IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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

Plaintiff,

OPINION AND ORDER

v.

01-C-0690-C

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.,

Defendant-Intervenor.

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This is a civil action for declaratory and injunctive relief in which plaintiff Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin, challenges a final decision issued by the Public Service Commission of Wisconsin on September 25, 2001. Plaintiff contends that the decision violates the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, as codified in scattered sections of Title 46 of the United States Code, by (1) requiring plaintiff, an incumbent local exchange carrier, to combine certain unbundled network elements for new entrants and (2) imposing a tariffing requirement.

The case is before the court in an unusual posture. At the briefing stage, plaintiff substituted a new claim for the claim it had alleged in its amended complaint without seeking leave to amend its complaint to delete its original claim and assert a replacement claim. Not surprisingly, defendants object to plaintiff's change of position as one that they were not prepared to address. I agree with defendants that the new claim is not properly before the court. Even if it were, it would have to be dismissed for lack of subject matter jurisdiction because it fails to state a case or controversy. In addition, I conclude that because plaintiff failed to argue the claim it pleaded in its amended complaint, it has waived that claim. As to the second count of plaintiff's amended complaint, I find that the commission's final decision imposes a tariff that an entrant may select in lieu of negotiating an interconnection agreement and that the decision is inconsistent with § 252 of the Telecommunications Act and preempted by it. Accordingly, I will grant plaintiff's request for a declaration of the invalidity of the tariff requirement.

BACKGROUND

On September 25, 2001, defendant commissioners issued a final decision that required plaintiff (an incumbent local exchange provider) to provide two types of network element combinations to new entrants: unbundled network element platforms and extended enhanced links. Final Decision: Investigation into Ameritech Wisconsin Operational Support Systems, Docket 6720-TI-160, at 16 (Sept. 25, 2001). Network elements are the equipment and facilities used to run the telephone network and provide services. 47 U.S.C. § 153(29). Two aspects of the decision are at issue. First is the requirement

that plaintiff "offer current and new combinations of both UNE-Ps and EELs in interconnection agreements and related negotiations consistent with federal law." Id. at 31. Second is the requirement that plaintiff offer these combinations as a "general proposition" by means of a tariff, id. at 17-18, that is, by setting out a general statement of terms and conditions under which plaintiff must make the combinations available to any new entrant who asks for them.

The commission did not make tariffs the exclusive means by which plaintiff was to offer unbundled network element platforms and extended enhanced links combinations; it recognized that plaintiff could provide the combinations through interconnection agreements, pursuant to 47 U.S.C. §§ 251-52. Final Decision at 17. In response to plaintiff's argument that the Telecommunications Act does not allow state commissions to require incumbents to sell services, network elements or interconnections by tariff, rather than by negotiated agreement, the commission held that preemption would not apply because it was requiring tariffs for two services only. "[T]he services together cannot create a complete regime of state-ordered tariffed interconnection offerings that bypass §§ 251 and 252 altogether. Furthermore, the [Telecommunications Act]'s contemplation of tariffing to satisfy [a Statement of Generally Available Terms] requirements in § 252(f)(1) and the state action protection afforded in §§ 251(d)(3), 252(e)(3), and 261(c) strongly imply that Congress was not preempting state power to order tariffing of services otherwise consistent with the [Telecommunications Act]." Final Decision at 18.

On October 15, 2002, plaintiff sought a rehearing before the commission, arguing in relevant part that "neither state nor federal law permit [sic] the Commission to require [plaintiff] to offer new combinations of unbundled network element platforms (UNE-Ps) or extended enhanced links (EELs)."

Order Denying Rehearing: Investigation into Ameritech Wisconsin Operational Support Systems, Docket 6720-TI-160, at 2 (Nov. 14, 2001). On December 13, 2001, plaintiff filed this cause of action. On January 30, 2002, the proceedings were stayed on the parties' motion, awaiting the Supreme Court's ruling in Verizon Communications, Inc. v. Federal Communications Commission. On May 13, 2002, when the Supreme Court issued its opinion in Verizon, 535 U.S.___, 122 S. Ct. 1646 (2002), the stay lifted automatically.

