

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WISCONSIN BELL, INC.
d/b/a AMERITECH WISCONSIN,

Plaintiff,

ORDER

00-C-0755-C

v.

AVE M. BIE, ROBERT M. GARVIN,
and JOSEPH P. METTNER, Commissioners of
the Public Service Commission of Wisconsin
(In Their Official Capacities and Not as Individuals),

Defendants,

and

WORLDCOM, INC., TDS METROCOM, INC.,
and TIME WARNER TELECOM OF
WISCONSIN, L.P.,

Defendants-Intervenors.

This is a civil case brought pursuant to the Telecommunications Act of 1996. Plaintiff Ameritech challenges the Public Service Commission of Wisconsin's conclusion in its Order Establishing a Method for Pricing Reciprocal Compensation in Interconnection Agreements, Docket 05-TI-283 (November 8, 2000), that dial-up Internet traffic is "a type

of local telecommunications traffic for purposes of 47 U.S.C. § 251(b)(5) and 47 C.F.R. § 51.701(a)” and thus subject to the reciprocal compensation arrangements required by the Act. The case is before the court now on plaintiff Ameritech and defendant commissioners’ joint motion to strike the “Merit Brief of Intervening Defendant TDS Metrocom, Inc.,” dkt. #53, Dec. 14, 2001, on the ground that defendant-intervenor TDS Metrocom has violated the court’s scheduling order by seeking belatedly to turn itself into a cross-claimant in order to challenge a separate portion of the commission’s order establishing a bifurcated rate methodology for calculating reciprocal compensation for all local telecommunications traffic.

On March 15, 2001, Magistrate Judge Crocker entered a preliminary pretrial conference order requiring that

[b]riefs and supporting documents from all parties seeking the relief requested in the complaint must be filed and served not later than August 16, 2001. All responses and supporting documents must be filed by September 6, 2001. Any replies must be filed and served not later than September 17, 2001.

On August 14, 2001, this briefing schedule was suspended until the court issued its decision on defendant commissioners’ motion to dismiss for lack of jurisdiction. After the motion to dismiss was denied, Magistrate Judge Crocker set an amended briefing schedule on October 25, 2001, providing that

1. Plaintiff and Plaintiffs-Intervenors may have until November 15, 2001 to file initial briefs on the merits.
2. Defendant and Defendants-Intervenors may have until December 14, 2001 to file response briefs on the merits.

3. Plaintiff and Plaintiffs-Intervenors may have until December 26, 2001 to file reply briefs on the merits.

On November 15, 2001, plaintiff Ameritech filed its “Opening Brief on the Merits of its Complaint” in which it challenged as contrary to and preempted by federal law one aspect of the order: defendant commissioners’ conclusion that calls to Internet service providers are a type of local telecommunications traffic under the Telecommunications Act and thus subject to reciprocal compensation. In its brief, plaintiff Ameritech asks the court to “enter judgment in Ameritech’s favor on the Complaint, and vacate that portion of the PSCW order that mandates reciprocal compensation on Internet traffic.” Ameritech’s Opening Br. on the Merits of its Compl., dkt. #51, at 3.

In response, defendant-intervenor TDS Metrocom filed a “merit brief” on December 14, 2001, in which it responded briefly to plaintiff Ameritech’s argument, adopting by reference the arguments set forth in fellow defendant-intervenor Worldcom’s brief. Merit Br. of Intervening Dft. TDS Metrocom, Inc., dkt. #53, at 1, 3. TDS then devoted the bulk of its brief to arguing for the first time that the court should invalidate on due process grounds a separate portion of the commission’s order establishing a bifurcated rate structure for all local telecommunications traffic subject to reciprocal compensation. This was potentially problematic because, when TDS moved to intervene in this case as a defendant on February 26, 2001, it did so for the specific purpose of “uphold[ing] the determinations

made by the Commission that ISP traffic is local traffic subject to reciprocal compensation requirements.” Br. of TDS Metrocom, Inc. & Time Warner Telecom of Wis., L.P., in Supp. of Mot. to Intervene as Dfts. or, in the Alt. for Leave to Participate as Amici Curiae, dkt. #10, at 4. Nowhere in its brief in support of its motion to intervene did defendant-intervenor TDS suggest that it intended to challenge the separate portion of the commission’s order dealing with a bifurcated rate methodology for local telecommunications traffic that was not targeted by Ameritech’s complaint. As plaintiff Ameritech and defendant commissioners pointed out in support of their motion to strike, if TDS wanted to put the court and the parties on notice that it intended to assert affirmative claims against the commissioners, it should have filed a cross-claim against them under Fed. R. Civ. P. 13(g).

From the arguments of plaintiff and defendant commissioners, the motion to strike appeared reasonable. Briefing was suspended on the merits until the motion was decided. However, two developments now make the motion to strike inappropriate. First, on January 30, 2002, I granted defendant-intervenor TDS’s *unopposed* motion to amend its answer to add a cross-claim against defendant commissioners regarding the order’s bifurcated rate structure provision. Order dated Jan. 30, 2002, dkt. #62. Even though plaintiff Ameritech and defendant commissioners acquiesced in this amendment, which allows TDS to move ahead with its attack on the bifurcated rate structure, they did not alert the court to the effect this development has on their pending motion to strike. Indeed, by not opposing

TDS's motion to file a counter-claim, they seem to have abandoned their plea that the court not allow TDS to "convert itself into a plaintiff" at this late date. Why plaintiff Ameritech and defendant commissioners still want to strike a brief on a dispute that they now agree the court should hear is inexplicable. At best, they should now be seeking only their alternative remedy of allowing defendant commissioners an opportunity to respond to TDS's brief, rather than a motion to strike the brief altogether.

