No. 98-1439

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RICHARD GOLDWASSER, MICHAEL J. COHN, ERIC S. CARTER and RICHARD C. LOZON, individually and on behalf of all others similarly situated,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Plaintiffs-Appellants,	)	
vs.	)	No. 97 C 6788
AMERITECH CORPORATION, a Delaware corporation,	)	Judge Charles P. Kocoras
Defendant-Appellee.	)	

BRIEF FOR DEFENDANT-APPELLEE AMERITECH CORPORATION

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RULE 26.1 CERTIFICATE OF INTEREST

The undersigned, attorney for defendant-appellee Ameritech Corporation, furnishes the following list in compliance with Federal Rule of Appellate Procedure 26.1:

Appellee Ameritech Corporation has no parent corporation. There is no publicly held company that owns 10% or more of Ameritech Corporation's stock.

A proposed merger of Ameritech Corporation and SBC Communications Inc. has been announced and is awaiting regulatory approvals.

____

One of the Attorneys for Ameritech Corporation

Dated: January 19, 1998

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STATEMENT OF JURISDICTION

The statement of jurisdiction in appellants' brief is complete and correct.

ISSUES PRESENTED FOR REVIEW

Plaintiffs claim that Ameritech Corporation ("Ameritech") violated the federal antitrust laws by failing to accommodate rival local telephone carriers as required by the Telecommunications Act of 1996, 47 U.S.C. §§ 151-614 ("1996 Act"). Purporting to represent a class of all local telephone service customers in the five states served by Ameritech, plaintiffs seek to recover alleged monopoly overcharges paid for local telephone service under tariffed rates overseen by state regulators, and also claim unspecified injunctive relief. The issues presented for review are:

1. Whether plaintiffs have standing to bring their antitrust claim where the telecommunications carriers directly affected by Ameritech's alleged conduct are better positioned to litigate, and are litigating in the forums mandated by the 1996 Act, the very issues plaintiffs raise; the relief plaintiffs seek would disrupt the scheme prescribed by Congress to implement the 1996 Act; and any link between the alleged violations and plaintiffs' asserted damages is indirect and speculative.

2. Whether the filed rate doctrine bars plaintiffs' claims for damages predicated on rates they paid for telephone service pursuant to binding and effective tariffs.

STATEMENT OF THE CASE

1. Introduction. Plaintiffs are four telephone service subscribers purporting to sue on behalf of themselves and other subscribers to local telephone service. Complaint, ¶ 4. Defendant Ameritech is one of the regional Bell telephone companies created by the AT&T divestiture. *United States v. AT&T,* 552 F. Supp. 131 (D.D.C. 1982), aff'd, *Maryland v. United States*, 460 U.S. 1001 (1983). Ameritech's rates for local telephone service, and the rates of its competitors, are regulated by the Public Utility Commissions ("PUCs") of the five states in which Ameritech provides local service. A16-17; p. 7, *infra*.

Plaintiffs seek to recover amounts paid for local telephone service under tariffed rates filed with and overseen by the PUCs in Illinois, Indiana, Michigan, Ohio, and Wisconsin. They claim those rates were higher than they should have been because Ameritech failed to satisfy duties created by the Telecommunications Act of 1996 ("1996 Act"), 47 U.S.C. §§ 151-614 (excerpted at Pamphlet Tab 1), which are owed to rival carriers that compete for business in local markets served by Ameritech.[1] Plaintiffs also seek unspecified injunctive relief. The district court held that plaintiffs' claim for damages is foreclosed by the filed rate doctrine. A18-28. It also held that their claim for injunctive relief is foreclosed by established rules of standing and the language and structure of the 1996 Act.

2. The 1996 Act. The 1996 Act is the first significant telecommunications legislation since the Communications Act of 1934, and it has "changed the entire telecommunications

[1/] Statutory and regulatory materials are submitted for the Court's convenience in a separate pamphlet pursuant to F.R.A.P. 28(f) (cited herein as "Pamphlet").

landscape." *BellSouth Corp. v. FCC*, ___ F.3d___, ___, 1998 WL 886764, at *2 (D.C. Cir. Dec. 22, 1998). It creates a comprehensive regulatory scheme to promote the development of advanced telecommunications services for all Americans. See H.R. Conf. Rep. No. 104-458, at 113 (1996).

Sections 251 and 252 of the 1996 Act. Sections 251 and 252 of the Act establish a mechanism by which competing carriers may gain access to the networks, facilities, and services of incumbent local exchange carriers ("LECs"), including Ameritech. In particular, 47 U.S.C. § 251(c) requires an incumbent LEC to negotiate with any requesting carrier an agreement under which the requesting carrier can "interconnect" with the incumbent LEC's network (§ 251(c)(2)); obtain access to the incumbent's "network elements" on an "unbundled basis" (§ 251(c)(3)); or buy the incumbent's retail services at wholesale rates for resale (§ 251(c)(4)). The contract prices for interconnection and access to network elements must be "just, reasonable and nondiscriminatory" (§ 251(c)(2) and (3)). Congress has provided general standards for determining those prices and for determining wholesale rates (§ 252(d)).

Congress also directed the FCC to issue regulations to implement § 251. § 251(d)(1). The FCC began to do so in 1996 and 1997 by issuing more than 900 single-spaced pages of orders,[2] which are now undergoing review in the courts of appeals and the Supreme Court. See *Iowa*

[2/] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket 96-98 (Aug. 8, 1996) ("First Report and Order"), 61 Fed. Reg. 45476 (Aug. 29, 1996) (excerpted at Pamphlet Tab 2); Second Report and Order (Aug. 8, 1996), 61 Fed. Reg. 47284 (Sept. 6, 1996); First Reconsideration Order, 61 Fed. Reg. 52706-01 (Oct. 8, 1996); Second Reconsideration Order, 61 Fed. Reg. 66931-01 (Dec. 19, 1996); Third Reconsideration Order, 62 Fed. Reg. 45579 (Aug. 28, 1997).

Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997) (upholding some FCC local competition rules and vacating others), cert. granted, 118 S. Ct. 879 (1998); *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 597 (8th Cir. 1998) (sustaining FCC regulation on "shared transport"; certiorari petitions to be filed). The rules applicable to an incumbent LEC are uncertain not only because of ongoing litigation concerning the FCC's regulations, but also because the FCC has not finished promulgating regulations. The FCC still is conducting its local competition rulemaking and is considering whether to issue more regulations pertaining to the operations support systems by which competing carriers obtain access to the products and services of the incumbent. See FCC Docket No. RM-9101, 12 FCC Rcd. 7720 (1997).[3]

Section 252 of the Act sets forth the procedure by which a competing carrier may obtain an interconnection agreement contemplated by § 251. The competing carrier must first ask the

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3/ The FCC has stated that its implementation of the 1996 Act is not complete. The rules it adopted in the First Report and Order , *supra* n.2, "represent only one part of a trilogy." *Id*., ¶ 6. The other two parts of the FCC's trilogy, universal service reform and access charge reform, which the FCC characterized as being "vitally connected to" and "intensely interrelated" with its local competition rules (*id*., ¶¶ 7-8), are also still ongoing. "Only when all parts of the trilogy are complete will the task of adjusting the regulatory framework to fully competitive markets be finished." *Id*., ¶ 9. Equally important, with respect to the local competition rules themselves, the FCC stated:

> The steps we take today are the initial measures that will enable the states and [this] Commission to begin to implement sections 251 and 252. Given the dynamic nature of telecommunications technology and markets, it will be necessary over time to review proactively and adjust these rules to ensure both that the statute's mandate of competition is effectuated and enforced, and that regulatory burdens are lifted as soon as competition eliminates the need for them. Efforts to review and revise these rules will be guided by the experience of the states in their initial implementation efforts.

Id., ¶ 6. Pamphlet Tab 2.

incumbent LEC to negotiate an agreement. § 252(a)(1). During the negotiations — which must proceed in "good faith" — either party may ask the state PUC to mediate between the parties. § 252(a)(2). If agreement is reached through negotiation (with or without mediation), the parties may enter into an agreement "without regard to the standards" set forth in subsections (b) and (c) of Section 251. § 252(a)(1).

If agreement is not reached through negotiation, either party may petition the state PUC to arbitrate "any open issues." § 252(b)(1). The PUC then must resolve disputed issues in conformity with the requirements of § 251 and the FCC's implementing regulations, and must establish rates according to § 252(d). § 252(c). Ameritech has participated, and continues to participate in, many such arbitrations.

The parties must submit any interconnection agreement to the state PUC for approval. § 252(e)(l). The PUC must approve or reject the agreement in accordance with criteria specified in the Act. § 252(e)(2). Any party aggrieved by a PUC's determination may sue in federal district court to challenge that determination. § 252(e)(6). Many such suits have been brought, 18 of them involving Ameritech and 17 of them (some not involving Ameritech) in this Circuit.[4] The PUC also enforces and resolves disputes under agreements it approves, again subject to federal court review. *Iowa Utils. Bd.*, 120 F.3d at 804 & n.24.[5]

4/ *E.g.*, *MCI v. Illinois Bell Tel. Co.*, N.D. Ill. No. 97 C 2225; *Indiana Bell Tel. Co. v. McCarty*, S.D. Ind. No. IP 97-0662-C-B/S; *MCI v. Wisconsin Bell*, W.D. Wis. No. 98-C-153-C. ("Illinois Bell," "Indiana Bell" and "Wisconsin Bell" are Ameritech operating companies.)

5/ See examples at Pamphlet Tabs 3, 4.

Sections 271 and 272 of the 1996 Act. Section 271 of the 1996 Act prescribes conditions that a Bell operating company must meet to obtain FCC authorization to provide long distance service originating in a state where it provides local service. Those conditions are not separately enforceable legal requirements that can be "violated," or which have consequences beyond denial of authorization to provide long distance service.

Section 272 prohibits a Bell operating company from providing long distance service except through a separate affiliate (§ 272(a)) and prescribes criteria the affiliate must satisfy to be deemed "separate" (§ 272(b)). The standards set forth in § 272(b) come into play only after the FCC has authorized long distance service.

3. Plaintiffs' Claims. Plaintiffs allege that Ameritech's treatment of its local service competitors violates the Sherman Act. Each of the alleged "bad acts" (Complaint, ¶ 33) is an asserted violation of Ameritech's duties to rival carriers under Section 251, 252, 271, or 272 of the 1996 Act. Thus, the issues plaintiffs raise are identical to issues that state and federal regulators and courts continue to address in the above-described proceedings under the 1996 Act.

For example, the Complaint alleges that Ameritech "has failed to provide 'dark fiber' as an unbundled network element in violation of the Act"; has caused competing local carriers to "experience[] undue delays in the provisioning of local loops in violation of Section 251(c)(3) of the Act"; and has "failed to provide unbundled access to local transport interoffice transmission facilities * * * in violation of Section 251(c)(3) of the Act." Complaint, ¶ 33(c), (g), (h). Each of these matters has been considered by the state PUCs in arbitrations and other proceedings

conducted pursuant to the 1996 Act, and each is currently at issue in federal lawsuits, to which Ameritech and its competitors are parties. See, *e.g.*, Pamphlet Tabs 5, 6.

Likewise, plaintiffs allege that Ameritech has violated the antitrust laws by "refus[ing] to sell to its competitors local telephone services at wholesale prices that are just, reasonable and nondiscriminatory." Complaint, ¶ 33(s). Yet the rates that Ameritech charges for resale services are governed by the 1996 Act, are within the comprehensive jurisdiction of the states (*Iowa Utils. Bd.*, 120 F.3d at 796), and already have been established by four of the five state PUCs in Ameritech's region and soon will be established by the fifth.[6]

The rival carriers that are litigating these issues are not parties here. Plaintiffs do not allege that plaintiffs themselves were involved in the negotiations or PUC and federal court review proceedings that have addressed the very issues they seek to litigate, or in the FCC's rulemakings and appellate review thereof. They merely presume that if Ameritech had dealt differently with its competitors, additional competitive entry might have followed, which in turn might have lowered retail telephone rates charged under tariff and overseen by state PUCs. Complaint, ¶¶ 49-50.