OPINION

A. Count I: Combining Unbundled Network Elements

1. Sufficiency of the pleadings

The initial question is whether plaintiff is asserting an entirely new claim in place of the issue it pleaded in its amended complaint. Originally, plaintiff argued that the commission's decision was unlawful because it requires incumbents, rather than entrants, to combine unbundled elements; now it argues a different issue: the commission's decision is unlawful because it lacks any terms and conditions that limit an incumbent's duty to combine unbundled elements. Plaintiff denies it made any material change in its position. It argues that the only issue is whether remand is "appropriate to allow the Commission to conform its Order to a recent, controlling decision of the United States Supreme Court, when the Commission's Order does not reflect (and could not have reflected) the specific holding of the Supreme Court [in Verizon, 122 S. Ct. 1646]?" Plt.'s Reply Br., dkt. #27, at 2.

Plaintiff's characterization of its original claim is much broader than the claim it alleged in its amended complaint. Plaintiff alleged that the "Commission's requirement that [plaintiff, an incumbent,] combine network elements for [entrants] is contrary to and preempted by controlling federal law." Plt.'s Am. Cpt., dkt. #14, at ¶ 35. Plaintiff contended that the commission was required to follow the court's ruling in Iowa Utilities Bd. v. Federal Communication Commission, 219 F.3d 744 (8th Cir. 2000), that it "is not the duty of the [incumbent] to 'perform the functions necessary to combine unbundled network elements in any manner' as required by the FCC's rule." Plt.'s Am. Cpt., dkt. #14, at ¶¶ 36, 38 (quoting Iowa Utilities, 219 F.3d at 759). Moreover, the parties stipulated in their preliminary pre-trial conference report that "[i]t is [plaintiff's] position that the 1996 Act requires [entrants] to perform the task of combining network elements, and that the [commission's] [d]ecision is contrary to and preempted by federal law." Prelim. Pre-Trial Conf. Rpt., dkt. #11, at 2.

Now, plaintiff has changed its claim of unlawfulness from an attack on the commission's insistence that the incumbent must provide new combinations of network elements to an entirely different one that the commission may require incumbents to combine network elements for entrants only if the requesting carrier is unable to combine those elements, if it would not place the incumbent at a competitive disadvantage and if it would not place competing carriers at a competitive disadvantage. This change in posture is a direct response to the Supreme Court's holding in Verizon, 122 S. Ct. at 1687, that incumbents must provide unbundled network elements to entrants in certain circumstances.

Plaintiff concedes that the holding in "Verizon moots [its] argument to the extent that [the

argument] relies upon [Iowa Utilities, 219 F.3d 744]," but argues that its original claim encompasses the argument that the commission has authority to require incumbents such as plaintiff to create combinations only in the circumstances specified in Verizon. Plaintiff notes correctly that the Court of Appeals for the Seventh Circuit has emphasized the liberal nature of notice pleading, see, e.g., Bennett v. Schmidt, 153 F.3d 516, 518 (7th Cir. 1998) (holding that discrimination complaint need allege only "I was turned down for a job because of my race" to conform with Fed. R. Civ. P. 8(a)), but overstates the scope of the court of appeals' approach. The court has not abandoned the requirement that a plaintiff must give her opponent "fair notice of what [her] claims is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957). If a plaintiff alleges she was turned down for a job because of her race, she cannot argue later that she was discriminated against on the basis of gender, without amending her complaint. By shifting its position as to *which aspect* of the commission's ruling is allegedly unlawful (not to be confused with *which legal theory* makes the ruling unlawful), plaintiff is arguing a claim it never pleaded.

2. Waiver

Defendants and defendant-intervenor have divergent viewpoints as to which claim plaintiff has waived. Interesting as their positions are, however, it is not necessary to discuss them in any detail. Plaintiff waived its *original* claim (as pleaded in its amended complaint) because it never briefed it. Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999) ("Arguments not developed in any meaningful way are waived."). It cannot

argue its new claim because it did not amend its complaint to assert the new claim, so as to give defendants fair warning it was raising it, and for the additional reason that it cannot show the existence of an actual case or controversy.

(Defendants contend that plaintiff "waived" its new claim by failing to raise it before the state commission. In so contending, they seem to be relying on a non-existent exhaustion requirement. Claims brought under § 251 or § 252 of the Telecommunications Act do not require exhaustion of administrative remedies, only a final determination by the commission. 47 U.S.C. § 252(e)(6). Defendants do not argue that plaintiff is trying to appeal an issue that was never the subject of a final determination; that might be another ground for not entertaining the claim, if one were needed.)