The second development that makes the motion to strike improper is more irksome. In defending its December 14, 2001 brief against the motion to strike, TDS argues that plaintiff Ameritech is seeking to affirm that portion of the commission's order establishing a bifurcated rate structure for all local telecommunications traffic and that, accordingly, it was entirely appropriate for TDS to challenge that portion of the order in its December 14, 2001 brief. In reply, plaintiff Ameritech and defendant commissioners point to the fact that plaintiff Ameritech has never asked the court to affirm any portion of the commission's order. That much is true. But they fail to point out that *defendant commissioners* are parties to the joint motion to strike and that they have asked the court to affirm the portion of the order that TDS seeks to challenge. Like TDS, defendant commissioners sought this affirmative relief for the first time in a response brief. On the same day that defendant-intervenor TDS submitted its response brief that is the target of the motion to strike, defendant commissioners submitted a response brief in which, among other things, they ask

the court to “[a]ffirm the Commission’s order in its entirety,” including the portion establishing the bifurcated rate structure for all local telecommunications traffic. In short, the commissioners seek to strike TDS’s response brief because it seeks affirmative relief relating to the bifurcated rate structure even though their own response brief does the same thing. If there is a good reason justifying this strategy, I cannot fathom what it is.

Given these developments, it is clear that a new scheduling order is needed. The briefs submitted by the parties raise three issues. First and foremost, the parties dispute the validity under federal law of that portion of the commission’s order declaring that dial-up Internet traffic is “a type of local telecommunications traffic for purposes of 47 U.S.C. § 251(b)(5) and 47 C.F.R. § 51.701(a)” and thus subject to the reciprocal compensation arrangements required by the Act. Second, now that defendant-intervenor TDS has filed a cross-claim against defendant commissioners, that portion of the order establishing a bifurcated rate structure for reciprocal compensation for all local traffic is at issue. Finally, several parties, including defendant commissioners and defendant-intervenors WorldCom and TDS, have asked the court in their briefs to affirm various other conclusions in the commission’s order.

As to the first issue, regarding the status of calls to Internet service providers for purposes of reciprocal compensation, plaintiff Ameritech has filed its initial brief and defendant and defendants-intervenors have filed either their own response briefs or, in the

case of defendant-intervenor TDS, have adopted the arguments set forth in another party's brief. To the extent that these response briefs deal with issues other than the classification of calls to Internet service providers for purposes of reciprocal compensation, they will be disregarded. Therefore, on this first issue, only plaintiff Ameritech's reply brief is outstanding. It will be due ten days from the date this order issues.

As to the second issue regarding the bifurcated rate structure for reciprocal compensation for all local traffic, defendant commissioners' answer to defendant-intervenor TDS's cross-claim is due on February 11, 2002, pursuant to the order issued by this court on January 30, 2002. TDS may have until February 22, 2002, in which to submit an initial brief on this claim (either by notifying the court and the other parties that it will stand by the brief it already submitted on December 14, 2001, or by submitting a new one). Response briefs will be due March 8, 2002 and TDS's reply brief will be due March 15, 2002.

The third issue involving the order's various other conclusions is more complicated. In its complaint, plaintiff Ameritech asked the court to declare the commission's entire order invalid. This sweeping request for relief appears to have been inadvertent, as plaintiff Ameritech has since made clear that it seeks to invalidate only that portion of the order dealing with reciprocal compensation for calls to Internet service providers. Perhaps believing the entire order was on the table, other parties have sought to have it broadly

affirmed. I am not convinced this court has jurisdiction to affirm the various other portions of the commission's order as some of the parties have requested, particularly when it is not clear that the parties seeking such relief have suffered any injury or that there exists the concrete adversity among the parties that is necessary to show the existence of a true case or controversy. Accordingly, any party seeking to challenge or affirm a portion of the order other than the two portions identified above must submit a brief specifically identifying the portion they are challenging or seeking to affirm and explaining to the court why such relief is proper in this proceeding. These initial briefs will be due on February 22, 2002. Any party wishing to respond to one of these briefs must do so by March 8, 2002. Reply briefs will be due March 15, 2002.

ORDER

IT IS ORDERED that

1. The motion of plaintiff Ameritech and defendants Ave M. Bie, Robert M. Garvin and Joseph P. Mettner to strike defendant-intervenor TDS Metrocom, Inc.'s brief of December 14, 2001 is DISMISSED as moot.
2. Plaintiff Ameritech is to submit a reply brief on the issue of the classification of calls to Internet service providers for purposes of reciprocal compensation by February 26, 2002.

3. Defendant-intervenor TDS's initial merits brief on the bifurcated rate structure for reciprocal compensation for all local traffic is due by February 22, 2002; response briefs are due by March 8, 2002; and defendant-intervenor TDS's reply brief is due by March 15, 2002.

4. Any party seeking to challenge or affirm any other portion of the order must submit a brief specifically identifying the portion at issue and explaining why such relief can be had in this proceeding by February 22, 2002. Any party wishing to respond to one of these briefs must do so by March 8, 2002. Reply briefs will be due March 15, 2002.

5. If the parties have any questions about any aspect of this order, they may request a telephone hearing before the court.

Entered this 12th day of February, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge