

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

BELLSOUTH TELECOMMUNICATIONS,
LLC,

Plaintiff,

v.

CASE NO. 4:11cv470-RH/WCS

HALO WIRELESS, INC.,

Defendant.

_____ /

ORDER OF REMAND

This is a dispute between two telecommunications carriers concerning the terms of the parties' wireless interconnection agreement and the amount due from one to the other for terminating access charges. The plaintiff initiated the proceeding by filing a complaint in the Florida Public Service Commission. The defendant removed the proceeding to this court, asserting this is a "civil action" within the meaning of the federal bankruptcy removal statute, 28 U.S.C. § 1452.

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The defendant has moved to transfer the case to the United States Bankruptcy Court for the Eastern District of Texas, where the defendant has filed a Chapter 11

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bankruptcy proceeding and an adversary proceeding. This order concludes that even if this is a civil action within the meaning of § 1452 and removal was therefore proper, equitable remand—as expressly authorized by § 1452—would be appropriate. This order grants the motion to remand and denies the motion to transfer.

I

BellSouth Communications, LLC d/b/a AT&T Florida (“AT&T”) is a local exchange carrier. Halo Wireless, Inc., is a telecommunications carrier. AT&T and Halo entered into a wireless interconnection agreement. Under that agreement Halo sends wireless-originated traffic to AT&T, and Halo compensates the local exchange carrier by means of a “terminating access charge.” AT&T asserts that Halo sent wireline-originated traffic in breach of that agreement and for the purpose of avoiding the payment of terminating access charges. AT&T also claims that Halo altered or deleted call information so that AT&T could not properly bill Halo for the termination of Halo’s traffic. AT&T filed a complaint with the Florida Public Service Commission seeking monetary relief for past underpayments and the authority to terminate the interconnection agreement.

According to Halo, from May to August of this year, 100 different telecommunications companies located in ten different states brought at least 20 separate proceedings against Halo in the public utility commissions of those states,

all seeking resolution of claims similar to AT&T's. Faced with substantial litigation costs, on August 8, 2011, Halo filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Texas. Halo began removing the state commission proceedings to federal court. On September 1, 2011, Halo filed an adversary proceeding in the United States Bankruptcy Court for the Eastern District of Texas, seeking a declaratory judgment as to the issues raised in the various state commission proceedings.

Halo removed the Florida Public Service Commission proceeding to this court, invoking the court's removal jurisdiction under 28 U.S.C. § 1452 and asserting subject matter jurisdiction under 28 U.S.C. § 1334. Halo has moved to transfer the proceeding to the Bankruptcy Court for the Eastern District of Texas. AT&T opposes transfer and has moved to remand.

II

Halo argues that I can and should transfer the case without deciding whether removal was proper. Although there is authority to the contrary, I assume I could indeed transfer the case without addressing removal. The better course here is not to do so.

III

Due to the limited jurisdiction of federal courts, removal statutes must be construed narrowly, and remand is generally favored. *See Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994). The sole basis for removal jurisdiction invoked by Halo is 28 U.S.C. § 1452(a), which provides in relevant part:

A party may remove *any claim or cause of action in a civil action* other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

28 U.S.C. § 1452(a) (emphasis added). None of the exceptions apply. The removability of the proceeding AT&T initiated in the Florida Public Service Commission turns on whether it was a "civil action" within the meaning of the statute.

The issue is one of first impression in this circuit. In *BellSouth Telecomms., Inc. v. Vartec Telecom, Inc.*, 185 F. Supp. 2d 1280 (N.D. Fla. 2002), I held that a Florida Public Service Commission proceeding was improperly removed under the general removal statute, 28 U.S.C. § 1441, which allows removal of "any civil action brought in a State court." I held that the Florida Commission is not a state "court" as required by the statute. But the bankruptcy removal statute, § 1452, does not include that language; it allows removal of a "civil action" without

requiring that the action be pending in a “court.” See *Quality Tooling, Inc. v. United States*, 47 F.3d 1569, 1572 (11th Cir. 1995) (holding that § 1452(a) is not limited to removal of claims from state courts).

