IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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

OPINION AND
ORDER

Plaintiff,

03-C-430-C

v.

BURNEATTA BRIDGE, AVE M. BIE and
ROBERT M. GARVIN, in Their Capacity
as Commissioners of the Public Service
Commission of Wisconsin and Not as Individuals,

Defendants,

and

AT&T COMMUNICATIONS OF WISCONSIN, L.P.,
TDS METROCOM, LLC and
WORLDCOM, INC. d/b/a MCI,

Intervening Defendants.

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This is another case arising from the changes brought about by the Telecommunications Act of 1996, which "fundamentally restructure[d] local telephone markets." AT&T Corp. v Iowa Utilities Board, 525 U.S. 366, 370 (1999). Plaintiff Wisconsin Bell, Inc., d/b/a/ SBC Wisconsin, is what the act calls an "incumbent local

exchange carrier," meaning that before 1996, it held a state-sanctioned monopoly in Wisconsin to provide local telephone service. Believing that current technology could support more competition, Congress passed the Telecommunications Act to secure lower prices for consumers and encourage the development of new technology. MCI Telecommunications Corp. v. Illinois Bell Telephone Co., 222 F.3d 323, 327 (7th Cir. 2000). Further, because new entrants into the market would be unable to build an infrastructure while remaining competitive with the incumbent, the act requires incumbents to allow competitors, or "competing local exchange carriers," to purchase access to elements of the incumbent's local telephone networks. 47 U.S.C. § 251(c)(3); Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635, 638 (2002). (A "network element" is "a facility or equipment used in the provision of a telecommunication service" and the features, functions, and capabilities that are provided by means of such facility or equipment." 47 U.S.C. § 153 (29).)

Under the act, incumbents and competitors may agree voluntarily on which elements of the network must be made available, or "unbundled," and at what rate. 47 U.S.C. § 252(a). If they cannot agree, the state commission must determine a "just and reasonable" rate that is "nondiscriminatory" and "based on the cost . . . of providing the interconnection or network element." 47 U.S.C. § 252(d)(1). Although these standards provide only general guidance to commissions, Congress has authorized the Federal Communications

Commission to promulgate rules "determining what network elements should be made available" to competitors and to otherwise "implement the requirements" of the act. 47 U.S.C. §§ 201(b) and 251(d)(1)-(2). This includes the methodology for determining the prices that the incumbent may charge the competitor. AT&T Corp., 525 U.S. at 384-85. The FCC has exercised this authority in the form of 47 C.F.R. §§ 51.505-.515, setting forth a method called "total element long-run incremental cost." This method "obliges both incumbents and state regulators to set prices based on the long-run costs that would be incurred to produce the services in question using the most efficient telecommunications technology now available, and the most efficient network configuration." AT&T Communications of Illinois, Inc. v. Illinois Bell Telephone, 349 F.3d 402, 405 (7th Cir. 2003).

At issue in this case are two orders of the Public Service Commission of Wisconsin in which the commission determined which network elements plaintiff had to make available to its competitors, the rates plaintiff could charge its competitors for use of those elements and the methodology used to determine the rates. Final Decision, Docket No. 6720-TI-160 (March 22, 2002); UNE Compliance Order, Docket No. 6720-TI-160 (July 9, 2003). In its complaint, plaintiff identifies six allegedly erroneous determinations made by the commission in these orders: (1) the methodology for determining "joint and common" costs; (2) the methodology for determining the costs of "unbundled local switching" and "shared

transport"; (3) the requirement to include digital subscriber line network architecture as an unbundled network element; (4) the requirement to include the high-frequency portion of a copper loop as an unbundled network element; (5) the methodology for determining "loop" prices; and (6) the methodology for determining "non-recurring" charges.

Several of plaintiff's competitors have intervened, both to defend the commission's determinations that plaintiff is challenging and to raise their own challenges to the orders. The cross-claim of intervening defendant AT&T Communications of Wisconsin, L.P., contains one count challenging the commission's decision to include operating support system test costs in the joint and common costs. The cross-claims of intervening defendants Worldcom, Inc. d/b/a/ MCI, and TDS Metrocom, LLC, include the same claim in addition to three other claims, one challenging the calculation of the "maintenance factor" and two challenging the process that the commission provided to the parties before making its determinations. Both MCI and TDS later dismissed the claim regarding the maintenance factor and one of the claims of inadequate process; their remaining procedural claim is that the commission failed to provide adequate process to them before deciding that the operating support system testing costs would be included as part of the joint and common costs.

The parties have each submitted "briefs on the merits," which I construe as motions for judgment on the pleadings under Fed. R. Civ. P. 12(c). However, I conclude that I

cannot rule on the merits of any the parties' claims at this time. I will dismiss as unripe for review plaintiff's claims that the commission erred in requiring plaintiff to provide its competitors with access to its digital subscriber line network architecture and the high frequency portion of its copper loop. With respect to plaintiff's remaining claims and intervening defendants' claims, the parties have failed to establish that the commission's determinations caused them an injury sufficient to create a case or controversy under Article III of the Constitution. Rather than dismiss these claims, I will allow the parties an opportunity to submit evidence demonstrating that they have standing to sue.