Plaintiff argues that because the commission's final decision lacks any terms and conditions, it "appears" to impose a duty on plaintiff that "goes beyond what the Act and the FCC's rules authorize," Plt.'s Merits Br., dkt. #19, at 12, and "appears" to impose a duty to combine "in any circumstance." Id. at 13. Ignoring the effect of its own tentative language, plaintiff asserts that a controversy exists because the commission has failed to state affirmatively either that it is bound by the ruling in Verizon, 122 S. Ct. 1646, or that its final decision does not impose any additional duties on plaintiff to combine beyond those set forth in Verizon. Plaintiff's concerns do not turn this issue into a justiciable case or controversy. See Preiser v. Newkirk, 422 U.S. 395, 401 (1975) (federal court lacks power to render advisory opinions); see also Wisconsin Right to Life, Inc. v. Paradise, 138 F.3d 1183, 1187 (7th Cir. 1998) ("A court is not permitted to prescribe how a state must deal with disputes that have never arisen and may never do so . . . . Such a foray is the paradigm of an advisory opinion."); North American

Natural Resources, Inc. v. Strand, 252 F.3d 808, 814 (6th Cir. 2001) (no case or controversy when challenge is based "not on what the [state commission] has done, but rather on what it has not done").

Plaintiff argues alternatively that it has a "well-founded fear that the Commission will seek to exceed the limits imposed by Verizon under the rubric of 'consistent' state regulation" and that this fear is enough to render an opinion non-advisory. In support of its position, plaintiff cites Virginia v. American Booksellers Ass'n, 484 U.S. 383, 393 (1988), a First Amendment case in which the Court held that a pre-enforcement challenge to a state statute prohibiting the commercial display of sexual material allegedly harmful to juveniles did not deprive booksellers of standing to maintain suit because (1) the state had not suggested that the newly enacted law would not be enforced; (2) the booksellers alleged an actual and well-founded fear that the law would be enforced against them; and (3) the alleged danger was in large measure one of self-censorship, a harm that could be realized without actual prosecution. However, merely proclaiming that one has a "well-founded fear" is not enough to establish the truth of the proclamation.

On its face, plaintiff's assertion is inconsistent with the explicit provisions in the commission's ruling that plaintiff is to offer combinations "consistent with federal law." Final Decision, 6720-TI-160, at 31. Unless and until defendant commissioners set forth specific combination requirements that plaintiff can show exceed the limits prescribed in Verizon, no case or controversy exists.

B. Count II: Tariffing Requirement

Count II raises the question whether a state commission can require incumbents to provide

unbundled access through a tariff, that is, a statement of the fixed terms upon which the incumbent will sell network elements to any competitor, or whether the Telecommunications Act prohibits commissions from requiring incumbents to sell network elements by any method other than the negotiated agreement provided for in § 252 of the Act. Plaintiff argues that a commission cannot impose such a requirement; defendants disagree.

Under the Telecommunications Act, incumbent local exchange carriers must resell their telecommunications systems by negotiating binding agreements with competitors. 47 U.S.C. § 251(b)(1). If there is a request for "interconnection, services, or network elements . . . an incumbent local exchange carrier may negotiate and enter into a binding agreement." 47 U.S.C. § 252(a)(1). Both the incumbent and competitor must negotiate in good faith. 47 U.S.C. § 251(c)(1). If the parties are unable to reach an agreement, either party may petition for binding arbitration before the state commission, 47 U.S.C. § 252(b), under arbitration standards set by the act for application by the state commission. 47 U.S.C. § 252(c) and (d).

In determining the legality of any state-imposed requirement on the telecommunications industry, a court must consider the interplay of federal and state law. In the Telecommunications Act, Congress gave sweeping authority to the federal government to regulate telecommunications, see, e.g., AT & T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 379 n.6 (1999) ("With regard to the matters addressed by the [Telecommunications] Act," the federal government has "taken the regulation of local telecommunications competition away from the States"). In the same act, however, Congress acknowledged the role of state governments in fostering industry competition. See 47 U.S.C. § 261

(state commissions can impose their own rules "in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of the [Telecommunications Act]").

In this case, the commission found that unbundled network element platforms and extended enhanced links combinations "qualify as unbundled access" under Wis. Stat. § 196.01(1b), and concluded that "they must be tariffed by [plaintiff] pursuant to Wis. Stat. §§ 196.196(2)(a) and 196.219(2m)." Final Decision, at 17-18. Acknowledging that these combinations "can also be sought in new interconnection agreements under [47 U.S.C.] §§ 251 and 252," the commission stated that it was not attempting to create "a complete regime of state-ordered tariff offerings that bypass §§ 251 and 252 altogether." Id. The question is whether the commission was correct about the nature of its tariff requirement and whether that requirement is consistent with the procedures Congress prescribed in § 252 for gaining access to unbundled elements.

Congress spoke directly to the issue of gaining access to network elements by enacting § 252, a detailed procedure for reaching agreements for the sale of network elements, services and interconnection. The commission's decision requires plaintiff to sell certain combinations of network elements using a procedure that allows an entrant to bypass the Telecommunications Act's provisions for negotiation by opting for the tariff, at least as to the two combinations covered by the decision.

Even if a state-imposed tariff furthers competition, as the commission's action seems to do, it may be preempted "'if it interferes with the *methods* by which the federal statute was designed to reach [its] goal.'" Verizon North, Inc. v. Strand, 140 F. Supp. 2d 803, 809 (W.D. Mich. 2000) (emphasis added) (quoting Gade v. National Solid Waste Management Ass'n, 505 U.S. 88 (1992)). In Verizon

North, the tariff at issue required the incumbent to offer its network elements and services for sale on fixed terms without requiring negotiation of an interconnection agreement. In that respect, it was like the tariff struck down in MCI Telecommunications Corp. v. GTE Northwest, Inc., 41 F. Supp. 2d 1157 (D. Or. 1999), because it "*completely* displace[d] the interconnection agreement" and for that reason, was inconsistent with the act and preempted by it. Verizon North, 190 F. Supp. 2d at 809. (Emphasis added). The Oregon tariff dispensed with the interconnection agreement mechanism and allowed entrants to order services "off the rack" without entering into an interconnection agreement. MCI, 41 F. Supp. 2d at 1176. In effect, the state established a procedure that bypassed the Act entirely and ignored the procedures and standards that Congress had established. Id. at 1178. In Verizon North, 140 F. Supp. 2d at 810, the court found Michigan's tariff requirement improper because "Congress designed a deregulatory process that would rely in the first instance on private negotiations to set the terms for implementing new duties under the Act" and requiring the incumbent "to file public tariffs offering its network elements . . . to any party . . . evades the exclusive process required by the 1996 Act, and effectively eliminates any incentive to engage in private negotiation, which is the centerpiece of the Act."

In this case, the state commission did not impose a tariff requirement that covered all possible network elements, services or interconnections but limited the requirement to only two network combinations (unbundled network element platforms and extended enhanced links). However, the net effect is the same. By forcing the incumbent to file a tariff that any entrant can select unilaterally without having to negotiate an interconnection agreement, the commission has imposed a requirement

that circumvents the interconnection agreement process prescribed under § 252.

Defendants try to distinguish the state's tariff, arguing that it is not the exclusive means to gain access to unbundled network element platforms and extended enhanced links. This distinction holds up only if the entrant chooses to negotiate an interconnection agreement rather than opting for the tariff. The "non-exclusivity" of the tariff applies only to the extent that an entrant decides against it; the incumbent has no choice in the matter. It is not persuasive that, as defendants argue, "any [entrant] having a healthy respect for its competitive and financial well-being is likely to negotiate for better pricing than the average pricing represented by tariffs." Dfts.' Resp., dkt. #22, at 27. This possibility does not make the entrant's choice any less unilateral. Rather, it raises the question why the commission would impose tariff requirements it thinks only unsophisticated entrants will use.

