

Petition for Special Permission

Exhibit 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS BELL TELEPHONE COMPANY,)	
)	
Plaintiff,)	
)	
v.)	
)	
EDWARD C. HURLEY,)	
ERIN M. O’CONNELL-DIAZ,)	
LULA M. FORD, ROBERT F. LIEBERMAN,)	
and KEVIN K. WRIGHT, in their)	Case No. 05 C 1149
official capacities as Commissioners)	
of the Illinois Commerce Commission,)	Judge Joan B. Gottschall
)	
Defendants,)	
)	
and)	
)	
ACCESS ONE, INC., et al.,)	
)	
Intervenors.)	

ORDER

Plaintiff Illinois Bell Telephone Company (now known as “AT&T Illinois” following the merger of plaintiff’s parent corporation with AT&T Corporation) brought this suit against the commissioners of the Illinois Commerce Commission (“the ICC”), in their official capacities, challenging, *inter alia*, section 13-801 of the Illinois Public Utilities Act, 220 Ill. Comp. Stat. Ann. 5/13-801 (West 2000 & Supp. 2006). Specifically, AT&T Illinois argued that section 13-801, the ICC’s implementing regulations, and certain ICC-imposed tariffs were preempted by and in violation of the federal Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* (2006) (“the Act”) and Federal Communications Commission (“FCC”) regulations implementing the Act.

On September 28, 2006, the court granted summary judgment for AT&T Illinois on the majority of its contentions (“the September 28th order”). *Ill. Bell Tel. Co. v. O’Connell-Diaz*, No. 05 C 1149, 2006 WL 2796488, at *18 (N.D. Ill. Sept. 28, 2006). Specifically, the court held that the following section 13-801 requirements were preempted by the Act: “(1) local circuit switching, switching-related elements, Ocn-level loops, dedicated transport, dark fiber loops, entrance facilities, and feeder subloops; (2) combination requirements; (3) splitters; and (4) access fee termination.” *Id.* With respect to the section 13-801 requirement of collocation, the court granted summary judgment to the ICC. *Id.* As to the requirements regarding DS1 loops, DS3 loops, DS 1 transport, and dark fiber transport, the court denied both AT&T Illinois’ and the ICC’s motions for summary judgment because neither party provided sufficient information to allow the court to make a preemption determination. *Id.* at *14.

Following the September 28th order, AT&T Illinois asked the ICC to lift its tariffs regarding the section 13-801 elements the court had ruled were preempted. The ICC, however, rejected AT&T Illinois’ request. AT&T Illinois then filed a motion seeking an order enforcing the September 28th order, arguing that by finding the requirements listed above to be preempted, the court had implicitly enjoined the ICC from enforcing those requirements. The court disagreed, noting that AT&T Illinois had not provided substantive briefing regarding the propriety of a permanent injunction. *Ill. Bell Tel. Co. v. O’Connell-Diaz*, No. 05 C 1149 (N.D. Ill. Jan. 9, 2007) (denying motion to enforce). The court directed AT&T Illinois to brief the issue, including the impact, if any, of Rule 54(b) of the Federal Rules of Civil Procedure, if it wished to receive permanent

injunctive relief. *Id.* AT&T Illinois then filed the motion for injunctive relief that is currently before the court.

According to the Seventh Circuit, a party must demonstrate the following in order to receive a permanent injunction: (1) it has succeeded on the merits; (2) no adequate remedy at law exists; (3) it will suffer irreparable harm without injunctive relief; (4) the irreparable harm outweighs the irreparable harm the non-moving party will suffer if the injunction issues; and (5) the injunction will not harm the public interest. *Old Republic Ins. Co. v. Employers Reinsurance Corp.*, 144 F.3d 1077, 1081 (7th Cir. 1998). The parties note that there is ambiguity in the Seventh Circuit cases regarding whether a party seeking permanent (as opposed to preliminary) injunctive relief is required to show irreparable harm in addition to an inadequate remedy at law. *Compare Old Republic*, 144 F.3d at 1081 (including irreparable harm as an element), *with Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1172 (7th Cir. 1997) (irreparable harm is not an element of the permanent injunction analysis), *Crane by Crane v. Ind. High School Athletic Ass'n*, 975 F.3d 1315, 1326 (7th Cir. 1992) (same), *and Walgreen Co. v. Sara Creek Prop. Co., B.V.*, 966 F.2d 273, 275 (7th Cir. 1992)(same). Because, for the reasons described below, AT&T Illinois has demonstrated irreparable injury, the court does not find the discrepancy important in this case.

As to the first element, there is no dispute—AT&T Illinois prevailed on the merits as to the requirements held preempted in the September 28th order. The ICC's characterization of that order as a "close one," Defs.' Resp. Pl.'s Mot. for Inj. 4, is irrelevant. The court identified only one issue—whether AT&T Illinois would be required to unbundle the elements at issue under section 271 of the Act irrespective of

section 251—as “a close one,” and, in any event, AT&T Illinois prevailed. *Ill. Bell. Tel. Co.*, 2006 WL 2796488, at *13.

The second and third elements also favor AT&T Illinois. In its order denying AT&T Illinois’ motion for a preliminary injunction, the court held that AT&T Illinois would suffer irreparable harm for which there was no adequate remedy at law “because, even if its losses are quantifiable, there is no entity against which [AT&T Illinois] could recover money damages.” *Ill. Bell. Tel. Co.*, 2005 WL 735968, at *7. The ICC asks the court to revisit its ruling, arguing that AT&T Illinois has an adequate remedy at law—a declaratory judgment—and that any economic injury AT&T Illinois may suffer is not irreparable because AT&T Illinois can file a petition asking the ICC to establish interim rates pursuant to section 13-801(g). The ICC also notes that it issued an order (“the Wire Center Designation Order” or “the WCDO”) implementing the new unbundling rules set forth in the FCC’s Triennial Review Remand Order (“TRRO”) on December 6, 2006; this order became final as to AT&T Illinois on January 24, 2007. According to the ICC, the Wire Center Designation Order clarifies its position regarding the section 13-801 requirements concerning which the court reserved judgment in the September 28th order, making the remaining issues ripe for briefing and decision.

The court rejects the ICC’s arguments. Notwithstanding the ICC’s quotation of Macbeth, AT&T Illinois’ request for an injunction is not merely “a tale, full of sound and fury, signifying nothing.” Def.s’ Resp. Pl.’s Mot. for Inj. 5 (internal quotation marks and citation omitted). AT&T Illinois argues (and the ICC’s briefs imply) that the ICC does not intend to comply with the September 28th order until the entry of final judgment. Thus, declaratory relief—which this court *already* granted as to the requirements at issue

here—is not sufficient to prevent the ICC from violating federal law in the meantime. Moreover, as the court noted in the September 28th order, that AT&T Illinois may petition the ICC for something—here, interim rates—does not mean that AT&T Illinois can voluntarily change its situation. *Ill. Bell. Tel. Co.*, 2006 WL 2796488, at *7. The ICC’s argument regarding the WCDO is also unpersuasive. If this litigation has demonstrated anything to this point, it is that, best laid plans aside, AT&T Illinois’ and the ICC’s disputes are not always capable of quick resolution. As AT&T Illinois notes, this suit was brought pursuant to *Ex Parte Young*, 209 U.S. 123 (1908), which allows private parties to seek injunctive relief preventing state officials from violating federal law (but not money damages). Thus, as the court previously held, the ICC’s violations of the Act cause AT&T Illinois irreparable harm for which there is no adequate remedy at law. The court will therefore adhere to its prior ruling regarding elements two and three.

The court finds that the balance of harms also favors AT&T Illinois. AT&T Illinois asks the court to consider not only the economic harm it is suffering under the section 13-801 requirements, but also the harm caused by allowing the ICC to continue to flout federal law. According to AT&T Illinois, Congress has already weighed the interests between local and national telecommunications regulation, and struck a balance in favor of the latter by passing the Act. AT&T Illinois argues that any interest the ICC may have in enforcing the requirements of section 13-801 that the court has ruled are preempted must give way because those requirements have been held to violate the Supremacy Clause of the United States Constitution.

In response, the ICC does not identify any harm it will suffer if an injunction issues. Instead, the ICC cites the court’s prior order denying AT&T Illinois’ motion for

preliminary injunction, where the court held that the balance of harms weighed against AT&T Illinois. *See Ill. Bell. Tel. Co.*, 2005 WL 735968, at *7. The ICC argues that the court has already resolved this issue, and asks that the court continue to maintain the status quo until the remaining issues are decided. But the court's previous ruling considered the balance of harms *vis a vis* AT&T Illinois and the intervenors, not AT&T Illinois and the ICC. *Id.* Previously, the court was concerned with the economic impact a decision requiring the ICC to stop enforcing section 13-801's unbundling requirements would have on the intervenors. *Id.* As AT&T Illinois notes, however, none of the intervenors oppose AT&T Illinois' current motion (according to AT&T Illinois, this is because the intervenors have had two years to prepare for the implementation of the FCC's rules in Illinois, and are no longer in a precarious position), and the ICC does not point to any quantifiable impact an injunction would have on it. The court therefore finds that the balance of harms clearly favors AT&T Illinois at this point. The court sees no reason to maintain the status quo between AT&T Illinois and the ICC; that status quo was altered nearly seven months ago when the court issued the September 28th order, yet the ICC continues to enforce requirements that were held to be unlawful.

Finally, the court finds that an injunction will not harm the public interest. As AT&T Illinois notes, it would be odd for the court to rule that an injunction preventing the ICC from enforcing requirements that the court has held are preempted by federal law and in violation of the Constitution is contrary to the public interest. For better or worse, Congress considered the public interest when it passed the Act, and the court must assume that it struck the correct balance. Moreover, the ICC does not identify any public interest that would be harmed if the injunction issues, but instead merely devotes its

energies to attacking AT&T Illinois' arguments. The ICC also cites this court's order denying AT&T Illinois' request for a preliminary injunction, but, as with the balancing of harms analysis above, that portion of the order pertained to the intervenors, who have not filed briefs with respect to AT&T Illinois' current motion. *See Ill. Bell. Tel. Co.*, 2005 WL 735968, at *8 (noting the potentially negative impact on the public if the intervenors' businesses were immediately denied the benefits of the unbundling requirements). At present, the court cannot identify any public interest that would be harmed by forcing the ICC to comply with the Act and abide by the September 28th order, and so the court concludes that the final element also favors AT&T Illinois.

Accordingly, the court grants AT&T Illinois' motion for injunctive relief. The court notes that its concerns regarding the application of Rule 54(b) of the Federal Rules of Civil Procedure, *see Ill. Bell. Tel. Co.*, No. 05 C 1149 (N.D. Ill. Jan. 9, 2007) (minute order denying motion to enforce) have been resolved. As AT&T Illinois notes (and the ICC concedes, as it has provided no briefing on the issue), the court has the discretion to enter final judgment on already-decided claims under Rule 54(b) when there are unadjudicated claims remaining. However, the court is not required to do so; when the court enters an order that "adjudicates fewer than all the claims," but does not enter final judgment on those claims, the order remains subject to modification until the court has adjudicated the remaining claims and entered final judgment. Fed. R. Civ. P. 54(b); *accord Ty, Inc. v. Publ'ns Int'l, Ltd.*, 292 F.3d 512, 516 (7th Cir. 2002) (noting that permanent injunction that does not wind up litigation is interlocutory in nature and may be appealed under 28 U.S.C. § 1292(a)(1) (2006) "irrespective of Rule 54(b)"). Such is the case here. The court grants AT&T Illinois a permanent injunction, but the injunction

will remain subject to modification and will not become a final judgment until the remaining issues are decided.

Therefore, and in accordance with Rule 65(d) of the Federal Rules of Civil Procedure, the ICC is hereby enjoined from enforcing the section 13-801 requirements held to be preempted by the Act in the September 28th order. Specifically, the ICC is enjoined from enforcing section 13-801, any ICC order implementing section 13-801, or any tariff implementing an ICC order or section 13-801 to the extent that such enforcement requires AT&T Illinois to: (1) unbundle “local circuit switching, switching-related elements, OCn-level loops, dedicated transport, dark fiber loops, entrance facilities, and feeder subloops;” (2) “furnish CLECs with preexisting combinations of network elements” or “combine network elements for CLECs;” (3) “unbundled splitters;” or (4) provide “terminating access” on an unbundled basis or unbundled the “terminating switch.” *Ill. Bell. Tel. Co.*, 2006 WL 2796488, at *14, 16.

ENTER:

/s/
Joan B. Gottschall
United States District Judge

DATED: April 17, 2007