Based on this theory, plaintiffs asked the district court to apply federal antitrust law principles to supplant (1) the ongoing negotiations by telecommunications carriers of interconnection agreements under the Act, (2) the determinations of PUCs responsible under the

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[6] See, *e.g.*, Order, Ill. Commerce Comm'n Dockets 95-0458/0531 (Cons.), 1996 Ill. PUC LEXIS 320; Opinion and Order, Mich. PSC Case No. U-11280, 1998 Mich. PSC LEXIS 46; Order on Rehearing, PUC of Ohio Nos. 96-752/888/1101-TP-ARB, 1997 Ohio PUC LEXIS 436; Decisions of the Arbitration Panel, Wisc. PSC Docket Nos. 265-MA-101 and 6730-MA-103 (Nov. 26, 1996), and Docket Nos. 3258-MA-101 and 6720-MA-104 (Dec. 26, 1996).

Act for arbitrating and approving interconnection agreements, (3) the rulings of federal courts reviewing those determinations, (4) the continuing decisions of the FCC and federal courts required under the Act to resolve interconnection issues at the request of directly affected carriers, and (5) the state PUCs' supervisory authority over tariffed retail rates for local telephone service.

4. The District Court's Ruling. Considering only the allegations of the Complaint and statutory and regulatory provisions properly considered on a motion to dismiss, and accepting all factual allegations as true (A7-9), Judge Kocoras dismissed the Complaint. Applying precedents of the Supreme Court and this Court, he concluded that the "filed rate doctrine" precludes plaintiffs' treble damages claim, which "simply seeks damages for Ameritech's overcharging for telephone service" — charges that were "approved by the state PUCs." A15-16. "Since Ameritech's rates are filed with, and subject to the review of, the state PUCs, this is enough to trigger the applicability of the filed rate doctrine." A18.

Judge Kocoras also ruled that plaintiffs lack standing to pursue their claims for injunctive relief. He concluded that these injunctive claims duplicated claims that could be brought by directly affected carriers and threatened to produce a regulatory cross fire: "Plaintiffs' allegations of anticompetitive conduct all involve Ameritech's purported failure to comply with its obligations to competing carriers under the 1996 Act. In order to resolve Plaintiffs' claims, the Court would be required to examine Ameritech's dealings with its competitors and determine what the Act specifically requires and whether Ameritech has complied. In fact, these are precisely the same issues which are currently being addressed by the regulatory agencies and federal courts." A24. The 1996 Act envisions that these issues are "a matter between the local

carriers, carriers seeking entry into the local markets, and the state regulatory commissions." A25. Thus, the district court concluded that conferring standing here would "severely threaten the delicate balance that Congress has struck in attempting to ease the transition of the telecommunications industry into a competitive marketplace." A26. Judge Kocoras also suggested that plaintiffs, as "consumers suing for overcharges by a monopolist," may have standing to pursue damages. A19. However, as he noted, he did not need to reach this issue given his holding that the filed rate doctrine bars plaintiffs' claim for damages. A21.[7]

SUMMARY OF ARGUMENT

Established principles of antitrust law deny standing to litigants whose asserted injury is indirectly and speculatively linked to the asserted violation. Those principles preclude standing for plaintiffs to seek damages or injunctive relief in this case, especially because Congress has designated telecommunications carriers as the appropriate enforcers of inter-carrier obligations under the 1996 Act. Moreover, plaintiffs' claim for damages is barred by the filed rate doctrine.

I.

Plaintiffs lack standing under the antitrust laws to enforce Ameritech's 1996 Act obligations to competing telecommunications carriers. Standing to bring antitrust claims for

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7/ Plaintiffs' Complaint also alleged a violation of the 1996 Act. The district court dismissed that claim both for lack of standing and because the provisions of the 1996 Act on which plaintiffs relied "do not establish duties that Ameritech owes to consumers." A27. As the district court explained, those provisions do not impose any freestanding duties on Ameritech to do anything other than to enter into interconnection agreements through the "negotiation/arbitration process." *Ibid.* Thus, the wrongs alleged by plaintiffs cannot violate the Act unless they breach agreements that Ameritech has executed with other carriers. The Complaint alleges no such breach. Plaintiffs have not appealed the district court's dismissal of their 1996 Act claim.

treble damages or an injunction requires a direct relationship between the asserted violation and the asserted injury. The alleged violation here is Ameritech's purported failure to perform its obligations to competing carriers under the 1996 Act. Those carriers are directly affected by Ameritech's performance of its duties under the Act. They have the right to litigate (and are vigorously litigating) the scope of those duties under the 1996 Act's detailed regulatory and judicial review scheme. Local telephone service subscribers, who are indirectly affected (if at all), have no such right.

Because plaintiffs have only an indirect and secondary relationship to any failure by Ameritech to comply with its obligations to competing carriers, their suit undermines the comprehensive regulatory scheme that Congress prescribed to resolve interconnection disputes. The precise telecommunications issues plaintiffs raise (which form the sole basis for their antitrust claim) have been and continue to be addressed by regulatory agencies and courts in proceedings to which the affected carriers are parties. As the district court ruled, antitrust suits brought by individual telephone subscribers seeking to enforce obligations to competing carriers under the 1996 Act would disrupt the Act's "delicate balance." A25-26. Although the district court applied that rationale only to plaintiffs' claim for injunctive relief, it applies *a fortiori* to their claim for damages.

Moreover, myriad factors unrelated to Ameritech's conduct determine local telephone rates, including business decisions by rival carriers and the service needs of particular consumers. Establishing the many links in the chain between Ameritech's conduct toward competing carriers

and plaintiffs' telephone charges would involve a hopelessly speculative inquiry. Accordingly, plaintiffs lack standing to sue.

II.

