COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP955 **Cir. Ct. No. 2003CV329**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

AT&T COMMUNICATIONS OF WISCONSIN, L.P.,

PETITIONER-APPELLANT,

V.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

RESPONDENT-RESPONDENT,

CENTURYTEL OF CENTRAL WISCONSIN, L.L.C. AND TELEPHONE USA OF WISCONSIN, L.L.C.,

INTERESTED PARTIES-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: ROBERT A. DeCHAMBEAU, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 LUNDSTEN, J. AT&T Communications of Wisconsin appeals an order of the circuit court affirming the respondent Public Service Commission's decision setting the rates charged by CenturyTel of Central Wisconsin ("Central Wisconsin") and Telephone USA of Wisconsin. Central Wisconsin and Telephone USA are also respondents in this appeal. At issue are intrastate access charges that AT&T pays to Central Wisconsin and Telephone USA. AT&T asserts that the commission's rate-setting violated the federal Telecommunications Act of 1996, that the commission failed to expressly consider the factors set forth in WIS. STAT. § 196.03(6) (2003-04),[1] and that the commission erred by permitting Central Wisconsin and Telephone USA allowances for certain income-tax-related expenses. We reject AT&T's arguments and affirm the circuit court's order, thereby upholding the commission's decision.

Background

¶2 Central Wisconsin and Telephone USA are telecommunications utilities serving a total of 77 telephone exchanges in Wisconsin. Both of these utilities applied to the Public Service Commission for approval of permanent rates at an increased level from existing interim rates. The interim rates included local-line access charges paid by long-distance providers, including AT&T, to Central Wisconsin and Telephone USA. These access charges are also referred to by the parties as "access rates" and "common carrier line charges."

¶3 Local-line access charges are the charges telecommunications carriers pay primary local telephone companies to tap into their local networks for

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

purposes of connecting long distance calls. *See* ***Wisconsin Bell, Inc. v. PSC***, 2004 WI App 8, ¶8, 269 Wis. 2d 409, 675 N.W.2d 242 (Ct. App. 2003), *aff'd*, 2005 WI 23, 279 Wis. 2d 1, 693 N.W.2d 301. The connection between a customer's premises and the local telephone company's central office is called the "local loop." Here, AT&T is the carrier, and Central Wisconsin and Telephone USA are the local telephone companies. Thus, this case centers on the charges that AT&T pays Central Wisconsin and Telephone USA for access to their "local loops." The rates approved by the commission involve only *intra*state rates, in that they involve only long distance calls within Wisconsin.

¶4 After the commission set permanent rates that included local-line access charges,[2] AT&T petitioned the circuit court for review. AT&T argued that the commission erroneously set access charges in violation of the federal Telecommunications Act of 1996, failed to expressly consider the factors set forth in WIS. STAT. § 196.03(6), and erroneously permitted Central Wisconsin and Telephone USA allowances for income-tax-related expenses. The circuit court affirmed the commission, and AT&T renews its arguments on appeal. We reference additional facts as needed below.

[2] After granting petitions for rehearing, the commission amended its decision. The difference between the commission's initial decision and its amended decision is not the focus of this appeal.

Discussion

AT&T's Argument that the Commission Set Access Charges that Violate Federal Law

¶5 AT&T argues that the access charges set by the commission violate 47 U.S.C. § 254(e) and (f) (2000).[3] AT&T asserts that § 254(e) and (f) prohibit access charges that constitute an "implicit subsidy for local rates." AT&T argues that the access charges approved by the commission constitute a subsidy because the commission, by its own admission, set the charges on a "residual basis" to recover revenue deficiencies for Central Wisconsin and Telephone USA not recovered through rates those companies charged for other services. AT&T explains that an "implicit subsidy" is a charge to some customers that permits more affordable rates to be charged to other customers.