To determine whether a proceeding is a “civil action,” the focus is on the nature of the specific dispute. See *Vartec*, 185 F. Supp. 2d at 1282-83. In analyzing the requirements of a “civil action” and “State court” under the general removal statute, the Supreme Court, after holding that a county court was a “State court,” went on to examine the proceeding to determine whether it was a “judicial controversy,” as opposed to an administrative concern:

Of course, the statutory designation of the action of a body as a judgment, or the phrasing of its finding and conclusion in the usual formula of a judicial order, is not conclusive of the character in which it is acting. When we find, however, that the proceeding before it has all the elements of a judicial controversy, to wit, adversary parties and an issue in which the claim of one of the parties against the other, capable of pecuniary estimation, is stated and answered in some form of pleading, and is to be determined, we must conclude that this constitutional court is functioning as such.

Comm'rs of Road Improvement Dist. No. 2 v. St. Louis Sw. Ry., 257 U.S. 547, 557 (1922) (citation omitted); see also *Upshur Cnty. v. Rich*, 135 U.S. 467, 474 (1890) (“The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a [civil action].”); *Sun Buick, Inc. v. Saab Cars USA, Inc.*, 26 F.3d 1259, 1267 (3d Cir. 1994).

This inter-carrier dispute has all the essential elements of a “judicial controversy.” The dispute is a contract dispute between adversarial parties, and AT&T seeks damages as a result of Halo’s alleged breach of the contract. The procedures involved also bear substantial similarities to a traditional civil action in a court. The action was initiated by AT&T’s complaint filed in the Public Service Commission. Halo may file an answer to the complaint. The parties may conduct discovery. *See, e.g.*, Fla. Stat. § 364.183(2). Either party may file motions, including motions to dismiss and in some cases, motions for summary final order. *See* Fla. Admin. Code Ann. r. § 28-106.204. There are also differences between court procedures and the procedures in effect at the Florida Public Service Commission. For example, courts enter enforceable judgments; the Commission, in contrast, ordinarily must go to court to enforce its orders. *See, e.g.*, Fla. Stat. § 364.015. But such limitations do “not destroy the essential character of the proceeding as a judicial contest.” *See In re Raymark Indus., Inc.*, 238 B.R. 295, 298 (Bankr. E.D. Pa. 1999). The case for holding this proceeding a “civil action” within the meaning of § 1452 is strong. *Cf. id.* (finding that a revival proceeding qualified as a civil action under § 1452(a) because the action was initiated by a complaint and the defendant could “file an answer or motion to dismiss, avail himself of discovery, file for summary judgment and ultimately have the matter resolved at an evidentiary hearing”).

To be sure, two decisions point the other way. In *In re Adams Delivery Service, Inc.*, 24 B.R. 589 (B.A.P. 9th Cir. 1982), the Ninth Circuit Bankruptcy Appellate Panel held that a proceeding before the National Labor Relations Board could not be removed under the statutory predecessor to § 1452. The panel said the NLRB was not acting as a court and “the concept of a civil action is inseparable from a court proceeding.” The panel thus concluded that the NLRB proceeding was not a “civil action” removable under the statute. *See id.* at 592. The court also noted that “the NLRB is not functionally a forum where private parties may present labor disputes. Rather the NLRB determines which complaints it will act upon in its own name in furthering the policies of the federal labor laws.” *Id.* This makes the NLRB different from the Florida Public Service Commission, which, at least as alleged in the complaint, has statutory authority to resolve private disputes of this nature.

Citing *Adams*, the United States Bankruptcy Court for the Eastern District of Kentucky recently held in an unpublished decision that removal of an administrative proceeding was improper under both § 1441 and § 1452(a) because the proceeding was not a civil action. *See In re T.S.P. Co.*, Bankr. No. 10-53637, 2011 WL 1431473, at *2-3 (Bankr. E.D. Ky. Apr. 14, 2011). Both *Adams* and *T.S.P.* substantially relied on a bankruptcy treatise for the proposition that an administrative proceeding is a not a civil action. *See 1-3 Collier on Bankruptcy ¶*

3.07[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011) (citing *In re Adams Delivery Serv., Inc.*, 24 B.R. 589) (“Section 1452(a) does not permit removal of actions that are not ‘civil actions.’ Such things as criminal or administrative proceedings, for example, are not subject to removal.”). Aside from citing the treatise, neither decision set out any significant analysis of why the proceeding at issue was not functionally a civil action.

Ultimately, though, whether § 1452 authorized the removal of this proceeding does not matter. The statute permits a court to remand a removed proceeding “on any equitable ground.” 28 U.S.C. § 1452(b). In deciding whether to remand a proceeding on this basis, courts consider a variety of factors, including the preference for a state tribunal to resolve state-law questions, the expertise of a particular court or tribunal, and the effect of remand on the efficient administration of the bankruptcy estate. *See, e.g., In re Scanware, Inc.*, 411 B.R. at 897-98; *In re Royal*, 197 B.R. 341, 349 (Bankr. N.D. Ala. 1996); *see also Whitney Nat’l Bank v. Lakewood Investors*, No. 11-0179-WS-B, 2011 WL 3267160, at *6 (S.D. Ala. July 28, 2011) (citing cases and noting the various factors applied by courts under § 1452(b)).

The Florida Legislature and Congress have given the Florida Public Service Commission a role in resolving inter-carrier disputes on issues of this kind due to

the Commission's expertise. *See, e.g.*, Fla. Stat. § 364.16; 47 U.S.C. § 252. As I noted in *Vartec*:

[T]he Florida Legislature has given the Florida Public Service Commission authority to resolve disputes between carriers, *see* Fla. Stat. § 364.07 (2001) [now Fla. Stat. § 364.16 (2011)], not in an effort to bypass, but instead precisely because of, its regulatory expertise. By creating a remedy for inter-carrier disputes before the Commission, the Legislature did not simply afford jurisdiction over such disputes in a different court; instead, it afforded a remedy in a different type of forum altogether. In such a proceeding, the competence brought to bear will not be that of a court, but of a regulator.

Vartec, 185 F. Supp. 2d at 1283-84. That expertise is important in the present dispute, which involves the interpretation and enforcement of an interconnection agreement approved by the Florida Commission. Halo argues this dispute involves “exclusive” questions that only the Federal Communications Commission can address, but that seems unlikely, and would not defeat equitable remand in any event. *See id.* at 1285 (“The remedy for a state administrative agency’s improper exercise of state-law-created jurisdiction over state-law disputes is not removal to federal court.”). According to the interconnection agreement, Halo agreed that the applicable state public utility commission could resolve disputes. *See* ECF No. 4-1 at 22 of 25. If the Florida Commission lacks jurisdiction, Halo can presumably seek relief in the Federal Communications Commission. *See id.* And any order of the Florida Commission will be subject to challenge in federal court. *See BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., Inc.*, 317

F.3d 1270, 1277-79 (11th Cir. 2003). Halo's remedy—if it ultimately needs or is entitled to a remedy—is not removal of this proceeding to a federal court before the Commission even has a chance to consider AT&T's petition.

Further, remand will have minimal effect on the administration of Halo's bankruptcy estate. The United States Bankruptcy Court for the Eastern District of Texas has ruled that the pending proceedings against Halo in state public utility commissions—but not any attempts to collect any amount determined to be due—are exempt from the automatic stay. *See* Case No. 11-42464, Hr'g Tr. 107, 111-12, Oct. 7, 2011; ECF No. 14-1 at 109 & 113-14 of 117. The bankruptcy court's determination that this type of proceeding is exempt from the automatic stay and may go forward supports this court's decision to remand the proceeding.

On balance, I conclude that equitable remand is appropriate.

IV

For these reasons,

IT IS ORDERED:

AT&T's motion to remand, ECF No. 10, is GRANTED. Halo's motion to transfer, ECF No. 8, is DENIED as moot. This proceeding is remanded to the Florida Public Service Commission. The clerk must take all steps necessary to effect the remand.

SO ORDERED on December 9, 2011.

s/Robert L. Hinkle
United States District Judge