

STATE OF MICHIGAN
COURT OF APPEALS

SBC Michigan,

Plaintiff-Appellant,

v

Michigan Public Service Commission,

Defendant-Appellee.

UNPUBLISHED
November 3, 2005

No. 256177
MPSC
LC No. 00-013774

Before: Kelly, P.J. and Meter and Davis, JJ.

PER CURIAM.

Plaintiff SBC Michigan (SBC) appeals as of right a May 18, 2004 order of defendant Public Service Commission (PSC) establishing procedures for certain telecommunications-related arbitration and mediation proceedings. SBC argues that these procedures were improperly adopted because the PSC did not follow the rulemaking requirements of the Administrative Procedures Act (APA) MCL 24.271 *et seq.*¹ The PSC claims that SBC lacks standing and this Court does not have jurisdiction over this appeal because it does not involve an actual case or controversy. We agree with the PSC and dismiss this appeal for lack of jurisdiction.

I. Basic Facts and Procedural Background

On July 16, 1996, the PSC entered an order (1996 order) in Case No. U-11134 that provided a general framework for the PSC to handle arbitration requests under the Federal Telecommunications Act of 1996, specifically 47 USC 252, regarding certain disputes between telecommunications carriers, including interconnection disputes.

On May 2, 2003, the PSC entered an opinion and order (2003 order), in which it proposed modified arbitration procedures for disputes under the federal Telecommunications Act set out in the 1996 order and also established mediation procedures related to the PSC's

¹ Because defendant concedes that the rulemaking requirements of the APA were not followed when adopting these procedures, we do not address this issue.

mediation responsibility under the Michigan Telecommunications Act (MTA), MCL 484.2101 *et seq.*,² and the Metropolitan Extension Telecommunications Rights-of-Way Oversight Act (METRO Act), MCL 484.3101 *et seq.* The 2003 order also provided that interested parties had twenty days from the date of that order to file written comments on the proposed procedures. This was not a contested case with adversarial parties.

On May 22, 2003, SBC filed comments with the PSC regarding the 2003 order's proposed arbitration and mediation procedures.³ SBC asserted that the PSC should adhere to the APA's rulemaking procedures in articulating its arbitration procedures and that the PSC "should commence a rulemaking applicable to [the telecommunications industry] and these types of cases." SBC also submitted proposed rules for the PSC's consideration.

On May 18, 2004, the PSC issued the order being appealed (2004 Order) regarding arbitration and mediation procedures. In the 2004 order, the PSC noted, but rejected, SBC's concerns.

II. Analysis

"Whether a party has legal standing to assert a claim [is] a question of law that we review *de novo*." *Heltzel v Heltzel*, 248 Mich App 1, 28; 638 NW2d 123 (2001). "The question of jurisdiction is always within the scope of this Court's review." *Walsh v Taylor*, 263 Mich App 618, 622; 689 NW2d 506 (2004).

A. Standing

The PSC's argues that SBC lacks standing to appeal the 2004 Order. We agree. Our Supreme Court has endorsed the test for standing articulated by the United States Supreme Court in *Lujan v Defenders of Wildlife*, 504 US 555, 560; 112 S Ct 2130; 119 L Ed 351 (1992). Accordingly, a plaintiff must meet the following constitutional minimum standing criteria:

"First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . t[he] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' [*Crawford v Dep't of Civil Services*, 466 Mich 250, 258; 645 NW2d 6 (2002), quoting *Lujan, supra* at 560-561.]

² By its own terms, the MTA will be repealed on December 31, 2005. MCL 484.2604.

³ SBC was the only party to submit comments about the proposed procedures.

In this case, SBC has neither alleged nor suffered the required “injury in fact.” SBC was not a party to the 2004 Order and the procedures to which SBC objects have not yet been applied to SBC.

Moreover, any alleged “harm” to SBC is based upon conjecture and speculation. The challenged arbitration and mediation procedures do not facially or blatantly target SBC for disfavored treatment. Rather, the procedures about which SBC has expressed concern, such as a lack of discovery and limitations on the ability to confront an adverse party’s evidence, apply generally to both sides to a proceeding in which they are applicable. Further, whether the challenged procedures would help or harm a particular telecommunications provider, such as SBC, could well vary from case to case depending on its facts and circumstances. SBC simply has not suffered a particularized injury in this case and, thus, does not have standing to challenge the arbitration and mediation procedures in this appeal. Rather, if at some point SBC believes it is adversely affected by some aspect of those procedures in an actual arbitration or mediation case, that might well provide an appropriate context for SBC to raise its challenge to the validity of the adoption of the procedures.

B. Jurisdiction

This matter does not present the type of genuine, particularized case or controversy that may properly be decided by the judiciary. In *Nat’l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 614; 684 NW2d 800 (2004), our Supreme Court stated that the judicial power, while not specifically defined by the Michigan Constitution, “is distinct from both the legislative and executive powers.” The Court also stated:

Perhaps the most critical element of the “judicial power” has been its requirement of a genuine case or controversy between the parties, one in which there is a real, not a hypothetical, dispute, *Muskrat v United States*, 219 US 346; 31 S Ct 250; 55 L Ed 246 (1911), and one in which the plaintiff has suffered a “particularized” or personal injury. *Massachusetts v Mellon*, 262 US 447, 488; 43 Ct 597; 67 L Ed 2d 1078 (1923). Such a “particularized” injury has generally required that a plaintiff must have suffered an injury distinct from that of the public generally. *Id.* [*Id.* at 615.]

The Court further indicated that absent the particularized injury requirement, “there would be little that would stand in the way of the judicial branch becoming intertwined in every matter of public debate” and expressed that such claims would improperly involve the judiciary in “deciding public policy, not in response to a real dispute in which a plaintiff had suffered a distinct and personal harm, but in response to a lawsuit from a citizen who had simply not prevailed in the representative processes of government.” *Id.* Accordingly, the Court disapproved of using “the judicial branch as a forum for giving parties who were unsuccessful in the legislative and executive processes simply another chance to prevail.” *Id.* at 616. In this vein, allowing SBC to preemptively challenge facially neutral arbitration and mediation procedures in this Court merely because it disagrees with them, presumably fears being disfavored by aspects of those procedures in future proceedings and because the PSC rejected SBC’s objections to those procedures, would improperly involve this Court in a matter of “public debate” absent an individualized claim of injury.

SBC argues to the contrary that MCL 462.26(1) confers jurisdiction to decide this appeal. We disagree. MCL 462.26(1) provides:

Except as otherwise provided in [certain statutory provisions not relevant to this case], and except as otherwise provided in this section, any common carrier *or other party in interest*, being dissatisfied with any order of the [PSC] fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or services, may within 30 days from the issuance and notice of that order file an appeal as of right in the court of appeals. The court of appeals shall not have jurisdiction over any appeal that is filed later than the 30-day appeal period provided for in this subsection. [Emphasis added.]

SBC was not a “party” to either the 2003 Order or the 2004 Order. Instead, SBC merely submitted comments and suggestions for consideration, which the PSC declined to adopt. MCL 462.26 does not provide a basis for this Court to exercise its jurisdiction in this appeal.

SBC lacks standing because it has no claim of an actual particularized injury. We lack jurisdiction over this appeal because there is no genuine case or controversy appropriate for judicial resolution.

Dismissed.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Alton T. Davis