¶6 The parties do not address what standard of review we should apply when the issue is the preemptive effect of federal law. AT&T states that "[i]ssues of statutory construction are questions of law and subject to *de novo* review," but cites to cases that demonstrate that we often defer to the commission's statutory

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[3] 47 U.S.C. § 254(e) (2000) provides:

> After the date on which [Federal Communications Commission] regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

Section 254(f) provides that states "may adopt regulations not inconsistent with the [FCC]'s rules to preserve and advance universal service."

interpretations. *See* ***Kimberly-Clark Corp. v. PSC***, 110 Wis. 2d 455, 466, 329 N.W.2d 143 (1983); ***CenturyTel of Midwest-Kendall, Inc. v. PSC***, 2002 WI App 236, ¶¶13, 18, 257 Wis. 2d 837, 653 N.W.2d 130. The commission, along with Central Wisconsin and Telephone USA, argues that we must defer to the commission but, like AT&T, provides no legal authority addressing our standard of review when the topic is preemption.

¶7 Our own research indicates that the preemptive effect of federal law is ordinarily a question of law for our *de novo* review. ***Miller Brewing Co. v. DILHR***, 210 Wis. 2d 26, 34, 563 N.W.2d 460 (1997). In the absence of adequate briefing, we do not definitively speak on the correct standard of review. We will, however, in keeping with ***Miller Brewing***, review *de novo* whether federal law preempts the commission's decision. *See* ***id.*** ("We conclude that DILHR has no special expertise or experience in determining questions of federal pre-emption, and therefore determine that *de novo* review is applicable ….").

¶8 AT&T is the petitioner-appellant in this case and, as such, it must present developed arguments that support its assertion that the commission approved illegal access charges. AT&T's arguments fall short in several respects.

¶9 First, we are unable to discern from AT&T's briefs any reason to suppose that AT&T, as one of Central Wisconsin's and Telephone USA's customers, should not, like any other customer, bear part of the local loop costs.[4]

[4] We note that, although AT&T does not develop the argument, it suggests in its briefs that it should shoulder no portion of local loop costs at all. For example, AT&T states: "[E]ven if it were appropriate to recover some portion of local loop costs via access rates (a proposition which is no longer sustainable in a competitive environment, or consistent with the 1996 Act) ….").

AT&T does not explain why it, as a customer, should be exempt from all such costs. AT&T does not explain why, for example, residential customers should pay part of this cost, while AT&T should not. In sum, we cannot discern from AT&T's arguments any reason why the commission cannot require AT&T to pay a local-line access charge without running afoul of a rule against implicit subsidies.

¶10 Second, AT&T effectively asks this court to conclude that the rates approved by the commission bear no relationship to actual loop costs. AT&T asserts that this is the conclusion we must reach because the "rates were admittedly set on a residual basis to recover the full amount of any revenue deficiency for each company not otherwise recovered through rates for other services." To support this alleged admission, AT&T cites to the commission's decision. What AT&T fails to appreciate, or intentionally ignores, is that its assertion, combined with the portions of the commission's decision it directs our attention to, does not explain that a rate that is set in this "residual" fashion is *not* related to actual local loop costs. It follows that AT&T has also failed to explain that a rate that is set in this manner necessarily exceeds an appropriate apportionment of local loop costs. In short, AT&T has not demonstrated that the access rates approved by the commission provide a subsidy to other customers of Central Wisconsin and Telephone USA.

¶11 Third, AT&T does not explain why the cases it relies on—cases that do not involve access charges as implicit subsidies in the *intra*state context—are applicable here. The commission found that the rates at issue here involve only intrastate telephone rates. AT&T does not dispute this finding of fact and it does not explain why purely intrastate telephone calls are subject to 47 U.S.C. § 254. In its reply brief, AT&T repeats its position that the language of § 254 has

consistently been construed by courts as requiring the elimination of implicit subsidies in access rates, but the cases it relies on do not raise the issue of access charges as implicit subsidies in the context of intrastate calling.[5]

¶12 At least one recent case seems to undercut AT&T's position. In ***Qwest Communications International, Inc. v. FCC***, 398 F.3d 1222 (10th Cir. 2005), the court explained that Congress has not foreclosed the continued existence of implicit subsidies by states. The court said:

> In this case, the FCC has unequivocally stated "that the 1996 Act does not require states to adopt explicit universal service support mechanisms."…
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> ….
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> … Qwest and SBC deduce a statutory mandate requiring states to transition from implicit to explicit support mechanisms. We reject this argument. In drafting the statute, Congress unambiguously imposed an explicit subsidy requirement on federal support mechanisms; no such requirement is expressly imposed on the states….
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> ….
>
> … Nor did Congress expressly foreclose the possibility of the continued existence of state implicit support mechanisms that function effectively to preserve and advance universal service.

Id. at 1231-33 (footnote omitted).

¶13 AT&T also relies on pronouncements by the Federal Communications Commission without explaining why such pronouncements apply in the context of *intra*state telecommunications services. Indeed, we have

[5] *See generally* ***Comsat Corp. v. FCC***, 250 F.3d 931 (5th Cir. 2001); ***Alenco Communications, Inc. v. FCC***, 201 F.3d 608 (5th Cir. 2000); ***Texas Office of Pub. Util. Counsel v. FCC***, 183 F.3d 393 (5th Cir. 1999).

located a recent FCC pronouncement which suggests that there may be some question about the scope of the FCC's authority and the FCC's intended course for intrastate access charges. Specifically, we find this discussion in an FCC Notice of Proposed Rulemaking, released March 3, 2005:

> 82. … In addition, the [Intercarrier Compensation Forum] argues that the Commission may assert preemptive authority over intrastate traffic under section 254. It claims that the Commission "can and should preempt intrastate access charges on the ground that they are inconsistent with the Commission's duty under section 254 to rationalize universal service support." *We take our charge under section 254 seriously, but are also mindful of the states' historical authority over charges for intrastate services.* Accordingly, we seek comment on the legal analysis presented by these proposals concerning the Commission's authority over intrastate access reform, and specifically *whether the changes wrought by the 1996 Act give the Commission the power to assert authority over the intrastate charges at issue in this proceeding*.
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> ….
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> 117. … Further, if the Commission has legal authority to reduce or eliminate intrastate access charges, should intrastate access charges be reduced or eliminated on the same schedule as interstate access charges, or would it be better to give states more flexibility in light of the role they historically have played in addressing these issues?

In the Matter of Developing a Unified Intercarrier Compensation Regime, FCC 05-33, CC Docket No. 01-92, at 40, 54 (footnotes omitted; emphasis added), available at 2005 WL 495087.

¶14 In short, AT&T provides little assistance to this court in answering the questions of whether and to what extent access charges on intrastate calling are covered by 47 U.S.C. § 254. In addition, even if we assume there is some federal regulatory authority over intrastate calling, as AT&T asserts, it does not

necessarily follow that § 254 preempts the commission's authority to approve local-line access charges on solely intrastate calls.

¶15 We conclude that AT&T has failed to demonstrate, particularly in light of the highly technical questions involved, why the access charges the commission authorized are unrelated to actual local loop costs or why those charges constitute implicit subsidies. And, even if these charges can be said to constitute an implicit subsidy, AT&T has failed to persuasively explain why 47 U.S.C. § 254 preempts such charges on intrastate calls.

Commission's Application of WIS. STAT. § 196.03(6)

¶16 There is no dispute that the commission had to set rates that were "reasonable and just" under WIS. STAT. § 196.03. Section 196.03(6) provides that, in determining what is "reasonable and just," the commission "shall consider at least the following factors":

> (a) Promotion and preservation of competition consistent with ch. 133 and s. 196.219.
>
> (b) Promotion of consumer choice.
>
> (c) Impact on the quality of life for the public, including privacy considerations.
>
> (d) Promotion of universal service.
>
> (e) Promotion of economic development, including telecommunications infrastructure deployment.
>
> (f) Promotion of efficiency and productivity.
>
> (g) Promotion of telecommunications services in geographical areas with diverse income or racial populations.

WIS. STAT. § 196.03(6).

¶17 AT&T agues that the "shall consider" language in WIS. STAT. § 196.03(6) directs that the commission must *explicitly* set forth its reasoning as to each factor. According to AT&T, the commission must set forth its application of each of the factors in order to demonstrate that its decision was not arbitrary and capricious and in order to facilitate judicial review. AT&T contends that the commission did not expressly discuss its application of each of the factors and, therefore, the commission violated § 196.03(6).

¶18 We need not resolve our standard of review regarding this issue. Regardless what level of deference we apply to the question of whether the commission violated WIS. STAT. § 196.03 in the manner alleged by AT&T, AT&T's argument is unavailing. Also, we will assume, without deciding, that the commission must provide some amount of explanation regarding the § 196.03(6) factors that are relevant in the particular case. *See* ***Madison Gas & Elec. Co. v. PSC***, 109 Wis. 2d 127, 136-37, 325 N.W.2d 339 (1982).

¶19 Once again, AT&T's argument lacks sufficient development. AT&T does not dispute the commission's argument that, even if the commission must expressly consider the factors listed in WIS. STAT. § 196.03(6), it need only expressly consider those factors that apply in the particular matter before the commission.[6] Thus, AT&T must, at a minimum, persuade us that the commission failed to expressly consider the § 196.03(6) factors that are relevant in setting local-line access charges. But AT&T fails to do this.

[6] For example, the commission asserts that paragraph (g) in WIS. STAT. § 196.03(6), pertaining to promotion of telecommunications services in geographical areas with diverse racial populations, is irrelevant in this case. AT&T does not respond to the commission's argument that irrelevant factors need not be discussed.

¶20 AT&T's only argument as to specific factors is that the commission's decision omits discussion of the first two factors listed in WIS. STAT. § 196.03(6), namely, whether the charges promote competition and whether they promote consumer choice. It is not apparent to this court, however, whether the local-line access charges at issue here affect either competition or consumer choice. Apparently AT&T thinks this proposition is self-evident. It is not.[7] Certainly, AT&T has not explained in plain language that there is an effect. Further, if local loop costs are "shared or joint and common" costs *and* such costs are, by definition, appropriately spread among all customers, including customers like AT&T, then it may be that the discussion contained in the commission's decision does address competition and consumer choice by explaining, albeit indirectly, that spreading costs appropriately takes precedence.

Commission's Consideration of Income-Tax-Related Expenses

¶21 AT&T argues that the commission erred by permitting an allowance for income taxes at corporate rates to be included in Central Wisconsin's and Telephone USA's expenses for the purpose of setting rates. According to the commission's decision, Central Wisconsin and Telephone USA are limited liability companies owned by CenturyTel, Inc. The commission determined as follows:

[7] In its reply brief, AT&T complains that the portion of the commission's decision that the commission itself points to "involved the ratio of business rates to residential rates" and that "[b]usiness service and residential service are not access services." AT&T then briefly defines "access services" and concludes that consideration of business rates for business customers "does not satisfy the statutory requirement that each factor be considered." AT&T goes on to repeat its consistent theme—that recovery of shared or common line costs through access charges constitutes an implicit subsidy. Here again, AT&T says too little.

> Applicants [Central Wisconsin and Telephone USA] are organized as LLCs; both share a common parent corporation, CenturyTel. [Central Wisconsin] is 100 percent owned by CenturyTel, whereas [Telephone USA] is 89 percent owned by CenturyTel. On a monthly basis, Applicants pay their ultimate parent, CenturyTel, for federal and state income taxes based on corporate tax rates because CenturyTel files a consolidated tax return on behalf of all CenturyTel affiliates. Applicants provided the monthly journal entries demonstrating income tax accruals and the applicable affiliated interest agreement covering income taxes….
>
> ….
>
> Although the Commission acknowledges that LLCs are not directly liable for income taxes, the payments of income taxes at corporate income tax rates are documented in the record as actual costs of business on a monthly basis for all of [Central Wisconsin's] operations and 89 percent of [Telephone USA's] operations and are covered by an affiliated interest agreement.

(Footnote omitted.) Consistent with these findings and with its own precedent, the commission concluded that federal and state income taxes should be included in Central Wisconsin's and Telephone USA's expenses for purposes of setting rates.

¶22 In ***Wisconsin Bell, Inc. v. PSC***, 2004 WI App 8, 269 Wis. 2d 409, 675 N.W.2d 242 (Ct. App. 2003), *aff'd*, 2005 WI 23, 279 Wis. 2d 1, 693 N.W.2d 301, we explained why we apply great weight deference to the commission's legal determinations in matters such as rate-setting that plainly relate to the commission's expertise and experience. *See* ***Wisconsin Bell***, 269 Wis. 2d 409, ¶¶6, 8-11, 15-22 (according great weight deference to the question of whether a "presubscribed interexchange carrier charge" was a prohibited "substitute" charge under WIS. STAT. § 196.196).[8] Thus, we accord great weight deference to the

[8] The supreme court affirmed ***Wisconsin Bell*** without an opinion in a 3-3 tie vote. *See* ***Wisconsin Bell, Inc. v. PSC***, 2005 WI 23, 279 Wis. 2d 1, 693 N.W.2d 301.

commission's determination that Central Wisconsin's and Telephone USA's income-tax-related expenses should be considered in the commission's rate-setting. Under the great weight deference standard, we will uphold the commission's determination so long as it is reasonable. ***Id.***, ¶23.

¶23 There is no dispute that the commission, as a general matter, must consider Central Wisconsin's and Telephone USA's costs in setting rates. AT&T argues, however, that, in light of the commission's finding that Central Wisconsin and Telephone USA are limited liability companies and do not directly incur any federal or state income tax, the commission erred by permitting them to assume an income tax expense for rate-making purposes. In addition, AT&T argues that the actual effective tax rate paid by CenturyTel, Inc., was never established.

¶24 These arguments miss the mark. The question is not whether Central Wisconsin or Telephone USA has a direct tax liability under the tax code, nor is it how much CenturyTel, Inc., paid in taxes. Rather, the question is what expenses Central Wisconsin and Telephone USA incurred. The commission's decision cites specific evidence supporting its conclusion that Central Wisconsin and Telephone USA actually incurred the tax expenses. AT&T has not demonstrated that the record shows otherwise.[9]

¶25 AT&T also argues that the commission ran afoul of WIS. STAT. § 196.204(1), which provides:

> Except for retained earnings, a telecommunications utility may not subsidize, directly or indirectly, any activity, including any activity of an affiliate, which is not subject to this chapter or is subject to this chapter under

[9] AT&T is not asserting that some sort of fraud or deception is in play here.

> [various statutory sections]. No telecommunications utility may allocate any costs or expenses in a manner which would subsidize any activity which is not subject to this chapter or is subject to this chapter under [such sections].

AT&T asserts that CenturyTel, Inc., is not a regulated utility in Wisconsin and that the commission erred under § 196.204 by allocating a "hypothetical" income tax expense to Central Wisconsin and Telephone USA.

¶26 As we have explained, the commission's decision demonstrates that the income tax expense is not hypothetical. Moreover, the commission apparently did not share AT&T's view of WIS. STAT. § 196.204. We conclude that the commission could have reasonably interpreted § 196.204 to allow the commission to consider the tax expenses at issue here. Thus, the commission reasonably permitted an allowance for Central Wisconsin's and Telephone USA's income-tax-related expenses.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.