Susan C. Gentz

AT&T Texas  
October 19, 2011

**TABLE OF CONTENTS**

DOCKET NO. 39700

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AGAINST SOUTHWESTERN BELL	§	
TELEPHONE COMPANY D/B/A AT&T	§	
TEXAS FOR POST-	§	PUBLIC UTILITY COMMISSION
INTERCONNECTION DISPUTE	§	OF TEXAS
RESOLUTION AND REQUEST FOR	§	
INTERIM RULING REGARDING	§	
UNLAWFUL ESCROW DEMAND	§	

**AT&T TEXAS' OPPOSITION TO INFOTELECOM'S ASSERTION THAT THE  
BANKRUPTCY STAY UNDER 11 U.S.C. 362 APPLIES TO THIS PROCEEDING**

	<b><u>Page</u></b>
AT&T Texas' Opposition to Infotelecom's Assertion that the Bankruptcy Stay Under 11 U.S.C. 362 Applies to this Proceeding .....	1
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**ATTACHMENT**

Attachment A:	Full Text of 11 U.S.C. § 362 [§ 362(a)(1) designated in brackets] .....	6
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DOCKET NO. 39700

PETITION OF INFOTELECOM, LLC	§	
AGAINST SOUTHWESTERN BELL	§	
TELEPHONE COMPANY D/B/A AT&T	§	
TEXAS FOR POST-	§	PUBLIC UTILITY COMMISSION
INTERCONNECTION DISPUTE	§	
RESOLUTION AND REQUEST FOR	§	OF TEXAS
INTERIM RULING REGARDING	§	
UNLAWFUL ESCROW DEMAND	§	

**AT&T TEXAS' OPPOSITION TO INFOTELECOM'S ASSERTION THAT THE  
BANKRUPTCY STAY UNDER 11 U.S.C. 362 APPLIES TO THIS PROCEEDING**

Southwestern Bell Telephone Company d/b/a AT&T Texas ("AT&T Texas") respectfully submits this Opposition to Infotelecom, LLC's ("Infotelecom") assertion, in its "Notice of Bankruptcy Filing and Suggestion of Stay," that the automatic stay under bankruptcy law, 11 U.S.C. § 362, applies to this proceeding. This proceeding is not subject to the bankruptcy stay and should continue as scheduled. In support of this opposition, AT&T Texas states as follows:

1. Infotelecom initiated this case by filing a Petition against AT&T Texas on August 24, 2011. On September 16, 2011, in Order No. 3, the Commission established the procedural schedule for this case.

2. Infotelecom filed a petition for bankruptcy in the United States Bankruptcy Court for the Northern District of Ohio on October 18, 2011. Also on October 18, 2011 Infotelecom filed with the Commission its "Notice of Bankruptcy Filing and Suggestion of Stay," asserting that the instant proceeding "is subject to an automatic stay pursuant to the United States Bankruptcy Code. See 11 U.S.C. Sec. 362."

3. Infotelecom is wrong. The automatic stay under 11 U.S.C. § 362 applies only to actions “against the debtor” (in this case, Infotelecom). 11 U.S.C. § 362(a)(1). The instant case is not one filed “against the debtor.” It was Infotelecom, not AT&T Texas, that initiated this proceeding seeking affirmative relief against AT&T Texas. Accordingly, the automatic bankruptcy stay under Section 362 does not apply.

4. Section 362(a)(1) states that a bankruptcy petition acts to stay “the commencement or continuation . . . of a judicial, administrative, or other action *against* the debtor that was or could have been commenced” before the filing of the bankruptcy case.<sup>1</sup> 11 U.S.C. § 362(a)(1) (emphasis added). Nothing in Section 362 applies to stay proceedings commenced *by* the debtor. Numerous courts have therefore interpreted this provision to mean that an action brought *by* the debtor – like this case – is not subject to the automatic stay. *Matter of U.S. Abatement Corp.*, 39 F.3d 563, 568 (5th Cir. 1994) (“The automatic stay of the Bankruptcy Code extends only to actions ‘against the debtor.’ 11 U.S.C. § 362(a). . . . [A] debtor’s offensive claims are not subject to the automatic stay.”); *Warren v. Farm Service Agency, USDA*, 2006 WL 470594, at \*2 (S.D. Tex., Feb. 24, 2006) (same). *Accord, e.g., In re Merrick*, 175 B.R. 333, 337 & n.6 (B.A.P. 9th Cir. 1994) (collecting cases); *Carley Capital Group v. Fireman’s Fund Ins. Co.*, 889 F.2d 1126, 1127 (D.C. Cir. 1989); *Martin-Trigona v. Champion Fed. Sav. & Loan Ass’n*, 892 F.2d 575, 577 (7th Cir. 1989) (“the automatic stay is inapplicable to suits *by* the bankrupt (‘debtor,’ as he is now called). This appears from the statutory language, which refers to actions ‘against the debtor,’ 11 U.S.C. § 362(a)(1), and from the policy behind the statute . . . . There is . . . no policy of preventing persons whom

---

<sup>1</sup> For convenience, the full text of 11 U.S.C. § 362 is provided as Attachment A hereto. As every subsection of Section 362(a) makes clear, the automatic stay applies only to actions *against* the debtor [designated in brackets].

the bankrupt has sued from protecting their legal rights.”); *In re Association of St. Croix Condominium Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 448 (3d Cir.1982) (“Section 362 by its terms only stays proceedings against the debtor. The statute does not address actions brought by the debtor”); *Rett White Motor Sales Co. v. Wells Fargo Bank*, 99 B.R. 12, 15 (N.D.Cal.1989). (“[T]he stay provisions are not designed to stay actions which have been commenced by the bankrupt party. . . . There is simply no language in Section 362(a) designed to stay actions initiated by the debtor.”).

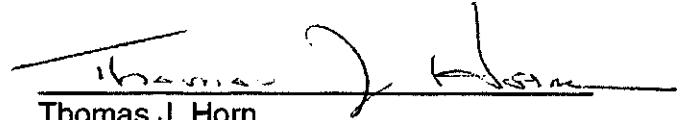
### **CONCLUSION**

For these reasons, Infotelecom’s “Suggestion of Stay” is contrary to established law, and AT&T Texas asks the Commission to continue with this proceeding on the existing schedule. In particular, because the Section 362 stay does not apply, AT&T Texas plans to file its response brief as scheduled, on October 21, 2011.

AT&T Texas does not, however, seek a ruling on its Motion for Security at this time.

Respectfully submitted,

JOSEPH E. COSGROVE, JR.  
General Attorney and Associate General  
Counsel - Austin



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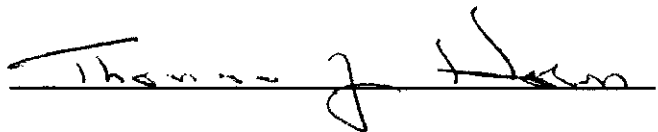
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d/b/a AT&T TEXAS**

**CERTIFICATE OF SERVICE**

I, Thomas J. Horn, General Attorney for AT&T Texas, certify that a true and correct copy of this document was served to all parties hereto on October 19, 2011, in the following manner, via: U.S. Mail, electronic mail, facsimile, or overnight delivery.



**STATE OF INDIANA  
INDIANA UTILITY REGULATORY COMMISSION**

<b>INFOTELECOM, LLC,</b>	)	
	)	
<b>COMPLAINANT,</b>	)	
	)	
<b>v.</b>	)	<b>CAUSE NO. 41268-INT-260 RD01</b>
	)	
<b>INDIANA BELL TELEPHONE</b>	)	
<b>COMPANY, D/B/A AT&amp;T INDIANA,</b>	)	
	)	
<b>DEFENDANT.</b>	)	

**AT&T INDIANA'S OPPOSITION TO INFOTELECOM'S  
ASSERTION THAT THE BANKRUPTCY STAY UNDER  
11 U.S.C. § 362 APPLIES TO THIS PROCEEDING**

Indiana Bell Telephone Company Incorporated d/b/a AT&T Indiana ("AT&T Indiana") respectfully submits this Opposition to Infotelecom, LLC's ("Infotelecom") assertion, in its "Notice of Bankruptcy Filing and Suggestion of Stay," that the automatic stay under bankruptcy law, 11 U.S.C. § 362, applies to this proceeding. Both the plain language of Section 362 and well-established case law show that this proceeding is *not* subject to the bankruptcy stay and should continue as scheduled. In support of this Opposition, AT&T Indiana states as follows:

1. Complainant Infotelecom initiated this case by filing a complaint against AT&T Indiana on July 27, 2011.
2. On October 18, 2011, Infotelecom filed a petition for bankruptcy in the United States Bankruptcy Court for the Northern District of Ohio. Also on October 18, 2011 Infotelecom filed with the Commission its "Notice of Bankruptcy Filing and Suggestion of Stay," baldly asserting that the instant proceeding "is subject to an automatic stay pursuant to the United States Bankruptcy Code. See 11 U.S.C. Sec. 362."

3. Infotelecom is wrong. The automatic stay under 11 U.S.C. § 362 applies *only* to actions “against the debtor” (in this case, Infotelecom). 11 U.S.C. § 362(a)(1). The instant case is *not* one filed “against the debtor.” It was Infotelecom, not AT&T Indiana, that initiated this proceeding, and the proceeding is therefore “against” AT&T Indiana. Accordingly, the automatic bankruptcy stay under Section 362 does not apply here.

4. Section 362(a)(1) states that a bankruptcy petition acts to stay “the commencement or continuation . . . of a judicial, administrative, or other action *against* the debtor that was or could have been commenced” before the filing of the bankruptcy case.<sup>1</sup> 11 U.S.C. § 362(a)(1) (emphasis added). Nothing in Section 362 acts to stay proceedings commenced *by* the debtor. The courts have therefore consistently interpreted this provision to mean that an action brought by the debtor – like this case – is *not* subject to the automatic stay. *In re Hall*, 304 F.3d 743, 746 (7th Cir. 2002) (“the automatic stay of 11 U.S.C. § 362 does not apply to suits by the debtor”); *Martin-Trigona v. Champion Fed. Sav. & Loan Ass’n*, 892 F.2d 575, 577 (7th Cir. 1989) (“the automatic stay is inapplicable to suits *by* the bankrupt (‘debtor,’ as he is now called). This appears from the statutory language, which refers to actions ‘against the debtor,’ 11 U.S.C. § 362(a)(1), and from the policy behind the statute . . . . There is . . . no policy of preventing persons whom the bankrupt has sued from protecting their legal rights.”).<sup>2</sup>

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<sup>1</sup> For convenience, the full text of 11 U.S.C. § 362 is provided as Attachment A hereto. As every subsection of Section 362(a) makes clear, the automatic stay applies only to actions *against* the debtor.

<sup>2</sup> *Accord*, e.g., *In re Palmdale Hills Property, LLC*, 423 B.R. 655, 663 (B.A.P. 9th Cir. 2009) (“the automatic stay has been found inapplicable to lawsuits initiated by the debtor”); *Matter of U.S. Abatement Corp.*, 39 F.3d 563, 568 (5th Cir. 1994) (“The automatic stay of the Bankruptcy Code extends only to actions ‘against the debtor.’ 11 U.S.C. § 362(a). . . . [A] debtor’s offensive claims are not subject to the automatic stay.”); *Koolik v. Markowitz*, 40 F.3d 567, 568 (2d Cir. 1994) (“the automatic stay is applicable only to proceedings ‘against,’ 11 U.S.C. § 362(a)(1), the debtor.”); *In re Merrick*, 175 B.R. 333, 337 & n.6 (B.A.P. 9th Cir. 1994); *Carley Capital Group v. Fireman’s Fund Ins. Co.*, 889 F.2d 1126, 1127 (D.C. Cir. 1989); *In re Association of St. Croix Condominium Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 448 (3d Cir. 1982) (“Section 362 by its terms only stays proceedings against the debtor. The statute does not address actions brought by the debtor”); *Madison Capital Co., LLC v. Smith*, 2009 WL 1119411, at \*2 (E.D. Ky. 2009) (“[A]ccording to the plain language of the statute, the filing of a bankruptcy petition only initiates a stay with respect to actions or proceedings *against* a debtor, not actions or proceedings pursued by a

5. Only this Commission (not any federal court or bankruptcy court) has jurisdiction to resolve the Interconnection Agreement ("ICA")-interpretation dispute that Infotelecom has raised in this case and determine the meaning of the ICA's escrow provision. This issue continues to be important for Infotelecom if and to the extent it desires to receive service from AT&T Indiana under the ICA while it seeks to reorganize. Bankruptcy does not allow Infotelecom to compel post-bankruptcy performance by AT&T Indiana under the ICA unless Infotelecom fully complies with the terms of the ICA. Thus, as long as Infotelecom intends to seek service from AT&T Indiana under the ICA during its bankruptcy case, it is critical that its obligations with respect to the ICA escrow provision be promptly determined.

6. For these reasons, Infotelecom's "Suggestion of Stay" is contrary to established law. The Section 362 stay does not apply here, and this case should therefore continue on the existing schedule.

Respectfully submitted,

INDIANA BELL TELEPHONE COMPANY

/s/Brian D. Robinson

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debtor against another party."); *Rett White Motor Sales Co. v. Wells Fargo Bank*, 99 B.R. 12, 15 (N.D.Cal.1989) ("[T]he stay provisions are not designed to stay actions which have been commenced by the bankrupt party. . . . There is simply no language in Section 362(a) designed to stay actions initiated by the debtor.").

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on October 20, 2011, a copy of the foregoing was served upon the following parties electronically or via First Class United States Mail.

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/s Katherine J. Yott



**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 OPPOSITION TO INFOTELECOM'S  
ASSERTION THAT THE BANKRUPTCY STAY UNDER  
11 U.S.C. § 362 APPLIES TO THIS PROCEEDING**

AT&T Ohio respectfully submits this Opposition to Infotelecom, LLC's ("Infotelecom") assertion, in its "Notice of Bankruptcy Filing and Suggestion of Stay," that the automatic stay under bankruptcy law, 11 U.S.C. § 362, applies to this proceeding. Both the plain language of Section 362 and well-established case law show that this proceeding is *not* subject to the bankruptcy stay and should continue without any stay. In support of this Opposition, AT&T Ohio states as follows:

1. Complainant Infotelecom initiated this case by filing a complaint against AT&T Ohio on August 24, 2011. Infotelecom asked the Commission to find that a provision in the parties' interconnection agreement ("ICA") did not require Infotelecom to escrow amounts that it may owe AT&T Ohio for intercarrier compensation in order to ensure the money would be there to pay AT&T Ohio when the FCC resolved the issue of compensation for the traffic at issue. Infotelecom was permitted to litigate the complaint without posting any kind of security and the case has been set for a prehearing conference. (Entry 10-11-11).

2. On October 18, 2011, Infotelecom filed a petition for bankruptcy in the United States Bankruptcy Court for the Northern District of Ohio. Also on October 18, 2011

Infotelecom filed with the Commission its “Notice of Bankruptcy Filing and Suggestion of Stay,” baldly asserting that the instant proceeding “is subject to an automatic stay pursuant to the United States Bankruptcy Code. See 11 U.S.C. Sec. 362.”

3. Infotelecom is wrong. The automatic stay under 11 U.S.C. § 362 applies *only* to actions “against the debtor” (in this case, Infotelecom). 11 U.S.C. § 362(a)(1). The instant case is *not* one filed “against the debtor.” It was Infotelecom, not AT&T Ohio, that initiated this proceeding, and the proceeding is therefore “against” AT&T Ohio. Accordingly, the automatic bankruptcy stay under Section 362 does not apply here.

4. Section 362(a)(1) states that a bankruptcy petition acts to stay “the commencement or continuation . . . of a judicial, administrative, or other action *against* the debtor that was or could have been commenced” before the filing of the bankruptcy case. 11 U.S.C. § 362(a)(1) (emphasis added). Nothing in Section 362 acts to stay proceedings commenced *by* the debtor. The courts have therefore consistently interpreted this provision to mean that an action brought by the debtor – like this case – is *not* subject to the automatic stay. *E.g., In re Palmdale Hills Property, LLC*, 423 B.R. 655, 663 (B.A.P. 9th Cir. 2009) (“the automatic stay has been found inapplicable to lawsuits initiated by the debtor”); *In re Hall*, 304 F.3d 743, 746 (7th Cir. 2002) (“the automatic stay of 11 U.S.C. § 362 does not apply to suits by the debtor”); *Matter of U.S. Abatement Corp.*, 39 F.3d 563, 568 (5th Cir. 1994) (“The automatic stay of the Bankruptcy Code extends only to actions ‘against the debtor.’ 11 U.S.C. § 362(a). . . . [A] debtor’s offensive claims are not subject to the automatic stay.”); *Koolik v. Markowitz*, 40 F.3d 567, 568 (2d Cir. 1994) (“the automatic stay is applicable only to proceedings ‘against,’ 11 U.S.C. § 362(a)(1), the debtor.”); *In re Merrick*, 175 B.R. 333, 337 & n.6 (B.A.P. 9th Cir. 1994); *Martin-Trigona v. Champion Fed. Sav. & Loan Ass’n*, 892 F.2d 575, 577 (7th Cir. 1989) (“the

automatic stay is inapplicable to suits *by* the bankrupt ('debtor,' as he is now called). This appears from the statutory language, which refers to actions 'against the debtor,' 11 U.S.C. § 362(a)(1), and from the policy behind the statute . . . . There is . . . no policy of preventing persons whom the bankrupt has sued from protecting their legal rights."); *Carley Capital Group v. Fireman's Fund Ins. Co.*, 889 F.2d 1126, 1127 (D.C. Cir. 1989); *In re Association of St. Croix Condominium Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 448 (3d Cir.1982) ("Section 362 by its terms only stays proceedings against the debtor. The statute does not address actions brought by the debtor"); *Madison Capital Co., LLC v. Smith*, 2009 WL 1119411, at \*2 (E.D. Ky. 2009) ("[A]ccording to the plain language of the statute, the filing of a bankruptcy petition only initiates a stay with respect to actions or proceedings *against* a debtor, not actions or proceedings pursued by a debtor against another party."); *Rett White Motor Sales Co. v. Wells Fargo Bank*, 99 B.R. 12, 15 (N.D.Cal.1989) ("[T]he stay provisions are not designed to stay actions which have been commenced by the bankrupt party. . . . There is simply no language in Section 362(a) designed to stay actions initiated by the debtor.").

5. For these reasons, Infotelecom's "Suggestion of Stay" is contrary to established law. The Section 362 stay does not apply here, and this case should therefore proceed on an expedited complaint schedule. Only this Commission (not any federal court or bankruptcy court) has jurisdiction to resolve the ICA-interpretation dispute that Infotelecom has raised in this case and determine the meaning of the ICA's escrow provision. This issue continues to be important for Infotelecom if and to the extent it desires to receive service from AT&T Ohio under the ICA while it seeks to reorganize. Bankruptcy does not allow Infotelecom to compel post-bankruptcy performance by AT&T Ohio under the ICA unless Infotelecom fully complies with the terms of the ICA. Thus, as long as Infotelecom intends to seek service from AT&T Ohio under the ICA

during its bankruptcy case, and afterwards, it is critical that its obligations with respect to the ICA escrow provision be promptly determined.

Respectfully submitted,

AT&T Ohio

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Its Attorneys

Certificate of Service

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

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11-4887.sl

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

INFOTELECOM, LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 11-0597
	)	
Illinois Bell Telephone Company,	)	
	)	
Defendant.	)	

**AT&T'S OPPOSITION TO INFOTELECOM'S ASSERTION THAT THE  
BANKRUPTCY STAY UNDER 11 U.S.C. 362 APPLIES TO THIS PROCEEDING**

Illinois Bell Telephone Company, Inc. ("AT&T Illinois") respectfully submits this Opposition to Infotelecom, LLC's ("Infotelecom") assertion, in its "Notice of Bankruptcy Filing and Suggestion of Stay," that the automatic stay under bankruptcy law, 11 U.S.C. § 362, applies to this proceeding. Both the plain language of Section 362 and well-established case law show that this proceeding is *not* subject to the bankruptcy stay and should continue as scheduled. In support of this opposition, AT&T Illinois states as follows:

1. Infotelecom initiated this case by filing a complaint against AT&T Illinois on August 24, 2011. The schedule thereafter was dictated by statute, 220 ILCS 5/13-515. Briefing on the merits is now complete and, pursuant to Section 13-515, the ALJ's decision must be issued no later than October 24, 2011.

2. Infotelecom filed a petition for bankruptcy in the United States Bankruptcy Court for the Northern District of Ohio on October 18, 2011. Also on October 18, 2011 Infotelecom filed with the Commission its "Notice of Bankruptcy Filing and Suggestion of Stay," asserting that the instant proceeding "is subject to an automatic stay pursuant to the United States Bankruptcy Code. See 11 U.S.C. Sec. 362."

3. Infotelecom is wrong. The automatic stay under 11 U.S.C. § 362 applies only to actions “against the debtor” (in this case, Infotelecom). 11 U.S.C. § 362(a)(1). The instant case is not one filed “against the debtor.” It was Infotelecom, not AT&T Illinois, that initiated this proceeding, and the proceeding is “against” AT&T Illinois. Accordingly, the automatic bankruptcy stay under Section 362 does not apply.

4. Section 362(a)(1) states that a bankruptcy petition acts to stay “the commencement or continuation . . . of a judicial, administrative, or other action *against* the debtor that was or could have been commenced” before the filing of the bankruptcy case. 11 U.S.C. § 362(a)(1) (emphasis added). Nothing in Section 362 applies to stay proceedings commenced *by* the debtor. The courts have therefore consistently interpreted this provision to mean that an action brought by the debtor – like this case – is *not* subject to the automatic stay. *In re Hall*, 304 F.3d 743, 746 (7th Cir. 2002) (“the automatic stay of 11 U.S.C. § 362 does not apply to suits by the debtor”); *Martin-Trigona v. Champion Fed. Sav. & Loan Ass’n*, 892 F.2d 575, 577 (7th Cir. 1989) (“the automatic stay is inapplicable to suits *by* the bankrupt (‘debtor,’ as he is now called). This appears from the statutory language, which refers to actions ‘against the debtor,’ 11 U.S.C. § 362(a)(1), . . . and from the policy behind the statute . . . There is . . . no policy of preventing persons whom the bankrupt has sued from protecting their legal rights.”).<sup>1</sup> The Commission itself recognized this in *Avenew, Inc. v. Illinois Bell Tel. Co.*, Docket No. 98-

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<sup>1</sup> *Accord, e.g., Matter of U.S. Abatement Corp.*, 39 F.3d 563, 568 (5th Cir. 1994) (“The automatic stay of the Bankruptcy Code extends only to actions ‘against the debtor.’ 11 U.S.C. § 362(a) . . . [A] debtor’s offensive claims are not subject to the automatic stay.”); *Koolik v. Markowitz*, 40 F.3d 567, 568 (2d Cir. 1994) (“the automatic stay is applicable only to proceedings ‘against,’ 11 U.S.C. § 362(a)(1), the debtor.”); *In re Merrick*, 175 B.R. 333, 337 & n.6 (B.A.P. 9th Cir. 1994) (collecting cases); *Carley Capital Group v. Fireman’s Fund Ins. Co.*, 889 F.2d 1126, 1127 (D.C. Cir. 1989); *In re Association of St. Croix Condominium Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 448 (3d Cir.1982) (“Section 362 by its terms only stays proceedings against the debtor. The statute does not address actions brought by the debtor”); *Rett White Motor Sales Co. v. Wells Fargo Bank*, 99 B.R. 12, 15 (N.D.Cal.1989) (“[T]he stay provisions are not designed to stay actions which have been commenced by the bankrupt party . . . There is simply no language in Section 362(a) designed to stay actions initiated by the debtor.”).

0876, 2002 Ill. PUC LEXIS 489, at \*4 (May 22, 2002), finding that when a claim is “brought by a debtor . . . the stay provisions of bankruptcy law do not apply” (citing *Martin-Trigona*).

5. For these reasons, Infotelecom’s “Suggestion of Stay” is contrary to established law, and the Commission must continue with this proceeding on the existing, statutorily mandated schedule.

Respectfully submitted,

ILLINOIS BELL TELEPHONE COMPANY

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**CERTIFICATE OF SERVICE**

I, Karl B. Anderson, an attorney, certify that a copy of the foregoing **AT&T'S  
OPPOSITION TO INFOTELECOM'S ASSERTION THAT THE BANKRUPTCY STAY  
UNDER 11 U.S.C. 362 APPLIES TO THIS PROCEEDING** was served on the following  
parties by U.S. Mail and/or electronic transmission on October 21, 2011.

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Karl B. Anderson

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