Defendants argue that tariffs are not inconsistent with the Telecommunications Act, as demonstrated by the fact that negotiating parties may incorporate tariffs into their interconnection agreements. See, e.g., U.S. West Communications, Inc. v. Sprint Communications Co., L.P., 275 F.3d 1241 (10th Cir. 2002) (tariffs may be opted for as part of interconnection agreement). This is correct but irrelevant. The issue is not the ability of the incumbent and entrant to agree on the use of a tariff within an interconnection agreement. Rather, the issue is whether it is permissible in light of § 252 to force the incumbent to issue a tariff that an entrant can select unilaterally without negotiating an interconnection agreement.

I am persuaded by Verizon North and Michigan Bell that because the commission's final decision allows the entrant to choose a tariff over an interconnection agreement, it creates a means of

evading the interconnection agreement process established in § 252. Like the tariffs in Verizon North and Michigan Bell, the tariff in this case completely displaces the incumbent's ability to negotiate unbundled network element platforms and extended enhanced links combinations through congressionally prescribed interconnection agreements when the entrant opts for the tariff.

Plaintiff points out that in a recent decision, the FCC held that:

> Consistent with the [Telecommunications Act's] recognition of parties' right to negotiate interconnection agreements, the parties are certainly free to agree that services will be provided pursuant to tariffs filed with the appropriate [state] commission, and they have done so with respect to certain services. Where the parties fail to agree, however, and ask a state commission to set rates or resolve other issues relating to the interconnection agreement, a carrier cannot use tariffs to circumvent the Commission's determinations under section 252 or the right to federal court review under section 252(e)(6).

In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, No DA-02-1731, 2002 WL 1576912, Memorandum Opinion & Order, at ¶ 602 (July 17, 2002). In this ruling, the FCC was approving the parties' agreement that services would be provided pursuant to tariffs. In stark contrast, under the regime proposed in this case, the parties *do not agree* that services will be provided pursuant to a tariff. An entrant can opt for the tariff unilaterally without having to reach an agreement with the incumbent. This would violate the FCC's ruling that, if the parties fail to agree, a carrier cannot simply resort to a tariff to solve the disagreement. See also U.S. West, 275 F.3d at 1250 (upholding tariff requirement that did not allow entrants to order services "off the rack" but did allow them to incorporate tariffs into their interconnection agreements; tariff provision did not allow entrant to bypass

interconnection agreement).

Defendants argue that the FCC held in another order that it was permissible to use a tariff that imposed a 5% minimum discount because "if the five percent discount is unattractive, there is nothing in [the tariff] that prohibits [entrants] from seeking flat rated local exchange service for resale through negotiation and arbitration pursuant to sections 251 and 252 of the Act." See In the Matter of The Public Utility Commission of Texas, 13 F.C.C.R. 3460, No. FCC 97-346, at ¶¶ 138-39. (Oct. 1, 1997). This holding is inapplicable because it centers on the conflict between a tariff and two substantive provisions of the act, rather than the permissible *method* for obtaining these services. Moreover, the FCC stated that it "accept[s] the Texas Commission's interpretation that this provision presents an option that [entrants] may elect under state law, but in no way interferes with a carrier's ability to invoke the negotiation and arbitration procedures in the Communication Act." Id. at ¶ 15. In this case, by contrast, the tariff interferes with the incumbent's ability to invoke the interconnection agreement procedures in situations in which the entrant opts for the state-imposed tariff.

Because defendant commissioners' final decision imposes a tariff that the entrant may select unilaterally in lieu of the interconnection agreement process, it is inconsistent with § 252 of the Telecommunications Act. Accordingly, plaintiff's request for a declaration of invalidity will be granted.

ORDER

IT IS ORDERED that

1. The request for a declaration by plaintiff Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin,

that the Public Service Commission of Wisconsin has violated the Telecommunications Act of 1996 by requiring in its Final Decision: Investigation into Ameritech Wisconsin Operational Support Systems, Docket 6720-TI-160 (Sept. 25, 2001), that incumbents combine unbundled network element platforms and extended enhanced lines for new entrants is DENIED;

2. Plaintiff's request for a declaration that the commission's tariffing requirement is inconsistent with and preempted by Telecommunications Act of 1996 is GRANTED; and IT IS DECLARED that the commission's tariffing requirement, as set forth in its Final Decision: Investigation into Ameritech Wisconsin Operational Support Systems, Docket 6720-TI-160 (Sept. 25, 2001), is inconsistent with and preempted by § 252 of the Telecommunications Act.

Entered this 26th day of September, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge