IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FBN AMERICA, INC.,	:	
Plaintiff,	:	
	:	
v.	:	**Civil No. 97-6427**
	:	
ATHENA INTERNATIONAL, L.L.C.,	:	
and AT&T COMMUNICATIONS,	:	
Defendants.	:	

M E M O R A N D U M

Cahn, C.J. November ____, 1997

Plaintiff filed a complaint against Defendants alleging tortious interference with business relations; violations of the Sherman Act, 15 U.S.C. § 1; and numerous violations of the Communications Act of 1934, *as amended* (the Act), 47 U.S.C. § 151 et seq. Plaintiff now moves for a preliminary injunction pursuant either to 47 U.S.C. § 406 or the court's traditional equitable powers. The court held hearings on Plaintiff's motion on October 20 and 27, 1997. For the reasons that follow, the court will deny Plaintiff's motion, refer Plaintiff's claims under the Act to the Federal Communications Commission (FCC), and stay further proceedings in this case.

I.

A.

Plaintiff is a long-distance reseller that "has developed a telecommunications market niche serving (*i.e.*, terminating traffic to) rural areas." Plaintiff obtains long-distance telephone service pursuant to a contract with Defendant Athena, also a long-distance reseller. Plaintiff explains that it "utilizes its own switch . . . which it leases through an arrangement with the

Ironton Telephone Company in Coplay, Pennsylvania." Athena, in turn, obtains service pursuant to a contract with AT&T. On October 12, 1997, AT&T discontinued service to Athena, thereby interrupting service to Plaintiff.

AT&T contends that it disconnected Athena for nonpayment of several million dollars in billings. Although Athena disputed some charges, the evidence presented by the parties establishes that Athena acknowledged a debt of $8.965 million, and that on September 19, 1997, AT&T and Athena entered into a payment agreement that expressly provided that "[a]ny delay in scheduled payments will result in the termination of service." After Athena failed, on October 7, 1997, to pay a $3.8 million installment due under the terms of the payment agreement, negotiations between Athena and AT&T broke down, and AT&T notified Athena that its service would be terminated.

Plaintiff contends that AT&T's real motivation for terminating service to Athena was a desire to eliminate Plaintiff's service to rural areas because it was costly and because Plaintiff was able to undercut AT&T's business.[1] To this end, Plaintiff claims that AT&T used Athena's indebtedness and an unlawful contract provision as pretextual "leverage" to eliminate Plaintiff's traffic. With regard to the Athena's indebtedness, Plaintiff argues that Athena's debt to AT&T was genuinely in dispute, that Athena was coerced into a payment agreement by the threat of

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[1]Although Plaintiff's complaint states numerous claims against Athena, Plaintiff's brief and oral argument in support of its Motion for a Preliminary Injunction have focussed on the alleged unlawful conduct of AT&T. Indeed, notwithstanding Athena's status as a defendant, Plaintiff has essentially characterized Athena as an incidental victim of AT&T's desire to rid itself of Plaintiff's traffic. Without prejudice to Plaintiff's claims against Athena, then, the court's explanation of Plaintiff's allegations tracks Plaintiff's predominant characterization of the case.

service termination, and that AT&T used the disputed debt as a "wedge with which to effectuate the elimination of undesired FBNA traffic."

In a deposition taken on October 21, 1997, Athena's President Michael Landers testified that Athena had numerous disputes with AT&T's billing, including disputes as to the quality of and the proper rates for service received from AT&T. Landers also reported that an AT&T representative, James McAllister, told him on several occasions that AT&T was unhappy with Plaintiff's traffic. Relatedly, at the October 20 hearing, Plaintiff's Vice-President Stuart Rogers testified that an Athena representative, Garth Cook, informed him of AT&T's dissatisfaction with Plaintiff's traffic. Both Rogers and Landers expressed their belief that AT&T used its billing dispute with Athena as a pretext to eliminate costly service to Plaintiff.

The contract provision that Plaintiff claims AT&T unlawfully utilized to eliminate Plaintiff's traffic is section 6.C.1 of the Carrier Agreement between Athena and AT&T. The parties refer to this section as the "80/20 provision." Pursuant to this provision, AT&T committed to provide service to Athena at an "undiscounted" rate with an "except[ion] that [a different] usage rate, and the discounts specified in Section 6.D of this Agreement, apply for AT&T MEGACOM Service-Domestic Interstate calls of which 80% will originate at an IXC Switch" owned by Athena.

In an August 26, 1997, memorandum drafted to summarize a meeting with James McAllister, Landers wrote that AT&T was "willing to negotiate a new contract with Athena" if, in part, "Athena comes into compliance with Section 6.C.1 of the Carrier Agreement by September 15, 1997." Landers also noted that "AT&T alleges that the existing traffic patterns result in non-compliance," and that, "[i]f this is found to be the case, AT&T believes that it can re-rate the traffic in excess of 20% at tariff rates and bill Athena for the differential of tariff and contract rates." A fax to Landers from an AT&T account manager on September 24, 1997 suggests that AT&T continued to believe that Athena was not in compliance with the 80/20 provision. Landers testified that the fax stated, in part, that

> [b]ased on the analysis . . . provided to you on September 2nd, only 19 percent of your outbound traffic originates at an IXC switch owned and operated by Athena. For the terms of your carrier agreement, all traffic not in compliance with Section 6.C.1 is to be billed at standard [Tariff No. 1] Megacom rate. We would like to work with you to explore options that would bring you into compliance with our carrier agreement.

Plaintiff contends that AT&T's insistence on compliance with the 80/20 provision was just another pretext designed to conceal AT&T's desire to eliminate Plaintiff's high-cost traffic, which was a substantial source of the traffic not originating at an Athena-owned IXC switch.

B.

Plaintiff argues that AT&T's conduct violates sections 201(a) & (b), 202(a), 203(c), 251(a), and 254(g) of the Act. Specifically, with regard to Plaintiff's claims under sections 201(a) and 251(a), Plaintiff contends that by disconnecting service to Athena, and thereby disconnecting service to Plaintiff, AT&T violated an absolute duty to provide interconnection. Plaintiff adds, in response to AT&T's argument that AT&T is entitled, and in fact obligated, to disconnect service for nonpayment, that the "duty to interconnect is violated when a dispute between two common carriers over compensation is used as an excuse to deny interconnection to a third [non-delinquent] common carrier." Thus, Plaintiff also claims that AT&T's denial of interconnection is an unjust and unreasonable practice under sections 201(b) and 202(a).

Plaintiff argues further that AT&T's desire to eliminate Plaintiff's high-cost rural traffic is unreasonable, discriminatory, and unlawful under sections 201(b), 202(a), and 254(g). To this end, Plaintiff challenges the validity of the 80/20 provision, and argues that Athena's debt to AT&T was genuinely in dispute. In particular, Plaintiff contends that the 80/20 provision is an unlawful restriction on Athena's right to resell service, in violation of sections 201 and 202; and that the provision is invalid under section 203(c) because it is not set forth in any tariff filed with the FCC. Finally, Plaintiff alleges that the concerted actions of AT&T and Athena to eliminate Plaintiff's lower-priced competition constitute resale price maintenance, in violation of 15 U.S.C. § 1, and tortious interference with Plaintiff's business relations.

Plaintiff now moves for a preliminary injunction, pursuant either to 47 U.S.C. § 406 or the court's traditional equitable powers, ordering AT&T and Athena to restore service to Plaintiff. AT&T has raised numerous arguments in opposition to Plaintiff's request for injunctive relief, which the court will discuss as necessary. Of particular significance is AT&T's invocation of the doctrine of primary jurisdiction.

II.

A.

AT&T argues that the present dispute falls squarely within the primary jurisdiction of the FCC because the reasonableness of AT&T's termination of service to Athena for nonpayment is at the heart of the case, and because the validity of the 80/20 provision, and interconnection disputes generally, are matters properly submitted to the FCC. Accordingly, AT&T concludes that "this court would be required to refer [Plaintiff's] claims . . .--and the accompanying request for an injunction--to the FCC before it could put in place emergency relief."

Plaintiff responds that referral to the FCC under the doctrine of primary jurisdiction is not necessary because technical expertise and sensitivity to telecommunications policies are not required to observe that AT&T has violated a clear and unequivocal duty to interconnect under section 251(a). Plaintiff adds that "[t]he purpose of the primary jurisdiction doctrine would not be served by a preliminary referral of this matter to the FCC, as the FCC has already passed upon its interpretation of Section 251(a) and there are no proceedings pending at the FCC." For the reasons that follow, the court will refer consideration of Plaintiff's claims under the Act to the FCC.

The doctrine of primary jurisdiction exists to promote the consistent, excellent, and efficient resolution of matters that have been specially entrusted to administrative agencies. MCI Communications Corp. v. American Tel. and Tel. Co., 496 F.2d 214, 220 (3d Cir. 1974). Pursuant to this doctrine,

> a court should refer a matter to an administrative agency for resolution, even if the matter is otherwise properly before the court, if it appears that the matter involves technical or policy considerations which are beyond the court's ordinary competence and within the agency's particular field of expertise.

Id. As the Supreme Court has explained,

> [u]niformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Far East Conference v. United States, 342 U.S. 570, 574 (1952).

Although there is no fixed test governing the applicability of the doctrine of primary jurisdiction, courts have frequently looked to several factors, including whether the question at issue: (1) is within the conventional experience of judges or involves technical and policy considerations within the agency's particular field of expertise; (2) calls for the exercise of the agency's discretion; (3) presents a substantial danger of inconsistent rulings; and (4) has already been presented to the agency. See, e.g., National Communications Ass'n, Inc. v. American Telephone and Telegraph Co., 46 F.3d 220, 222-23 (2d Cir. 1995).

In Total Telecommunications Services, Inc. v. American Tel. and Tel. Co., 919 F. Supp. 472, 475-77 (D.D.C. 1996), *aff'd*, 99 F.3d 448 (D.C. Cir. 1996), an alleged competitive access provider, Total Telecommunications Services, Inc. (TTS), and the local exchange carrier (LEC) from which TTS leased access service, sued AT&T after AT&T terminated interconnection services to TTS because AT&T believed that it was being unfairly double-billed by TTS and the LEC. The plaintiffs moved for a preliminary injunction, alleging that AT&T's refusal to provide service violated sections 201(a), 202, 214, and 251 of the Act. Id. at 477. Thus, the case raised questions as to

> (1) whether AT&T must interconnect its services to those of TTS; (2) the validity of TTS's tariff and practices; (3) whether AT&T discontinued service in violation of Section 214; (4) whether AT&T engaged in discriminatory conduct and whether TTS is properly categorized as a competitive access provider.

Id. The court concluded that, because "[t]he resolution of these issues involve [sic] policy considerations concerning the public interest and technical questions relating to TTS's tariff and operating structure," the case should be referred to the FCC pursuant to the doctrine of primary jurisdiction. Id. at 478.

The court explained, in relevant part, that "[t]he central claim in this case . . . is whether TTS has the right and AT&T the concomitant obligation, to interconnect its services to those of TTS." Id. at 479. The court concluded that this claim should be addressed in the first instance by the FCC, because it "involve[s], as it must, the comparative evaluation of complex technical, economic, and policy factors, as well as consideration of the public interest." Id. at 479-80 & n.9 (quoting MCI Telecommunications Corp., 496 F.2d at 224). As to TTS's claim that AT&T's termination of services violated section 251(a) of the Act, the court "decline[d] to interpret Section 251" without any guidance from the FCC because "inconsistent and disparate results might ensue." Id. at 482. Finally, with regard to "the adequacy and validity of TTS's filed tariff," the court concluded unequivocally that "[t]he FCC has primary jurisdiction over claims that tariffs and/or practices are not just or reasonable." Id. at 480.

Here, although it is true that, "considered broadly," Plaintiff's claims under the Act "involve[] the sort of statutory interpretation in which courts regularly engage, . . . considered more specifically" these claims also involve numerous, interrelated technical and policy questions that are beyond this court's ordinary experience and squarely within the primary jurisdiction of the FCC. Mical Communications, Inc. v. Sprint Telemedia, Inc., 1 F.3d 1031, 1039 (10th Cir. 1993). To begin with, the central issue in the present case is, as it was in Total Telecommunications Services, Inc., the resolution of an interconnection-termination dispute, and this court cannot accept Plaintiff's position that AT&T's duty to interconnect in this case is manifest. Under section 201(a), a common carrier's duty to interconnect is not "unconditional"; to the contrary, the duty attaches by order of the FCC, see Total Telecommunications Services, Inc., 919 F. Supp. at 479-80 & n.10, and there is no suggestion that any such order has issued in this case.

Plaintiff contends, however, that the recent addition of section 251(a) to the Act makes it clear that the duty to interconnect no longer requires action by the FCC, and that the FCC has determined that section 251(a) "means what it says." Although it is true that the FCC has included a verbatim recitation of section 251(a)'s command in its regulations, see 47 C.F.R. § 51.100, and that these regulations had not been published at the time of the court's decision in Total Telecommunications Services, Inc., this court does not find it to be particularly illuminating to know that the FCC has concluded that section 251(a) means what it means. Moreover, as both AT&T and Plaintiff have pointed out, the relevant legislative history explains that

> [s]ection [251][2] restates the obligation contained in section 201(a) of the Communications Act of 1934 on all common carriers to interconnect with the facilities and equipment of other providers of telecommunications services and information services. The interconnection requirement in section 201(a) is a cornerstone principle of common carriage, and it is restated here in light of its importance and relevance as the local telephone industry undergoes the transition to a competitive market.

H.R. Rep. No. 104-204, at 71 (1995) (emphasis added). Lacking any other guidance, then, this legislative history suggests that the duty to interconnect remains a duty to interconnect when so ordered by the FCC.

Even accepting that the duty to interconnect is "unconditional," it is not at all clear that interconnection is required in this case. The duty to interconnect under section 251(a) refers to

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[2]The passage refers to proposed "Section 241" which eventually became section 251 of the Act.

interconnection "with the facilities and equipment of other telecommunications carriers," 47 U.S.C. § 251(a), and has been interpreted to require only the physical linking of two networks, and not the provision of transmission, routing, or termination services. See 47 C.F.R. § 51.5; Competitive Telecommunications Ass'n v. FCC, 117 F.3d 1068, 1071-73 (8th Cir. 1997). Relying on this interpretation, AT&T argues that because Plaintiff is "a pure reseller that owns no facilities or equipment, and simply leased a portion of a switch," Plaintiff "has never sought 'interconnection,' as that term is used in section 251." Plaintiff disputes both this characterization of its business and the significance of these facts.

Resolution of these questions regarding AT&T's interconnection obligations requires the experience, technical expertise, and policy judgments of the FCC. See MCI Telecommunications Corp., 496 F.2d at 224; Total Telecommunications Services, Inc., 919 F. Supp. at 478-82. This conclusion is fortified by the fact that the Total Telecommunications Services, Inc. case is currently pending before the FCC. Total Telecommunications Services, Inc. and Atlas Telephone Company, Inc. v. AT&T Corp., FCC File No. E-97-03 (filed October 28, 1996). The disposition of that case by the FCC will shed light on the dispute before this court, and referral of the case at bar to the FCC will avoid the risk of inconsistent rulings.

Further militating in favor of preliminary resort to the FCC is the fact that the reasonableness of AT&T's termination of service is at issue. Plaintiff would have this court conclude that AT&T's billings were genuinely in dispute because, inter alia, AT&T's service was defective and not billed at the appropriate rates; and that AT&T acted unreasonably, unjustly, and with a discriminatory intent when it relied on this billing dispute to terminate service to Plaintiff.

The resolution of these issues "is squarely at the heart of the FCC's mandate." See American Tel. & Tel. Co. v. IMR Capital Corp., 888 F. Supp. 221, 244 (D. Mass. 1995) ("The Communication Act's prohibition of 'unreasonable,' 'unjust' and 'discriminatory' practices is a contentless injunction, which essentially invites the FCC to promulgate specific policies governing the practices of the telecommunications industry"); see also Total Telecommunications Services, Inc., 919 F. Supp. at 480.

Finally, Plaintiff's argument against referral of this case to the FCC ignores the numerous questions raised by its own claims regarding the validity and effect of the 80/20 provision. As described earlier, Plaintiff argues that this provision is an unpublished and unlawful restriction on resale which has the secondary, and also unlawful, effect of discriminating against rural traffic. AT&T argues, however, that the 80/20 provision is a legitimate and reasonable cost-based agreement. Plaintiff has not referred this court to any specific treatment by the FCC of the kind of provision at issue in this case. Absent such guidance, there can be no doubt that this court should refer consideration of Plaintiff's claims regarding the validity or effect of the 80/20 provision to the FCC. See Allnet Communication Serv., Inc. v. National Exch. Carrier Ass'n, Inc., 965 F.2d 1118, 1120 (D.C. Cir. 1992) (referring to the FCC question as to "compliance of a tariff with regulatory standards and the consequences of imperfect compliance"); Total Telecommunications Services, Inc., 919 F. Supp. at 480; American Tel. & Tel. Co., 888 F. Supp. at 244-45.

For all of the foregoing reasons, preliminary resort to the FCC for resolution of Plaintiff's claims under the Act will promote the consistent, excellent, and efficient adminstration of the

Act. Preliminary treatment of these claims by the FCC will also greatly aid this court in its consideration of Plaintiff's ancillary antitrust and tortious interference claims. Accordingly, the court will refer consideration of Plaintiff's claims under the Act to the FCC.

B.

(I)

Although this court will refer consideration of Plaintiff's claims under the Act to the FCC, it nevertheless concludes that Plaintiff's motion for a preliminary injunction may be, and therefore should be, denied without consideration of any of the matters within the primary jurisdiction of the FCC. Cf. MCI Communications Corp., 496 F.2d at 220-22 (vacating grant of preliminary injunction because district court considered matters within the primary jurisdiction of the FCC); Total Telecommunications Services, Inc., 919 F. Supp. at 484 ("declin[ing] to entertain plaintiffs' request for injunctive relief in order to avoid . . . engaging in an analysis of the underlying merits of this action.").

Section 406 of the Act permits this court to order a carrier to provide service to the moving party upon a finding that the carrier has committed a violation of the Act,

> which prevent[s] the [moving party] from receiving service in interstate or foreign communication by wire or radio, or in interstate or foreign transmission of energy by radio, from said carrier at the same charges, or upon terms or conditions as favorable as those given by said carrier for like communication or transmission under similar conditions to any other person.

47 U.S.C. § 406 (emphasis added). Because section 406 provides for relief by writ of mandamus, the moving party must show a clear and unequivocal right to relief. See Mical Communications, Inc., 1 F.3d at 1036; MCI Communications Corp. v. American Tel. and Tel.

Co., 369 F. Supp. 1004, 1025 (E.D. Pa. 1973), *vacated pending FCC action*, MCI Communications Corp, 496 F.2d 214; see also Stehney v. Perry, 101 F.3d 925, 934 & n. 6 (3d Cir. 1996).

On its face, section 406 requires the moving party to establish that the same service it is requesting the court to order the defendant to provide is actually available from the defendant, under similar terms and conditions, to some other person. See MCI Communications Corp., 369 F. Supp. at 1021. Thus, in Mical, 1 F.3d at 1034, the plaintiff argued "that [the defendant's] selective termination of [the desired] services for some area code 900 subscribers but not for others amounts to prohibited discrimination"; and, in MCI Communications Corp., 369 F. Supp. at 1009, the plaintiff "claim[ed that the desired services] are provided to [plaintiff's] competitors."

Had Plaintiff in this case presented evidence of a similarly-situated party allegedly receiving the service Plaintiff seeks, this court may have been hard-pressed to determine whether that party's service, and the terms and conditions of that service, were truly similar to the service sought by Plaintiff. In other words, the doctrine of primary jurisdiction may have counseled referral of Plaintiff's motion for a preliminary injunction to the FCC. Plaintiff did not, however, present any such evidence.

Plaintiff claimed in its brief to this court that "AT&T has refused to provide [direct] service at rates similar to those charged to Athena." However, when pressed at the hearing on October 27, 1997, Plaintiff acknowledged that the terms and conditions of the service that it seeks are not identical to those pursuant to which Athena received service. Other than the Carrier

Agreement between Athena and AT&T, there is no evidence before the court of any other party receiving any other service, let alone the precise service Plaintiff seeks, from AT&T. This court acts well within the bounds of its competence in recognizing both that Plaintiff has failed to present such evidence, and that this failure is fatal under section 406.

(ii)

Turning then to Plaintiff's request that this court enter a preliminary injunction pursuant to its traditional equitable powers, the court similarly finds that it may deny Plaintiff's motion without offending the doctrine of primary jurisdiction.

Although a party proceeding under section 406 of the Act need not show irreparable harm, see Mical Communications, Inc., 1 F.3d at 1035-36, such a showing is required under traditional standards for preliminary injunctive relief, see Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 800 (3d Cir. 1989). Upon consideration of the limited evidence produced by Plaintiff, the court concludes that Plaintiff has failed to meet its burden of establishing irreparable harm.

Plaintiff argues that Defendants' discontinuation of service is causing irreparable harm because Plaintiff's loss of goodwill and current and future business are not susceptible to calculation for monetary relief. In particular, Plaintiff suggests that Defendants' conduct has resulted in a "virtual destruction of Plaintiff's operations in the Commonwealth of Pennsylvania,"[3] that Plaintiff "was a growing business with only a short track record reselling

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[3]Plaintiff has not seriously contended, and in any event has not presented a "clear factual record" to establish, that it will "no longer be in existence to collect any money damages it is awarded." Instant Air Freight, 882 F.2d at 802-03. Plaintiff also has not argued, for obvious reasons, that AT&T would be unable to satisfy a judgment in Plaintiff's favor. Id.

AT&T's services," and that "[t]here is no adequate long term baseline against which to gauge future performance." Plaintiff argues that these facts distinguish its case from the holding in Instant Air Freight. The court disagrees.

In Instant Air Freight, 882 F.2d at 801, the court explained that "[i]n order to demonstrate irreparable harm the plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy. . . . The preliminary injunction must be the only way of protecting the plaintiff from harm." It follows, then, that "the injury created by a failure to issue the requested injunction must be of a peculiar nature, so that compensation in money cannot atone for it." Acierno v. New Castle County, 40 F.3d 645, 653 (3d Cir. 1994) (internal quotation marks and citation omitted).

Here, the losses that Plaintiff alleges are not of such "a peculiar nature, . . . that compensation in money cannot atone for" them, id. (emphasis added); they are, rather, the kinds of losses that may be "fully compensated" by money damages, Instant Air Freight, 882 F.2d 801. Plaintiff has not explained why damages resulting from any loss of, or increased costs to serve, its existing customer base are not capable of ascertainment. Furthermore, difficulty in assessing the value of such losses or in predicting Plaintiff's lost growth opportunities is not tantamount to irreparableness. As the court explained in Acierno, 40 F.3d at 655, "[a]n inability to precisely measure financial harm does not make that harm irreparable or immeasurable." In other words, uncertainty as to the extent of harm does not make fundamentally reparable harms irreparable for purposes of injunctive relief.

On the record before the court, then, Plaintiff has failed to produce either sufficient evidence of discrimination for purposes of relief under 47 U.S.C. § 406, or sufficient evidence of irreparable harm for purposes of relief pursuant to this court's traditional equitable powers. Accordingly, Plaintiff's motion for a preliminary injunction will be denied.

III.

For all of the foregoing reasons, Plaintiff's Motion for a Preliminary Injunction will be denied, Plaintiff's claims under the Communications Act will be referred to the FCC, and further proceedings in this case will be stayed.

An appropriate order follows.

BY THE COURT:

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Edward N. Cahn, C.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FBN AMERICA, INC.,	:	
Plaintiff,	:	
	:	
v.	:	**Civil No. 97-6427**
	:	
ATHENA INTERNATIONAL, L.L.C.,	:	
and AT&T COMMUNICATIONS,	:	
Defendants.	:	

O R D E R

AND NOW, this ____ day of November, 1997, upon consideration of Plaintiff's Motion for a Preliminary Injunction, and Defendants' responses thereto, it is hereby ORDERED that:

(1) Plaintiff's Motion is DENIED;

(2) Plaintiff's claims under the Communications Act are referred to the Federal Communications Commission;

(3) Further proceedings in this case are STAYED, pending resolution of Plaintiff's claims under the Communications Act by the Federal Communications Commission; and

(4) On or before June 26, 1998, Plaintiff's counsel will arrange a telephone conference with the court and opposing counsel to discuss the status of the proceedings before the Federal Communications Commission.

BY THE COURT:

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Edward N. Cahn, C.J.