OPINION

A. Standing

The majority of plaintiff's challenges to the Public Service Commission's orders involve the commission's application of the Federal Communication Commission's pricing rules. Intervening defendants' solitary challenge to the orders is based on the commission's decision to include operating support system testing costs as part of the "joint and common costs" that plaintiff could recover from intervening defendants. (TDS and MCI are contending also that they did not receive due process before the commission made its decision on this issue.) As defendants point out, each of these asserted errors is only *one factor* in a larger formula that the commission applies to determine rates that plaintiff may

charge for various elements of its network. Because one lower factor may be offset by higher factors elsewhere (or vice versa), the final rate for a particular element will not necessarily be affected because one factor is understated (or overstated). AT&T Communications of Illinois v. Illinois Bell Telephone Co., 349 F.3d 402, 408 (7th Cir. 2003). In this case, plaintiff and intervening defendants have focused on factors that *may influence* the final rate without showing how the isolated determinations *actually affected* what plaintiff would be entitled to charge intervening defendants. This raises the question whether the parties have adequately shown that they have standing to challenge the commission's decision as to these issues.

To create a "case or controversy" under Article III of the Constitution, a party seeking relief in federal court must show that it has suffered an "injury in fact," which is "concrete," "distinct and palpable," and "actual or imminent," as opposed to "conjectural" or "hypothetical." E.g., McConnell v. Federal Election Commission, 124 S. Ct. 619, 707 (2003). In addition, the party must show that its injury is "fairly traceable" to the defendant's conduct and that there is a "substantial likelihood" that the requested relief will redress the harm. Id. Without such a showing, the court is without jurisdiction to consider the party's arguments on the merits. Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 778 (2000) ("Questions of jurisdiction, of course, should be given priority—since if there is no jurisdiction there is no authority to sit in judgment of

anything else.")

In other words, it is not enough for plaintiff or intervening defendants to say that the commission is applying the wrong methodology; they must show that the commission's decision has resulted in an increased rate (for defendants) or a decreased one (for plaintiff). With one exception, plaintiff did not even *allege* any injury in its complaint other than that the commission's determinations "violated federal law," which is not sufficient. Allen v. Wright, 468 U.S. 737, 754 (1984) ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.") Intervening defendants similarly allege that the commission erred in including operating support system testing costs in its calculation for joint and common costs without alleging whether this had any effect on any of the final rates. A preliminary inquiry in any standing analysis is whether the party has "allege[d] facts from which it reasonably could be inferred that, absent the [defendants' conduct], there is a substantial probability that" the party would not have incurred a concrete injury. Warth v. Seldin, 422 U.S. 490, 504 (1975).

Plaintiff does allege in its complaint that the commission's calculation regarding fill factors resulted in prices that are "understated" and "do not allow SBC Wisconsin to recover its TELRIC costs." Plt.'s Cpt., dkt. #2, at ¶77. Although this allegation might be enough to survive a motion to dismiss, it is insufficient to establish standing conclusively for the

purpose of ruling on the merits. Rather, the parties must demonstrate with competent evidence that the commission's determinations adversely affected a legally protected interest. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) ("Since [the elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation."); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231-236 (1990) (dismissing claim because record did not affirmatively establish existence of standing). As defendants point out, plaintiff and intervening defendants have failed to point to any rate set by the commission that would be different if the commission's determinations were reversed, much less show *how* those rates would be different. Before I may rule on the merits of the parties' claims regarding the methodology employed by the commission, they will have to submit evidence showing whether and how the commission's determinations affected the rates.

B. Ripeness

The only claims that do not involve challenges to the commission's methodology are plaintiff's claims that the commission erred in concluding that plaintiff must provide competitors with unbundled access to both its "Project Pronto" digital subscriber line

network architecture and the high-frequency portion of its loop (HFPL). Plaintiff argues that the commission's decision violates federal law holding that these two network elements do not need to be unbundled. United States Telecom Association v. FCC, 290 F.3d 415 (D.C. Cir. 2002); In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, FCC 03-36 (Aug. 21, 2003) However, plaintiff acknowledges that the commission stayed "all its determinations relating to the Project Pronto and the HFPL issues" in the July 9, 2003 UNE Compliance Order because it anticipated that the FCC's upcoming order might change the requirements as to these issues.

Defendants argue in their brief that plaintiff's claims on these issues are not ripe for review because the commission has neither enforced its determinations nor indicated that it will do so any time in the future. Although plaintiff acknowledges defendants' position in its reply brief, it does not even attempt to argue that it would suffer any hardship if this court did not review the commission's determination and it does not otherwise address any of the factors courts must consider in deciding whether a claim is ripe. Wisconsin Bell, Inc. v. Bie, 216 F. Supp. 2d 864, 872 (W.D. Wis. 2001) (setting forth factors); see also AT&T Corp., 525 U.S. at 386 ("When . . . there is no immediate effect on the plaintiff's primary conduct, federal courts normally do not entertain pre-enforcement challenges to agency rules and policy statements.") Accordingly, I conclude that plaintiff has waived any argument that

these claims are ripe for review. Renne v. Geary, 501 U.S. 312, 316 (1991) (burden to show ripeness is on proponent of exercise of jurisdiction).

ORDER

IT IS ORDERED that

1. The following two claims of plaintiff Wisconsin Bell, Inc. d/b/a/ SBC Wisconsin are DISMISSED as unripe for review: (1) the Public Service Commission of Wisconsin erred in determining that plaintiff's digital subscriber line network architecture must be made available to competitors and (2) the Public Service Commission of Wisconsin erred in determining that the high frequency portion of plaintiff's copper loop must be made available to competitors.

2. With respect to the remaining claims of plaintiff and intervening defendants AT & T Communications of Wisconsin, L.P., TDS Metrocom, LLC and Worldcom, Inc. d/b/a/ MCI, plaintiffs and intervening defendants may have until May 17, 2004, in which to submit materials to the court demonstrating that they have standing to sue. Defendants Burneatta Bridge, Ave Bie, and Robert Garvin may have until June 1, 2004, in which to file

a response.

Entered this 30th day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge