



**FILED**

02-09-10

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

CommPartners, LLC (U6910C),

Complainant,

vs.

Pacific Bell Telephone Company, dba  
AT&T California (U1001C),

Defendant.

Case 08-01-007  
(Filed January 14, 2008)

**ADMINISTRATIVE LAW JUDGE'S RULING  
DENYING EMERGENCY MOTION FOR EX PARTE TEMPORARY  
RESTRAINING ORDER AND ORDER TO SHOW CAUSE**

On January 13, 2010, CommPartners, LLC (CommPartners), the complainant in the above-titled closed proceeding,<sup>1</sup> filed an emergency motion for an *ex parte* Temporary Restraining Order and an Order Showing Cause why the Commission should not issue a Preliminary Injunction against Pacific Bell Telephone Company, doing business as AT&T California. Movant alleges that AT&T California has failed to comply with the Decision 09-12-018 "instruction to change its policy of charging for 911 trunks that CommPartners does not use and

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<sup>1</sup> The request reopened this matter. It remains open during the pendency of the Application for Rehearing of Decision 09-12-018, filed January 19, 2010.

has sought repeatedly to disconnect.”<sup>2</sup> It further maintains that AT&T California threatened to discontinue processing, as of January 14, 2010, CommPartners’ existing and new orders for services unrelated to the disputed charges.

CommPartners asks the Commission to enjoin AT&T California from refusing to accept its existing and new orders and to maintain the status quo until the Commission can reconsider the merits of the underlying dispute between the parties.<sup>3</sup> The emergency motion is denied for failure to make a sufficient case for such extraordinary relief.

### **Background**

On January 18, 2008, CommPartners filed Case 08-01-007, alleging that AT&T California overcharged it for access services, specifically that AT&T California was billing CommPartners for E911 trunks that it did not need. CommPartners asserted that it was obtaining E911 trunks from a third party provider. It maintained that AT&T California had discriminated against CommPartners by refusing to amend their interconnection agreement (ICA) in order to allow a waiver of the E911 trunking requirement, as it has done for other competitive local exchange carriers. CommPartners sought declaratory and compensatory relief as well as sanctions.

In response, AT&T California contended that CommPartners agreed to “establish and maintain” E911 trunking from it to interconnect with AT&T California’s E911 Selective Router when CommPartners opted into the ICA.

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<sup>2</sup> Emergency Motion at p. 1.

<sup>3</sup> CommPartners filed an application for the rehearing of Decision (D.) 09-12-018 on January 19, 2010.

AT&T California argued that its E911 trunking requirements facilitate E911 service reliability and public safety. It declared that if the Commission determined that AT&T California relieving CommPartners of its contractual trunking obligation would neither raise public safety issues nor expose AT&T California to liability for any potential failed 911 calls after disconnection of the trunks, AT&T California would not object to executing a prospective 911 waiver amendment with CommPartners.

On December 18, 2009, the Commission issued D.09-12-018, in which it denied CommPartners' complaint. The decision held that CommPartners was obligated under the ICA to meet the trunking requirements. It had not demonstrated that AT&T California had either discriminated against it or failed to act in good faith by declining to execute a 911 waiver amendment with CommPartners. D.09-12-018 further stated that each carrier is responsible for meeting its own 911 obligations; therefore, AT&T California bares no overall responsibility for E911 service and reliability by virtue of its incumbency and historic role as custodian. After addressing the stated concerns for its reluctance to negotiate a 911 waiver amendment with CommPartners, the decision urged AT&T California to undertake executing a prospective 911 waiver with CommPartners and disconnecting its 911 trunks.

On January 13, 2010, CommPartners filed its emergency motion, and AT&T California requested leave to respond to the motion on shortened time, through either an oral or written submission. On January 14, 2010, by teleconference with both parties, the undersigned Administrative Law Judge (ALJ) granted AT&T California leave to file a response to the motion by January 19, 2010. At the request of the undersigned ALJ, AT&T California agreed to forbear and await the ruling on the emergency motion before it

proceeded with the collection actions set forth in its December 29, 2009 letter to CommPartners. CommPartners and AT&T California argued their motion and response, respectively, before the ALJ on January 20, 2010. The oral argument was transcribed. On January 22, 2010, CommPartners asked for an opportunity to orally respond to a question that the ALJ asked during the argument. By teleconference, on January 25, 2010, CommPartners and AT&T California presented additional information in response to the question.

### **Position of the Parties**

CommPartners maintains that if the Commission does not enjoin AT&T California from taking stated collection actions against it, the company's reputation and operations will be irreparably injured. It states that AT&T California has informed CommPartners that unless it pays all of the outstanding E911 trunking charges that have accrued, the incumbent carrier will stop accepting any of CommPartners' existing and new service orders.

CommPartners declares that the rejection of all of its non-E911 related service orders will "compromis[e] its ability to adequately serve existing customers, or to optimize and expand its network."<sup>4</sup> It claims that AT&T California's actions will harm its reputation, force CommPartners to continue paying for facilities it neither wants nor needs, and deprive it of the benefit of the Commission's entreaty to AT&T California in D.09-12-018 to waive the 911 trunking requirements. CommPartners contends that injunctive relief will not harm AT&T California, because the affected trunks are presently in place, idle, and thus, should not require added personnel nor incur expenses.

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<sup>4</sup> Motion for TRO at p. 2.

AT&T California responds that the Commission held in D.09-12-018 that the ICA and the attendant 911 trunking obligations are valid. It asserts that CommPartners not only has refused to remit payment for the amount in arrears, but also has continued to withhold payment for new 911 charges incurred each month. AT&T California submits that CommPartners does not allege any dispute over the 911 charges that the Commission has not already rejected. It points out that CommPartners simply objects to having to pay for the 911 trunks that the Commission found CommPartners was obligated to lease, and could avoid any injury to its operations and/or reputation by remitting the invoiced sums. AT&T California maintains that, rather than seeking to preserve the existing conditions, CommPartners is here seeking a stay of D.09-12-018. It argues that the balance of harms and the public interest favor enforcing the parties' negotiated ICA and "putting an end to CommPartners' meritless refusals to pay."<sup>5</sup>

### **Discussion**

To prevail, a motion for a temporary restraining order or injunctive relief must demonstrate that its underlying facts satisfy a four-part test. It must show that: (1) the requested remedy is necessary in order to avoid "imminent irreparable harm;" (2) the requested remedy is consistent with the public interest; (3) the temporary restraining order does not substantially harm other interested parties; and (4) that the moving party is likely to succeed on the merits.

CommPartners' request does not persuasively satisfy any part of the test. It claims that it will suffer irreparable harm if the Commission does not enjoin

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<sup>5</sup> AT&T California Response at p. 4.

AT&T California from pursuing the collection actions authorized under the parties' ICA for failure to pay the 911 charges that D.09-12-018 found to be valid. CommPartners contends that it cannot guarantee that it will be able to complete all calls attempted by its customers, if AT&T California refuses to process its orders. It will also be unable to add, or change any service, feature, or function on the CommPartners network, and it will be unable to access AT&T California's newly revamped order processing platform. CommPartners declares that it will be unable to optimize or expand its network and its business reputation will suffer if it is not able to fully meet customer needs.<sup>6</sup>

As described, the potential effect of AT&T California's threatened collection actions on CommPartners' business appears to be grave, but not irreparable. The declaration does not document the projected financial impact of an AT&T California order embargo. CommPartners states that at no time has it placed any of the disputed charges in escrow. It has refused to establish any type of payment arrangements for the disputed charges. CommPartners can avoid the potential harm to business and reputation that it has outlined by paying AT&T California the outstanding amounts due and owing for the 911 trunks. The possible harm is not without remedy.

CommPartners established that it did not want nor need the 911 trunks that the ICA obligated it to pay for. But, it did not show that the ICA obligation to establish, maintain, and pay for dedicated 911 trunks between each of its switches and an AT&T Selective Router for the routing of 911 calls was in violation of the California Public Utilities Code, Commission policy, or federal

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<sup>6</sup> Affidavit of Mike Burke in Support of Emergency Motion of CommPartners, LLC at pp. 2-3.

law. Invalidating a provision of a voluntary agreement because one of the parties considers it to be costly, unreasonable, or inconvenient, is not consistent with the public interest.

CommPartners, which opted into its ICA with AT&T California as a certificated competitive local exchange carrier, apparently made certain business decisions in early 2006 that motivated it to obtain 911 trunking through a third party provider. According to CommPartners, it made an internal decision to have the AT&T California 911 trunks turned off when it ascertained that the third party provider had enough contracts in place “to cover a good portion of where CommPartners’ California end users were.”<sup>7</sup> It has asserted that CommPartners attempted to negotiate a waiver of the 911 trunking obligation, but AT&T California rebuffed it. CommPartners did not demonstrate that AT&T California’s rebuff was evidence of discrimination rather than leverage. Authorizing a party to a voluntary agreement to pick and choose those terms and conditions to which it wants to be obligated also does not further the public interest.

CommPartners argues that AT&T California’s interests will suffer no harm if it is granted injunctive relief. It contends that the fully-installed trunks lie idle at present, and AT&T California “will not need to devote any personnel or incur any expense to operate the unused facilities.”<sup>8</sup> CommPartners submits that AT&T California will simply have to continue bookkeeping efforts on the outstanding invoiced charges. It does not address why even a relatively large creditor, owed more than a million dollars, would not be injured by either

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<sup>7</sup> Transcript of January 20, 2010 Oral Argument at pp. 47, line 4 through 48, line 25.

CommPartners' refusal to pay or the Commission ignoring or discounting unpaid charges owed under an agreement that it held to be valid. Even if one can view a growing receivable in excess of \$1 million dollars as an insubstantial harm, AT&T California and the public interest are significantly harmed by the Commission sanctioning the rejection of those lawful provisions that CommPartners and other parties find to be expensive or impractical in their voluntary agreements.

There does not appear to be a substantial likelihood of CommPartners prevailing on the merits of its application for rehearing of D.09-12-018. In its Motion, CommPartners argues that the decision erred by finding that AT&T California "does not have a monopoly over operation of the 911 system," while simultaneously finding that "AT&T was justified in refusing to disconnect its 911 trunks." Yet, it does not address how these findings alter the decision's central holding that the ICA, into which it voluntarily opted, was valid and obligated CommPartners to establish, maintain and pay for 911 trunking to AT&T California's Selective Routers.

Further, it finds that there was legal error in the weight accorded CommPartners' disputed showing on its allegations of discrimination and failure to negotiate in good faith. CommPartners raises no new arguments and neglects to mention that it stipulated to a determination based on written witness testimonies, rather than evidentiary hearing, and briefs. It also claims that D.09-12-018 erred by not limiting CommPartners' liability for unpaid 911 trunking charges to the statutory deadline of the proceeding. However, the

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<sup>8</sup> CommPartners' Emergency Motion at p. 9.

decision found that the 911 trunking obligation, although disliked by CommPartners, was a provision of a valid voluntarily-signed ICA. Thus, the waiver thereof and the attendant limitation of liability is a matter for negotiation between the parties. While the Commission can facilitate such negotiations, it cannot rewrite a legal, voluntary agreement because one of the parties' business plans changed. If a broader competitive issue exists, it cannot be properly addressed in a complaint proceeding regarding an ICA.

In response to the undersigned ALJ's question, during the oral argument on the Emergency Motion, whether the parties' ICA permitted AT&T California to take collection actions against CommPartners for the unpaid 911 trunking charges,<sup>9</sup> CommPartners asserted that the ICA's dispute resolution provisions require AT&T California to continue providing services to it during the pendency of their dispute.<sup>10</sup> AT&T California countered that CommPartners has failed to meet its respective obligation to pay the 911 trunking charges, and that the dispute resolution process concluded when the Commission issued D.09-12-018. It also argued that pursuant to Section 7 of the Resale Appendix of the ICA, CommPartners risked service disconnection by failing to take one of two actions: (1) pay AT&T California any or all due charges billed under the agreement, or (2) pay AT&T California all undisputed charges and pay any disputed charges into an interest bearing escrow account.

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<sup>9</sup> TR at p. 21:23-25.

<sup>10</sup> "The Parties shall continue providing services to each other during the pendency of any dispute resolution procedure, and each Party shall continue to perform its obligations (including making payments in accordance with this agreement)." General Terms and Conditions, 30.13.7.

Both the ICA's General Terms and Resale Appendix appear not to limit AT&T California's authority to disconnect services for either nonpayment of undisputed billed charges due and owing or failure to pay into escrow disputed billed charges. CommPartners has not put any of the disputed amounts into an interest bearing escrow account, or clearly explained why it has not.

In sum, CommPartners has not made a sufficient showing to support its Emergency Motion for a temporary restraining order. It seeks not to maintain the status quo, because under the status quo there is a Commission decision that holds that a valid voluntary agreement obligates CommPartners to establish, maintain, and pay for 911 trunking to AT&T California's Selective Routers. CommPartners has not made the case for its request for extraordinary relief. Moreover, a motion for a temporary restraining order is not the appropriate vehicle in which to seek to stay D.09-12-018. CommPartners' Emergency Motion is denied.

Accordingly, **IT IS RULED** that CommPartners, LLC's January 13, 2010 "Emergency Motion for an *Ex Parte* Temporary Restraining Order and Order to Show Cause Why Preliminary Injunction Should not Issue" is denied.

Dated February 9, 2010, at San Francisco, California.

/s/ JACQUELINE A. REED

Jacqueline A. Reed  
Administrative Law Judge

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Dated February 9, 2010, at San Francisco, California.

/s/ JEANNIE CHANG  
Jeannie Chang

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