



FILED

09-12-11
01:08 PM

ALJ/KAJ/gd2 9/12/2011

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Infotelecom, LLC (U6946C),

Complainant,

vs.

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

Defendant.

Case 11-07-021
(Filed July 25, 2011)

**ADMINISTRATIVE LAW JUDGE'S RULING
DENYING INFOTELECOM, LLC'S MOTION FOR
EMERGENCY INJUNCTIVE RELIEF**

1. Background

On July 25, 2011, Infotelecom LLC (Infotelecom) filed a complaint against Pacific Bell Telephone Company d/b/a AT&T California (AT&T) requesting interpretation of its interconnection agreement (ICA) with AT&T and to prevent disconnection of service. On August 9, 2011, the parties filed a joint motion to stay the case during settlement discussions. The motion indicated that since Infotelecom had filed the complaint, the parties had engaged in productive settlement discussions to resolve their dispute. They agreed it would be desirable to focus exclusively on those conversations and to temporarily suspend further litigation activities.

Then on August 25, 2011, Infotelecom filed a motion for emergency injunctive relief. Infotelecom requests that the Commission issue a stay to maintain the status quo pending resolution of its complaint. According to Infotelecom, on August 17, 2011, AT&T discontinued settlement conversations and sent Infotelecom a notice of termination setting September 1, 2011 as the date AT&T will terminate the ICA and disconnect Infotelecom. Infotelecom indicates that it filed the motion for emergency injunctive relief to prevent the imminent and irreparable harm that will flow to Infotelecom and consumers if AT&T disconnects service before the Commission has an opportunity to fully evaluate the merits of the parties' positions.

Infotelecom's August 25, 2011 Motion for Emergency Injunctive Relief was accompanied by a motion for order shortening the time for response to Infotelecom's motion. Infotelecom requested that the Commission set August 26, 2011 as the due date for a response. On August 25, 2011, I ruled on Infotelecom's motion for order shortening time via an e-mail to the parties. In that e-mail I gave AT&T until August 29, 2011 to respond to Infotelecom's motion. I indicated that I would rule on Infotelecom's Motion for Emergency Injunctive Relief again via e-mail, on August 30, 2011. That e-mail ruling would be followed by an official ALJ Ruling. AT&T filed its response in opposition to Infotelecom's motion on August 29, 2011. In its response AT&T indicated that it agreed to defer the disconnection of Infotelecom until September 9, 2011.¹

¹ In an e-mail to the parties on August 30, 2011, I indicated that in light of AT&T's extension in time, I would delay ruling until September 8, 2011. I also clarified that AT&T had intended to set September 9, 2011 as the disconnection date.

2. Standard For Injunctive Relief

The Commission uses the same test for temporary restraining orders that it uses for preliminary injunctions.² “To obtain a temporary restraining order, the moving party must show (1) a likelihood of prevailing on the merits; (2) irreparable injury to the moving party without the order; (3) no substantial harm to other interested parties; and (4) no harm to the public interest.” *Id.*

3. Discussion

In the following section, the four-pronged analysis for injunctive relief outlined above is applied to Infotelecom’s request.

3.1. Likelihood of Prevailing on the Merits:

The parties disagree as to whether Infotelecom will prevail. Infotelecom asserts that it has shown a likelihood of success that the escrow provision in the ICA should be interpreted as a monthly, non-cumulative, and state-specific calculation based on the plain language of the ICA.

Some background information is needed to analyze Infotelecom’s assertion. Following is the language that is in dispute:

7.3 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 15th day of the succeeding month to which the calculation applies, the Delivering Party shall report its calculation of the difference between the amounts Level 3 paid to SBC for terminating such traffic (at rates

² *AT&T Communications of California, Inc. et al., v. Verizon California Inc.*, D.04-09-056, mimeo., p. 6 (citing *Westcom Long Distance, Inc. v. Pacific Bell et al.*, D.94-04-082, 54 CPUC 2d 244, 259; see also *Re Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates*, D.98-12-075, 84 CPUC 2d 155, 169.)

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 and interstate switched access tariffs based upon originating and terminating NPA-NXX ("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 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 above language was negotiated between SBC (the predecessor to AT&T)³ and Level 3, a Competitive Local Exchange Carrier (CLEC). Infotelecom was not a party to those negotiations but, pursuant to 47 U.S.C. § 252(i), Infotelecom adopted the terms and conditions of the 13-State ICA, including the First Amendment, which AT&T had negotiated with Level 3.

The dispute between SBC and Level 3 centered around the amount that would be paid for traffic that originates on an Internet network in Internet Protocol (IP) format and is carried for termination at points on the public switched telephone network (PSTN). The parties reached a compromise that all such IP-PSTN traffic would be treated as local traffic, and a rate of \$.000035 per minute would be charged for IP-PSTN traffic. That traffic would not be subject to the higher tariffed access charges associated with originating and terminating traditional long distance traffic. However, the First Amendment provides that Infotelecom shall perform a series of monthly calculations to determine the amount that Infotelecom would have paid for any non-local traffic to determine the amount that Infotelecom would have paid for the traffic, had such traffic

³ The terms SBC and AT&T are used interchangeably throughout this Ruling.

been traditional telecommunications traffic subject to AT&T's tariffed switched access charges. Those monthly calculations are referred to as the "Delta" in ICA Section 7.3 cited above.

AT&T and Infotelecom disagree about the interpretation of Section 7.3. It is clear from the proprietary negotiating documents used by SBC and Level 3 that those two companies were in agreement on what the section means. Specifically, they were in agreement that the so-called Delta calculation would be performed across the 13-state SBC region and cumulative from month to month. This fact is confirmed in a deposition of Rogier Ducloo on behalf of Level 3 in Federal District Court, District of Connecticut on June 24, 2011. The document was marked proprietary so I cannot cite specific sections in support.

Since Infotelecom adopted the SBC/Level 3 ICA pursuant to § 252(i), Infotelecom has stepped in the shoes of Level 3 and must receive the same terms and conditions as Level 3. As AT&T states, when Infotelecom adopted Level 3's ICA, it got the whole agreement. Indeed, the FCC's rule implementing section 252(i) of the 1996 Act is called the "All or Nothing Rule" because it requires the requesting carrier to adopt "in its entirety" an existing, state commission-approved ICA.⁴

AT&T points to First Amendment Paragraph 9.4 which provides 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

⁴ Second Report and Order, *In the Matter of the Review of the Section 252 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, 19 FCC Rcd 13494, (rel. July 8, 2004), at Paragraph 1.

either Party.” Infotelecom suggests that this should not apply here because Infotelecom was not a party to the negotiation of the First Amendment. That is not the case. When Infotelecom adopted Level 3’s ICA, it stands in exactly the same shoes as Level 3 under the ICA. Infotelecom suggests that the terms of the ICA with AT&T should not be the same as those adopted for Level 3. In light of the requirements of Section 252(i), I do not agree. I find that it is not likely that Infotelecom will prevail on the merits.

3.2. Irreparable Injury to the Moving Party

Infotelecom indicates that there can be no dispute that Infotelecom would suffer irreparable harm if AT&T discontinues service to Infotelecom while the complaint is pending. Infotelecom states that because AT&T possesses a physical monopoly over the telecommunications facilities that connect an end user customer to the telephone network, it is not possible to deliver calls to customers that receive local exchange service from AT&T without a direct or indirect interconnection. Thus, if Infotelecom is not able to complete calls to the end users of AT&T, or vice versa, a significant amount of the traffic flowing through Infotelecom’s network will not be able to reach its intended recipient. This disruption would affect calls to Infotelecom and calls from Infotelecom.

AT&T responds that Infotelecom will not suffer harm unless it chooses to. To avoid the termination of service, Infotelecom need only pay into escrow the amounts it is supposed to have paid to AT&T. AT&T states that if Infotelecom needs to borrow to pay the Delta into escrow, so be it.

3.3. No Substantial Harm to AT&T

Infotelecom states that while Infotelecom faces the destruction of its business in the absence of a stay preserving the status quo, AT&T would suffer no substantial harm. Infotelecom states that from AT&T’s perspective this

dispute is entirely about money, and therefore can be cured through money damages. AT&T refutes Infotelecom's allegation, saying that it faces substantial harm if a stay is granted. AT&T says that the emergency injunction would exacerbate this harm by forcing AT&T to continue providing services to Infotelecom while Infotelecom refuses to escrow the Delta for safe keeping until the FCC issues its decision on IP-PSTN traffic.

AT&T points out that the reason the escrow provision was added to the ICA in the first place, was that CLECs are at a historical risk for insolvency. Indeed, in connection with its federal lawsuit, Infotelecom admitted that it is currently not financially able to escrow the cumulative Delta amount across the 13-state region of AT&T, assuming the amount is, as AT&T calculates, \$4,935,981.58.

According to AT&T, California courts have long held that a party may be substantially harmed if it is unable to collect on a judgment entered in its favor, including where the opposing party would be "judgment proof" due to insolvency.⁵

I concur that the harm that AT&T will suffer if it is enjoined from disconnecting service to Infotelecom is both concrete and substantial. Any additional services provided by AT&T to Infotelecom will only increase the amount of the un-escrowed Delta.

⁵ See, e.g. *Paradise Hills Associates v. Procel*, 235 Cal.App.3d 1528, 1538 (1991) (considering plaintiff's assertion that defendant lacked resources to pay damages); *West Coast Constr. Co. v. Oceano Sanitary Dist.*, 17 Cal.App.3d 693, 700 (1971) (monetary loss may be considered irreparable where the "parties causing the loss are insolvent or in any manner unable to respond in damages").

3.4. No Harm to the Public Interest

Infotelecom asserts that public interest favors preserving the status quo pending the resolution of Infotelecom's complaint. Infotelecom points out that the Commission has admonished carriers not to block calls because of compensation disputes.⁶ Infotelecom also states that the FCC has made clear that any actions by a carrier that "may degrade the reliability of the nation's telecommunications network," is against the public interest. (*Call Blocking by Carriers, supra*, at 11631, Paragraph 6.) The cases that Infotelecom cites are not on point, but it is critical that phone calls reach their intended recipient.

There will be harm to the public, if Infotelecom's customers are not given timely notice that AT&T is terminating service to their carrier. I do not want Infotelecom's customers to wake up one morning and not be able to place or receive calls.

In light of that, I ask that AT&T defer termination of service to Infotelecom until we can set up a plan for Infotelecom to provide notice to its customers. I request that AT&T and Infotelecom set up a conference call with me within the next few days, so that we can discuss the issue of notice to Infotelecom's customers.

⁶ *Pac-West Telecomm, Inc. v. Evans Tel. Co, et al.*, D97-12-094, 77 CPUC 2d 717, 724.

IT IS RULED that Infotelecom's August 25, 2011 motion for emergency injunctive relief is hereby denied.

Dated September 12, 2011, at San Francisco, California.

/s/ KAREN A. JONES
Karen A. Jones
Administrative Law Judge