

Docket No. 11-0597

**AT&T ILLINOIS' RESPONSE IN OPPOSITION
TO MOTION TO SUSPEND SCHEDULE**

Exhibit 2

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

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

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

I. INTRODUCTION

Plaintiff Infotelecom, LLC (“Infotelecom”) brings this action against defendants Illinois Bell Telephone Company (d/b/a AT&T Illinois), Indiana Bell Telephone Company (d/b/a AT&T Indiana), Michigan Bell Telephone Company (d/b/a AT&T Michigan), Nevada Bell Telephone Company (d/b/a AT&T Nevada), the Ohio Bell Telephone Company (d/b/a AT&T Ohio), Pacific Bell Telephone Company (d/b/a AT&T California), the Southern New England Telephone Company (d/b/a AT&T Connecticut), Southwestern Bell Telephone Company (d/b/a AT&T Arkansas, AT&T Kansas, AT&T Missouri, AT&T Oklahoma, and AT&T Texas), and Wisconsin Bell, Inc. (d/b/a AT&T Wisconsin) (collectively, “AT&T”). Infotelecom seeks a declaration that Infotelecom has not breached its Interconnection Agreement with AT&T and an injunction preventing AT&T from terminating the Interconnection Agreement. Compl., Count One.

Infotelecom’s Complaint also alleges that AT&T has discriminated against Infotelecom in violation of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of 47 U.S.C.). Compl., ¶¶ 45-46.

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

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

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

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

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

Infotelecom seeks an injunction secured by a \$150,000 bond it has already posted.

Mem. in Supp. (Doc. No. 84), at 24.

II. STANDARD OF REVIEW

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

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

In re World Trade Center Disaster Site Litigation, 503 F.3d 167, 170 (2d Cir. 2007)

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

III. DISCUSSION

A. Authority to Issue Injunction

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

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

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

B. Balance of the Four Factors

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

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

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

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

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

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

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

2. Whether Applicant Will Be Irreparably Injured Absent a Stay

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

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

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

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

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

3. Whether Issuance of Stay Would Substantially Injure Other Parties

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

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

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

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

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

4. Evaluation of the Public Interest

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

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

IV. CONCLUSION

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

SO ORDERED.

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

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