



Public Service Commission

-M-E-M-O-R-A-N-D-U-M-

DATE: APRIL 7, 1999

TO: JOE GARCIA, CHAIRMAN
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FROM: DAVID E. SMITH, DIRECTOR OF APPEALS *DES*

RE: TIME WARNER AXS OF FLORIDA, L.P. V. FLORIDA PUBLIC SERVICE COMMISSION, CASE NO. 4:98 CV 62-RH, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE

Attached is a copy of Judge Hinkle's Order granting summary judgment for the Commission in the above case. Time Warner brought the suit when it was denied intervention in the BellSouth-MCI/AT&T arbitration proceedings to set permanent UNE rates. Time Warner had claimed that because it had negotiated agreements with BellSouth that tied its UNE rates to those set in the MCI and AT&T agreements, it should be allowed to participate in the Commission proceedings. Alternatively, Time Warner asked the Commission to conduct a generic proceeding to set UNE rates for BellSouth.

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MEMORANDUM
Page -2-
April 7, 1999

In the federal district court, Time Warner claimed that it had the right to participate at the Commission under the Telecommunications Act of 1996 (the Act) and that its due process rights had been violated by its exclusion. ACSI, which also had sought intervention at the Commission, joined the federal suit as plaintiff-intervenor. After Time Warner moved for summary judgment, the Commission countered with a motion to dismiss and cross-motion for summary judgment. The Court granted the Commission's motion.

The Court concluded that 47 U.S.C. §252(e)6 of the Act, that allows federal court review of state commission-approved arbitration agreements, provided a no basis for review of Time Warner's denial of intervention. The Court found, however, that it had general federal question jurisdiction under 28 U.S.C. §1331 to entertain Time Warner's due process claims against individual Commissioners. As for Time Warner's attempt to name the agency a defendant, the Court determined that such a suit was barred by the Eleventh Amendment. That Amendment prohibits suits against states in federal court.

In rejecting Time Warner's due process claims, Judge Hinkle likened Time Warner's and ACSI's position to that of a borrower who, having negotiated a loan tied to the discount rate, then claimed a right to participate in Federal Reserve Board proceedings because the Board's actions affects interest rates. Time Warner's and ACSI's voluntary agreements to true-up UNE rates based on the AT&T and MCI arbitrations provided no basis for a claim of deprivation of due process.

Judge Hinkle's opinion vindicates the Commission's interpretation of it Act as not contemplating third-party intervention in arbitration proceedings. It also establishes that the Court will narrowly construe its jurisdiction to review Commission actions under the Telecommunications Act. Apparently, the judge feels that 47 U.S.C. § 252(e) (6) does not provide an open door to the federal court house for review of every action taken in fulfilling the Act's requirements.

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

TIME WARNER AXS OF FLORIDA, L.P.,

Plaintiff,

v.

CASE NO. 4:98cv62-RH

FLORIDA PUBLIC SERVICE
COMMISSION, et al.,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANTS

This action arises from a contract entered between plaintiff Time Warner AXS of Florida, L.P. and BellSouth Telecommunications, Inc. Under the contract, BellSouth provides telecommunications services to Time Warner, and the price BellSouth ultimately receives from Time Warner for certain of those services may depend on the price the Florida Public Service Commission establishes as the price to be charged by BellSouth to other companies for the same services.

ENTERED ON DOCKET 4/1 BY pk
[Rules 58 & 79(a) FRCP or 32(d)(1) & 55 FRCRP]

Copies mailed to:

J. J. ...
Judge ...
Smith Caswell
Indley

U.S. DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE, FLORIDA

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Time Warner sought to intervene in the Florida Public Service Commission proceeding in which the determination was to be made of the price BellSouth would charge those other companies. The Commission denied the motion to intervene.

Time Warner alleges in this lawsuit that the Commission's denial of its motion to intervene violated the federal Telecommunications Act of 1996 and the Due Process Clause of the United States Constitution. Time Warner has named as defendants the Commission and its individual commissioners. American Communications Services, Inc. ("ACSI"), which like Time Warner entered a contract with BellSouth with prices possibly tied in part to prices BellSouth was allowed to charge other companies, has intervened as a plaintiff.

Defendants have moved to dismiss the complaint or for summary judgment. Defendants assert the court lacks jurisdiction, that the action is barred by the Eleventh Amendment, and that Time Warner's claims are unfounded on the merits. I conclude that the court has jurisdiction over the claims against the individual commissioners but that the Commission itself has Eleventh Amendment immunity. I conclude further that the Commission's denial of

intervention violated neither the Telecommunications Act nor the Due Process Clause. I thus grant the motion to dismiss or for summary judgment.