As the district court correctly determined, plaintiffs' claim for damages also is barred by the filed rate doctrine. That doctrine, which the Supreme Court and this Court consistently have reaffirmed, bars any suit for damages based on challenges to the amount or reasonableness of a utility's tariffed rates. Plaintiffs seek treble damages on the ground that they paid too much for tariffed local telephone service. Such overcharge claims are subject to the filed rate bar. The doctrine is not narrowly limited, as plaintiffs contend, to "rate-setting" activity or to rates subject to "meaningful review," but rather applies to all complaints regarding a filed and effective rate. Because local telephone rates in all five states served by Ameritech must be filed with and are overseen by state PUCs, the district court's straightforward application of the filed rate doctrine should be affirmed.

ARGUMENT

The district court correctly held that the filed rate doctrine bars plaintiffs' damages claim and that plaintiffs lack standing to pursue injunctive relief. Judge Kocoras also suggested in dictum that, if not for the filed rate doctrine, plaintiffs might have standing to seek damages. Because standing is a threshold issue, we first demonstrate that plaintiffs lack standing to seek either damages or injunctive relief. We then demonstrate that the district court correctly held that the filed rate doctrine bars plaintiffs' damages claim.

I. PLAINTIFFS LACK STANDING TO BRING THIS ANTITRUST SUIT.

Plaintiffs' antitrust allegations all relate to rights and obligations of Ameritech and competing carriers prescribed in the 1996 Act. A24. But Congress required that those rights and obligations be implemented through bilateral negotiation and arbitration, initiated by the carriers themselves, with subsequent review in specialized administrative and judicial proceedings and with continuing oversight by state and federal regulators. The Act does not contemplate that individual telephone service subscribers will file their own lawsuits based on perceived shortcomings in the carrier-to-carrier agreements executed under this statutory regime. Plaintiffs' packaging of their allegations into an antitrust claim cannot provide them with standing to litigate issues from which they are far removed and about which they can only speculate.

The Supreme Court has made clear that "Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." *Associated General Contractors v. California Council of Carpenters*, 459 U.S. 519, 534 (1983) ("*Associated General*"). Otherwise, as this Court has

explained, "overdeterrence" would result, "severely burdening the judicial system" and frustrating "efficient competitive behavior." *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 394 (7th Cir. 1993). Principles of antitrust standing protect against this risk by incorporating the concept of "proximate cause." *Associated General*, 459 U.S. at 535-37. See also *Holmes v. SIPC*, 503 U.S. 258, 268 (1992); *Greater Rockford*, 998 F.2d at 394; P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 364, at 227-28 (antitrust standing requires "a suitable degree of proximity between cause and injury").

In *Associated General*, the Supreme Court identified the "proximate cause" factors that guide the standing inquiry, including the directness of the asserted injury, the existence of more directly affected parties, and the speculativeness of the asserted harm. 459 U.S. at 540-42. "[T]hese factors analyze whether the plaintiff would be an efficient enforcer of the antitrust laws." *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1451 (11th Cir. 1991). Applying these factors, plaintiffs lack standing to litigate their antitrust claim.

A. Plaintiffs' Claimed Injury Is Indirect and Secondary.

Plaintiffs allege that Ameritech has failed to perform its obligations to competing carriers under the 1996 Act in twenty different ways. Complaint, ¶ 33(a)-(t). Plaintiffs further allege that they paid supracompetitive telephone rates "as a result of" such noncompliance with the Act. *Id.*, ¶¶ 49-50. The Complaint thus acknowledges that all of the challenged conduct was directed at competing carriers, and any harm suffered by plaintiffs was indirect.

In *Associated General*, a union alleged that an association of contractors violated the antitrust laws by pressuring contractors to hire non-union subcontractors, thereby adversely

affecting union subcontractors and, in turn, the union. The Supreme Court held that the plaintiff union lacked standing, finding it "obvious that any such injuries were only an indirect result" of injuries suffered by the more direct victims of the defendant's alleged conduct. 459 U.S. at 541. See *Greater Rockford*, 998 F.2d at 395 (standing requires "a direct link between the antitrust violation and the antitrust injury"); *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1168 (7th Cir. 1978) ("treble damages suit [is] too lethal a cannon to put in the hands of anyone who has suffered only an 'indirect,' 'secondary,' or 'remote' injury"). Based on these principles, plaintiffs lack standing because the injury they allege is indirect and secondary.

1. Competing carriers — not purchasers of retail telephone service — have the direct stake and expertise needed to litigate the underlying telecommunications issues in proceedings mandated by Congress.

Plaintiffs' purported injury — local telephone service overcharges — is the last link in a long chain that starts with Ameritech's interconnection practices, extends to the business decisions of competing carriers, and ends with plaintiffs paying hypothetical higher rates in each of their localities.[8] Persons so removed from the conduct about which they complain do not have standing.

The fact that there are parties with a "more direct" stake in the issues raised by plaintiffs is particularly significant. *Associated General*, 459 U.S. at 545. As the Supreme Court explained, "[t]he existence of an identifiable class of persons whose self-interest would normally

[8/] Allegations of these links in the chain of causation are nowhere to be found in the Complaint, making them even more "vaguely defined" than those found deficient in *Associated General*, 459 U.S. at 540.

motivate them" to bring suit "diminishes the justification for allowing a more remote party [to] perform the office of a private attorney general." *Id.* at 542. This Court too has recognized that principles of antitrust standing "limit the class of potential plaintiffs to those who are in the *best position*" to vindicate asserted interests. *Greater Rockford*, 998 F.2d at 395 (emphasis added). See *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1242 (7th Cir. 1991) ("An important purpose of rules of standing is to identify the best-placed plaintiff"); *SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co.*, 48 F.3d 39, 45 (1st Cir. 1995) (in telecommunications case, "second-best plaintiff" lacked antitrust standing).

Plaintiffs obviously are not in "the best position" to challenge Ameritech's treatment of its competitors under numerous negotiated and arbitrated interconnection agreements. Congress has given competing carriers specific remedies to vindicate their interest in interconnection, and those carriers have the incentive and expertise to do so. See *Holmes*, 503 U.S. at 269-70 ("directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely"). It is those carriers, not plaintiffs, that are negotiating and arbitrating interconnection agreements, litigating the propriety of the agreements under the 1996 Act before state PUCs and federal district courts, and seeking to enforce their rights under the agreements in state regulatory proceedings.[9]

[9/] See pp. 5-6, *supra*. The brief amicus curiae of MCI confirms that competing carriers are vigilant in protecting their own interests.

Congress did not intend to permit millions of local telephone service subscribers — with little or no knowledge of the technological issues and so indirect a personal stake — to enforce those agreements in lieu of the affected carriers themselves. See *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 215 (1990) ("Consumers may lack the expertise and experience necessary for detecting improper pricing by a utility's suppliers").[10] Telephone service subscribers are in no position to litigate the intricacies of "dark fiber" (Complaint, ¶ 33(c)) or "customized routing" (*id.*, ¶ 33(k)), because their purchases of retail telephone service are distant from those carrier-to-carrier transactions. Because plaintiffs are poorly positioned to litigate these issues, and because others are better situated to litigate (and are litigating) them, plaintiffs lack standing.

2. Granting plaintiffs standing to sue would disrupt the scheme fashioned by Congress to implement the 1996 Act.

Precisely because plaintiffs lack a direct interest in the issues they raise, their suit threatens a head-on collision with the efforts of directly interested carriers to resolve those issues in the proceedings designated by Congress. As the district court ruled, the implementation scheme of the 1996 Act is directed to transactions between incumbent and competing telecommunications carriers; that scheme would be disrupted if a court were to "stick its nose into this complicated morass of regulatory review." A25-26. The district court also recognized that this danger is properly addressed as part of the standing inquiry, because it raises the question *who* should be

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10/ As explained *infra* pp. 35-36, the antitrust savings clause in the 1996 Act does not abrogate the requirement that a plaintiff must have standing to bring an antitrust claim.

permitted to bring lawsuits — regardless of legal theory — based on alleged failures to satisfy obligations imposed by the 1996 Act.

Each of plaintiffs' allegations of wrongful conduct (Complaint, ¶ 33) is, at bottom, an allegation that Ameritech has not yet fully implemented new (and hotly debated) obligations owed to competing carriers under the many interconnection agreements negotiated or arbitrated pursuant to the 1996 Act. See *supra*, pp. 6-7. To resolve plaintiffs' claims, an antitrust court would be required both to interpret interconnection agreements and to determine what standards are established by the Act. As the district court found, "these are precisely the same issues which are currently being addressed by regulatory agencies and federal courts." A24. Plaintiffs' lawsuit, therefore, creates a significant risk of inconsistent standards and of placing Ameritech (as well as other carriers and regulators) in an intolerable cross fire. For example:

(1) Plaintiffs allege that the rates at which Ameritech makes available network elements and interconnection are not "just, reasonable and nondiscriminatory" as required by the Act. Complaint, ¶ 33(r), (t). PUCs in four of Ameritech's states, however, are still in the process of determining what the "permanent" rates for certain of those elements should be. And where PUCs have established permanent rates for certain elements,[11] federal courts currently are reviewing their decisions. *E.g.*, *Illinois Bell v. Miller*, N.D. Ill. No. 98 C 2686 (Pamphlet Tab 7). Moreover, at least one of the PUCs (Michigan) plans to review, and if necessary revise,

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[11] Ill. Commerce Comm'n Dockets 96-0486/0569, 1998 Ill. PUC LEXIS 109; 98-0396, 1998 Ill. PUC LEXIS 472; 98-0397, 1998 Ill. PUC LEXIS 473; Indiana PSC Cause No. 40611, 1996 Ind. PUC LEXIS 555; Michigan PSC Case No. U-11280, 1998 Mich. PUC LEXIS 160; PUC of Ohio Nos. 96-922-TP-UNC/96-974-TP-ATA/96-1057-TP-UNC, 1998 Ohio PUC LEXIS 286; Decision of the Arbitration Panel, Wisc. PSC Docket Nos. 265- MA-101 and 6720-MA-103 (Nov. 26, 1996).

Ameritech's rates on a periodic basis. See Order, Mich. PSC Case No. U-11831, 1998 Mich. PSC LEXIS 295.

(2) Plaintiffs allege that Ameritech has failed to provide competitors with "access to its operations support systems (OSS)." Complaint, ¶ 33(b). The FCC, however, is currently considering the need for regulations defining precisely what constitutes appropriate access to OSS, as are several PUCs. See FCC Docket No. RM-9101; Ind. PSC Cause No. 41324, 1998 Ind. PUC LEXIS 428; Mich. PSC Docket No. U-11830.

(3) Plaintiffs complain about Ameritech's alleged failure to provide "dark fiber," to provision "loops" in a timely fashion, and unbundle local transport. Complaint, ¶ 33(c), (g), (h). However, *each* of these matters has been considered by the PUCs in arbitrations conducted under the 1996 Act, and *each* is under review in federal lawsuits brought by AT&T, MCI, and other carriers. See, *e.g.*, *MCI v. Illinois Bell Tel. Co.*, N.D. Ill. No. 97 C 2225 (Pamphlet Tab 6).

Eroding traditional rules of antitrust standing to allow local service subscribers to bring claims based on provisions of the 1996 Act would inevitably produce conflict with the regulatory scheme. See *United States v. NASD*, 422 U.S. 694, 728, 734-35 (1975) (affirming dismissal of antitrust claim in view of "substantial danger that [defendants] would be subjected to conflicting and inconsistent standards," where "contractual" arrangements were subject to "administrative oversight"); *In re Wheat Rail Freight Rate Antitrust Litig.*, 759 F.2d 1305, 1315 (7th Cir. 1985) (same). Allowing such suits would displace the Act's specific procedures.

Because *all* the misconduct alleged in the Complaint was directed at Ameritech's competitors, plaintiffs' lawsuit by proxy would, like the consumer lawsuit in *Block v. Community*

Nutrition Inst., 467 U.S. 340, 348, 352 (1984), "severely disrupt th[e] complex and delicate * * * scheme" of a federal statute. As in *Block*, "[c]onsumer suits would undermine the congressional preference for administrative remedies and provide a mechanism for disrupting administration of the congressional scheme." *Id*. at 352. In *Block*, consumers of milk sued to set aside the Secretary of Agriculture's "milk orders" setting minimum prices that handlers of dairy products must pay to producers. *Id*. at 343-44. Like plaintiffs here, the *Block* plaintiffs wanted to lower prices paid by handlers to producers so that retail prices would decrease. *Id*. at 352 n.3. The Supreme Court, however, held that the plaintiffs lacked standing. The Court attached great weight to the fact that the regulatory mechanism focused on handlers and producers, not consumers. *Id*. at 346-47. Thus, even though "the general purpose sections of the Act allude to general consumer interests," the "structure of this Act indicates that Congress intended only producers and handlers, and not consumers, to ensure that the statutory objectives would be realized." *Id*. at 347. The parallel with the 1996 Act could hardly be more striking. The 1996 Act's detailed regime of negotiation, mediation, arbitration, regulatory evaluation, and federal court review — *all directed at incumbent local carriers and their competitors* — demonstrates that Congress intended telecommunications carriers, not retail telephone service subscribers, to enforce the Act's statutory objectives.

Plaintiffs attempt to distinguish *Block* by asserting (Br. 17) that their antitrust claims "arise from statutory rights that are completely independent of the administrative scheme established by the 1996 Act." That assertion is false. Plaintiffs' entire list of purported anticompetitive acts is based *solely* on alleged duties that would come into existence (if at all) only upon completion

of the negotiation/arbitration process prescribed by the Act. See A27. Plaintiffs have no answer to Ameritech's demonstration that permitting them to pursue their claims would disrupt the Act's regulatory scheme.[12]

The progression of steps that the Act requires to reach its goal underscores the disruptive potential of plaintiffs' lawsuit. Plaintiffs contend (Br. 4) that the purpose of the 1996 Act was "to create competition, without delay." But Congress did not expect full-blown competition to emerge immediately from the old regulated monopoly regime. The text and structure of the Act plainly demonstrate that it inaugurated a structured regulatory process, subject to judicial review, that would establish the conditions for robust competition. The inherently lengthy negotiation/arbitration/judicial review process prescribed in Section 252 contemplates extensive proceedings before the regulatory bodies and courts. As discussed above, a profusion of such proceedings is currently ongoing. In the words of Assistant Attorney General Joel I. Klein, "competition will not blossom overnight [because] [f]undamental transitions like the one called for by the Act are difficult and take time, as they require the development of new, extraordinarily complex legal, technical and economic arrangments." Statement before Sen. Comm. on Judiciary (Sept. 18, 1997), available in LEXIS, Genfed library, Fednew file; see also n.3, *supra*. Plaintiffs

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12/ The fact that all interconnection agreements can be negotiated, and that negotiated agreements need not comply with the substantive provisions of the Act (§ 252(a)(1)), makes clear that the Act does not impose freestanding duties. Moreover, many of plaintiffs' allegations of misconduct refer to §§ 271 and 272 of the Act. See Complaint, ¶¶ 33(i), (l), (p), (q). These sections impose no duty on Ameritech; they merely set forth conditions that Ameritech must satisfy before the FCC can authorize it to provide certain long distance and other services. See A27.

offer no support for their assertion (Br. 17) that what they acknowledge to be a "period of transition" envisioned by the Act had "passed" by the time they filed their complaint.

A recent case is instructive. In *City of Pittsburgh v. West Penn Power Comp.*, 147 F.3d 256 (3d Cir. 1998), the plaintiff, a consumer of electricity, challenged an agreement between two electric utilities under the antitrust laws. The plaintiff's asserted injury, similar to that of plaintiffs here, included "paying higher, non-competitive rates for electric utility service generally [and] losing the opportunity to have lower electric service charges." 147 F.3d at 262. But development of competition in the electric power industry was governed by a newly enacted state statute, which "envision[ed] a *transition* from an industry which is largely regulated to one where there [was] a competitive market." *Id.* at 260 (emphasis is added). Accordingly, the Third Circuit found, the "factual context" was "substantially different from that of most antitrust cases." The industry is "highly regulated," and, although regulated industries are not necessarily exempt from the antitrust laws, the "comprehensive regulatory framework significantly restricts the nature of the competition which is permitted," and the contemplated "changes will result in a form of regulated competition." *Id.* at 263-64. In those circumstances, the court held, the consumer plaintiff did not have standing to bring its antitrust complaint, which would be inconsistent with the regulated transition contemplated by the statute. The same rationale applies here.

Although Judge Kocoras correctly held that conferring standing on plaintiffs would undermine the 1996 Act's regulatory scheme, he limited his application of that holding to plaintiffs' claim for injunctive relief. Given his ruling that the filed rate doctrine barred plain-

tiffs' claim for damages, he had no need to consider the disruptive impact of granting plaintiffs standing to sue for damages. But the nature of the requested relief does not change the fact that the alleged injury is indirect and secondary. And permitting plaintiffs to maintain this suit would disrupt the statutory scheme whether the remedy they demand is damages or an injunction. It is well settled that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); accord *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992); *Lynbrook Farms v. Smithkline Beecham Corp.*, 79 F.3d 620, 627 (7th Cir. 1996). Damage awards or injunctions in suits such as this one would thoroughly subvert the mode of regulation prescribed by Congress in Sections 251 and 252 of the Act.

B. Plaintiffs' Claimed Injury Is Remote And Speculative.

"The notion of speculativeness plays a crucial role in the law of standing." R. Blair & W. Page, *"Speculative" Antitrust Damages*, 70 Wash. L. Rev. 423, 434 (1995). An asserted injury that is "remote from the violation" does not support antitrust standing. Areeda & Hovenkamp, *Antitrust Law* ¶ 360c, at 195. Thus, courts commonly deny standing to antitrust plaintiffs where the asserted injury is "highly speculative" and "may have been produced by independent factors." *Associated General*, 459 U.S. at 542. The Third Circuit accordingly has ruled, in the closely analogous *City of Pittsburgh* case, that a consumer plaintiff lacked standing where it was "really claiming that it would have benefited from competition it *hoped* would occur." 147 F.3d at 267 (emphasis added).

The same principle mandates dismissal of plaintiffs' antitrust claim. To begin with, the length of the chain linking their asserted harm to Ameritech's purported misconduct (see *supra*, Section A.1) in itself makes the claim speculative. See Blair & Page, *"Speculative" Antitrust Damages*, *supra*, at 435 ("Proof of damages becomes more speculative as the list of causal factors that may have contributed to the plaintiff's harm grows"). Moreover, determining the existence of each supposed link to plaintiffs' purported injury would be a fruitless, speculative exercise.

First, there is no reliable way to establish how competing carriers would have acted in the absence of Ameritech's alleged misconduct. Plaintiffs assume that carriers would have rushed in to provide local telephone service to all customers, including residential customers. But potential local exchange rivals also face myriad competitive pressures of their own, including pending mergers, rapidly changing global business plans, and cash flow problems, and they may find it more profitable to protect their dominant positions in long distance service than to provide local service. Any attempt to calculate whether — and, if so, when, how, and to what extent — they would enter each local exchange market in which plaintiffs receive service would be pure conjecture. See *Sea Shore Corp. v. Sullivan*, 158 F.3d 51, 56 (1st Cir. 1998) ("predicting future injury and the behavior of third parties is usually suspect"). Factors having nothing to do with Ameritech, including universal service obligations and cross-subsidy requirements, heavily influence the profitability of providing local residential service and discourage carriers from offering it. See M. Kellogg et al., *Federal Telecommunications Law* §§ 9.4, 9.7 (1992).

Second, determining whether competing carriers would offer lower prices requires an inquiry into future hypothetical cost structures and profit objectives that courts are ill-suited to conduct. Whether particular plaintiffs would, in fact, obtain lower prices also depends on their particular circumstances and service needs. The impact might be very different on subscribers to basic residential service than on multiple-line subscribers to high-speed Internet access services. See W. Baumol & G. Sidak, *Toward Competition in Local Telephony* 142 (1994) ("it is impossible either to foretell the degree to which [local] competition will take hold" or the "sectors of local telecommunications activity where it will succeed").

Under these circumstances, any claimed injury would necessarily be "produced by independent factors" and rest on a "speculative measure of harm." *Associated General*, 459 U.S. at 542-43. Although the district court (A21) surmised that "telephone rates will be lower once the telecommunications industry becomes competitive," this says nothing about whether *these* plaintiffs' rates will be lower. Many basic local telephone service subscribers pay rates below cost (while other subscribers pay rates above cost), based on state and FCC-created cross-subsidies and universal service policies. See Kellogg et al., *Federal Telecommunications Law*, *supra*, §§ 9.4, 9.7. Because some or all of these plaintiffs benefit from subsidized residential rates, full cost-based competition may not yield lower rates for them. See T. Krattenmaker, *The Telecommunications Act of 1996*, 29 Conn. L. Rev. 123, 129 (1996) (warning of "increase" in "residents' rates" if competition reduces subsidization); *City of Pittsburgh*, 147 F.3d at 268 (consumer plaintiff's alleged injury "is not only 'speculative' because it is difficult to measure [but also] because the injury claimed may never occur").

Because plaintiffs' claim of injury rests on a multitude of intervening factors and speculative hypotheses, it also would raise intractable problems of "identifying damages and apportioning them." *Associated General*, 459 U.S. at 545. Determining whether each plaintiff is entitled to damages would be a hopelessly unmanageable inquiry because of (i) the geographic range of plaintiffs' allegations (five states and thousands of local exchanges), (ii) plaintiffs' diverse circumstances — they are defined as "local telephone service subscribers" (Complaint, ¶ 4), with no indication of their service locations or whether they use residential or business service, (iii) raw speculation as to the service and price that competing providers theoretically would have offered, and (iv) the independent ratemaking policies of the five PUCs in Ameritech's region.[13] As in *Associated General*, these considerations reinforce the conclusion that plaintiffs lack standing.

The standing doctrine was designed to foreclose such speculative allegations. In *United States v. Western Elec. Co.*, 900 F.2d 283, 289 (D.C. Cir. 1990), the Court of Appeals considered whether the Public Service Commission of the District of Columbia ("DC-PSC") had standing to challenge modification of the AT&T consent decree governing the competitive practices of the Bell Companies. The DC-PSC asserted standing as a purchaser of telecommunications services, claiming that the modification would "reduce the quality or increase the cost of service to [telephone] customers." The court ruled that the DC-PSC did *not* have standing:

13/ See *City of Pittsburgh*, 147 F.3d at 267 (chain of causation is necessarily speculative because "the realization of competition is in the hands of regulators"); *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 209 (1990) (inquiry into alleged overcharge must consider "what the state regulators would have allowed").

> DC-PSC's argument that it has standing as a consumer, if accepted, would mean that any consumer of telecommunications service in the country would have standing * * * * This is far too broad; it approaches the kind of diffuse and unparticularized "taxpayer" standing that the Supreme Court consistently has rejected. See *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 476-82 (1982).

Ibid. These same principles foreclose plaintiffs' claim here.

C. Plaintiffs' Standing Arguments Are Meritless.

1. Plaintiffs do not have standing to seek damages merely because they are consumers.

Plaintiffs argue broadly (Br. 14) that consumers always have standing to seek treble damages, citing *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 598 (7th Cir. 1995). But this Court never has adopted such a categorical rule, stressing instead that "standing involves a case-by-case analysis of 'the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.'" *Greater Rockford*, 998 F.2d at 396 (quoting *Associated General*, 459 U.S. at 535). Thus, as the Third Circuit recently held, an antitrust plaintiff's "status as a consumer [is not] dispositive." *City of Pittsburgh*, 147 F.3d at 265-66 (rejecting standing of electrical power consumer to bring antitrust claim due to "the lack of causal connection between the defendants' actions and the alleged harm"). In this case, permitting consumer suits over competing carriers' interconnection obligations would thwart the intention of Congress to have the carriers themselves enforce those obligations — and ultimately would hurt consumers.