Background - The Agreements

The Telecommunications Act, which seeks to open local telephone service to competition, allows an incumbent local exchange carrier such as BellSouth and any other carrier to negotiate a voluntary agreement under which the local exchange carrier will provide interconnection, services or network elements to the other carrier. See 47 U.S.C. § 252(a)(1). The Act also allows any party who has made or received a request for negotiation of such an agreement to petition the state public service commission for binding arbitration of any open issues. See 47 U.S.C. § 252(b). Any such agreement, whether adopted by negotiation or arbitration, must be submitted to the state commission for approval. See 47 U.S.C. § 252(e).

On June 1, 1996, Time Warner entered into a negotiated agreement with BellSouth. Neither side petitioned the Commission to request arbitration of any contract term. The Commission issued an order approving the negotiated

agreement on September 24, 1996.

The parties later voluntarily entered, and the Commission approved, an amendment to the agreement under which they would adjust or "true up" interim rates for certain unbundled network elements ("UNEs"). For the elements subject to the "true up," the amendment provides:

The true-up will consist of comparing the actual volumes and demand for each item[], together with the price associated with such item by this Amendment, with the final prices determined for each item. Each party shall keep its own records upon which a true-up can be based and any final payment from one party to the other shall be in an amount agreed upon by the parties based on such records. In the event of any disagreement as between the records or the Parties regarding the amount of such "true-up", the Parties agree that the body having jurisdiction over the matter for the affected states shall be called upon to resolve such differences, or that they will submit the matter to commercial arbitration in accordance with the terms contained in Article XX of the Interconnection Agreement.

(Doc. 25, Exh. 4, Amendment ¶ 5).

Like Time Warner, ACSI amended an initial interconnection agreement with incumbent BellSouth to include a pricing "true up" provision. The amendment provides:

The Parties agree that the prices reflected herein shall be "true-up" (up or down) based on final prices either determined by further agreement or by a final order (including any appeals) of the relevant public service commission or other body having jurisdiction over the subject matter of this Amendment, which final order meets the criteria contained in paragraph 4 hereof. The "true-up" will consist of comparing the actual volumes and demand for each item, together with the price associated with such item by this Amendment, with the final prices determined for each item. Each party shall keep its own records upon which a "true-up" can be based and any final payment from one party to the other shall be in an amount agreed upon by the Parties based on such records. In the event of any disagreement as between the records or the Parties regarding the amount of such "true-up", the Parties agree that the body having jurisdiction over the matter for the affected states shall be called upon to resolve such differences, or that they will submit the matter to commercial arbitration in accordance with the terms contained in Section XXV of the Interconnection Agreement.

(Doc. 10, Exh. A, Amendment ¶ 2). Paragraph 4, in turn, provides:

Any final order that forms the basis of a "true-up" under this Amendment shall meet the following criteria:

(a) It shall be a proceeding to which ACSI and BellSouth are entitled to be full parties to the proceeding.

(b) It shall apply the provisions of the Telecommunications Act of 1996, including, but not limited to, Section 252(d)(1) and all effective

implementing rules and regulations; provided that such Act and such regulations are in effect at the time of the final order.

(c) It shall include as an issue the geographic deaveraging of unbundled element rates, which deaveraged rates, if any are required by said final order, shall form the basis of any "true-up."

(Doc. 10, Exh. A, Amendment ¶ 4).

Time Warner and ACSI assert that the effect of these true up provisions is that the rates BellSouth ultimately will be entitled to receive from Time Warner or ACSI under the agreements will depend on the rate ultimately established by the Commission in arbitration proceedings between BellSouth, on the one hand, and AT&T Communications of the Southern States, Inc., MCI Telecommunications Corporation and Metropolitan Fiber Systems of Florida, Inc., on the other.

Time Warner and ACSI petitioned to intervene in the ongoing arbitration proceedings among BellSouth, AT&T, MCI and MFS. The Commission ultimately denied the petitions to intervene.

Jurisdiction

In 47 U.S.C. § 252(e)(6), the Telecommunications Act establishes federal jurisdiction of any action challenging a "determination" of a state commission "under this section," that is, under 47 U.S.C. § 252. The denial of Time Warner's and ACSI's petitions to intervene was not a "determination . . . under this section"; nothing in § 252 speaks at all to the issue of intervention under these circumstances. The Telecommunications Act thus does not provide federal jurisdiction over the case at bar.¹

Nonetheless, Time Warner and ACSI assert a due process claim that is within the court's general federal question jurisdiction. See 28 U.S.C. § 1331. And while the Commission has Eleventh Amendment immunity, the individual commissioners themselves do not.

¹ I also reject Time Warner's assertion of federal jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201. That statute does not provide any additional jurisdictional authority. See, e.g., Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671, 70 S.Ct. 867, 879, 94 L.Ed. 1194 (1950).

The Merits

Nothing in federal law provides Time Warner or ACSI any right to intervene in Florida Public Service Commission proceedings such as those at issue. The Telecommunications Act provides for arbitration before the Commission between parties to a negotiation, but neither Time Warner or ACSI was a party to the negotiations at issue in the arbitration in which they sought to intervene. Time Warner and ACSI were parties to their own negotiations, but they did not request arbitration in connection with those negotiations. In short, the Telecommunications Act did not require the Commission to allow Time Warner and ACSI to intervene.²

Time Warner and ACSI assert, however, that the due process clause required the Commission to allow them to intervene, because their interests will be affected by the decision. Many persons of course are affected by court and agency decisions because of the precedential effect of those decisions; this ordinarily provides no basis for intervention of right or even as a matter of discretion, and

²Similarly, Federal Rule of Civil Procedure 24 is inapplicable to proceedings in the Florida Public Service Commission. See Fed. R. Civ. P. 1.

even more clearly there is no due process right to intervene under such circumstances. Any contrary claim would be frivolous, and Time Warner and ACSI advance no such claim.

Time Warner and ACSI do assert, however, that they will be directly affected by the Commission's decision, because of the true up clauses in their own agreements. If so, this is not an effect imposed on Time Warner or ACSI under color of law; this is instead an effect that Time Warner and ACSI voluntarily agreed to. If the Commission were indeed mandating rates to be paid by Time Warner or ACSI, they might have a due process right to participate in the proceedings in which the rates would be determined. But that is not the situation. The Due Process Clause gave Time Warner and ACSI no right to intervene in the Commission proceedings at issue.³

³ The error in plaintiffs' position is confirmed by the result that apparently would flow from a contrary ruling. If a person borrowing money from a private lender agreed the interest rate would be two points above the Discount Rate established by the Federal Reserve Board, would the borrower have a due process right to participate in Federal Reserve Board proceedings setting the Discount Rate? Of course not. A person has a right to due process before the state or federal government deprives the person of a property interest. A person ordinarily has no right to due process before the state or federal government takes action involving only someone else that, as a result of the

Accordingly,

IT IS ORDERED:

Defendant's motion to dismiss or for summary judgment (document 26) is GRANTED. Plaintiffs' motion for summary judgment (document 16) is DENIED. The clerk shall enter judgment stating, "The claims against the Florida Public Service Commission are dismissed for lack of jurisdiction under the Eleventh Amendment. The claims against the individual defendants are dismissed with prejudice." The clerk shall close the file.

SO ORDERED this 31st day of March, 1999.



Robert L. Hinkle
United States District Judge

person's own voluntary agreement, affects the person's own interests.

JUDGMENT IN A CIVIL CASE

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| <i>United States District Court</i> | <i>Northern District of Florida</i> |
| <i>Case Title:</i> TIME WARNER AXS OF FLORIDA, L.P., V. FLORIDA PUBLIC SERVICE COMMISSION, et al., | <i>Docket Number</i> 4:98CV62-RH <i>Name of Judge or Magistrate Judge</i> ROBERT L. HINKLE |

Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate judge) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The claims against the Florida Public Service Commission are dismissed for lack of jurisdiction under the Eleventh Amendment. The claims against the individual defendants are dismissed with prejudice.

ENTERED
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 U.S. DISTRICT COURT
 NORTHERN DISTRICT OF FLORIDA

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| ROBERT A. MOSSING, CLERK By Deputy Clerk: Pam L. Kuminkoski  | April 1, 1999 |
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ENTERED ON DOCKET April 1, 1999 BY 4/1/99
 (Rules 58 & 79(a) FRCP or 32(d)(1) & 55 FRCP)

Copies mailed to: Tunncliff, Auger, Dunbar, Smith, Caldwell,
 Findley

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