"[C]onsumer status does not guarantee standing" if the consumer is "too remote [from] the alleged violation." Areeda & Hovenkamp, *Antitrust Law* ¶ 370, at 254. Thus, in *Blue Shield v. McCready*, 457 U.S. 465 (1982), the plaintiff health plan subscriber had standing because, as

the *Associated General* Court explained, she was "the *direct* victim of unlawful coercion." 459 U.S. at 540 n.44 (emphasis added). The *McCready* plaintiff alleged that defendant Blue Shield, in an attempt to coerce her choice of practitioner, had refused her request for reimbursement of fees paid to a psychologist. As the Supreme Court put it, she "did not yield to Blue Shield's coercive pressure" and paid increased fees as a "sanction" for her refusal. *Ibid*. In contrast, the plaintiff in *Associated General* was not "a direct victim of the defendants' coercive practices" and thus was denied standing. *Ibid*.

Based on this principle, this Court has held that public utility consumers who allegedly paid higher electric rates due to antitrust violations by an equipment manufacturer had no standing to pursue claims against the manufacturer because "[t]he aftereffects of the hurt on the consumers [were] consequential and too remote." *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 315 F.2d 564, 567 (7th Cir. 1963). Similarly, the Eleventh Circuit has held that patients complaining of high hospital bills, allegedly resulting from unlawful agreements between defendant Blue Cross and area hospitals, did not have standing to sue Blue Cross under the Sherman Act because "the causal connection between Plaintiffs' injuries and Blue Cross' alleged misconduct is at best remote and tenuous." *Austin v. Blue Cross & Blue Shield*, 903 F.2d 1385, 1389 (11th Cir. 1990). And the Fifth Circuit, in *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1130-32 (5th Cir. 1975), held that telephone service consumers did not have standing to assert antitrust claims against their local service provider because the monopolistic conduct that forced them to pay "unnecessarily high monthly rates" was directed not at them but at independent

equipment manufacturers.[14] See also *City of Pittsburgh*, 147 F.3d at 265 (rejecting standing of consumer of electric power to bring antitrust claim due to "the lack of causal connection between the defendants' actions and the alleged harm").[15]

Plaintiffs here — like the consumer plaintiffs in *Allis-Chalmers*, *Austin*, *Jeffrey*, and *City of Pittsburgh* — lack standing because the injury they allege is indirect, speculative, and remote. Moreover, the local competition provisions of the 1996 Act, which are geared to the execution of interconnection agreements between competing carriers, plainly evince Congress's intent not to permit complaints by local service subscribers about carriers' interconnection arrangements. See *supra*, Section A. As the leading commentators observe, "ownership of a claimed essential facility should not be the basis for a consumer action seeking an overcharge. Even in cases where an actual rival has been turned away * * * overcharge damages are generally not appropriate." Areeda & Hovenkamp, *Antitrust Law* ¶ 774d, at 221-22. Essential facilities claims, such as that

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14/ The district court attempted to distinguish *Jeffrey* (A20) on the ground that plaintiffs are "consumers seeking relief from the telephone rates which they allege to be the product of anticompetitive activity." But the same was true in *Jeffrey*, where the plaintiffs complained of paying higher monthly telephone rates "because of" the defendant carriers' antitrust violations. See 518 F.2d at 1130. The Fifth Circuit affirmed their lack of standing because the asserted antitrust violations were "aimed at manufacturers, sellers, and lessors of telephone equipment," not at residential telephone subscribers. *Id.* at 1131. The same analysis precludes plaintiffs' standing here.

15/ Plaintiffs' contention that consumers always have standing also conflicts with the *Illinois Brick* doctrine, which denies standing to indirect purchasers. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 730 (1977); *Utilicorp United*, 497 U.S. at 204. *Illinois Brick* is but one application of the more general principle — controlling in this case — that forecloses "indirect" claims raising "speculative" issues courts are ill equipped to resolve. *Associated General*, 459 U.S. 543-46 & n. 52. Of course, consumers have standing to bring antitrust claims in many circumstances. But where, as here, Congress has prescribed specific regulatory mechanisms for resolving the very issues raised by plaintiffs, consumer standing to assert indirect and speculative claims is especially unwarranted.

of plaintiffs here, demand complex technological judgments, as illustrated by this Court's 117-page opinion in *MCI v. AT&T*, 708 F.2d 1081 (7th Cir. 1983). It would be folly to permit such suits to be initiated by any of the millions of telephone service subscribers in Ameritech's region who feel aggrieved about their phone bills and are enticed by the treble damages and attorneys' fees available in antitrust actions.[16]

2. Plaintiffs cannot establish standing to seek an injunction merely by characterizing such relief as harmless.

It is the duty of a court sitting in equity to ensure that an injunction "will not harm the public interest." *Old Republic Ins. Co. v. Employers Reinsurance Corp.*, 144 F.3d 1077, 1081 (7th Cir. 1998). The district court correctly found that injunctive relief would be highly disruptive of the policies incorporated in the 1996 Act. See A26 (injunctive relief may "frustrat[e] the goals of the 1996 Act"). As explained above, the interconnection obligations between Ameritech and third-party carriers are the subject of ongoing proceedings before state commissions, the FCC, and a variety of federal courts. An order requiring Ameritech to perform interconnection on terms specified by the court under generalized antitrust standards would work at cross purposes with those proceedings. Plaintiffs offer no plausible reason to reverse the district court's ruling on this score.

16/ Permitting consumer class actions based solely on inter-carrier conduct would threaten a proliferation of claims and *in terrorem* settlements. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). The costs of such suits would constitute a tax on telecommunications consumers that would not be offset by any social benefit. Enforcement by local service subscribers of carrier-to-carrier obligations is superfluous given the extensive enforcement mechanisms already in place.

First, although plaintiffs advocate a more relaxed approach to standing for their injunctive claims, the indirect and speculative character of plaintiffs' complaint (see *supra*, Sections A and B) precludes their standing to seek injunctive relief as well as damages. In the words of Professors Areeda and Hovenkamp, "the plaintiff in equity must connect his prospective injury to the violation in about the same proximate way as the damage plaintiff." *Antitrust Law* ¶ 360b, at 193. See also *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987) (the "causal connection between harm and violation was too attenuated to support standing to seek * * * injunctive relief"); *Jeffrey*, 518 F.2d at 1132; J. von Kalinowski et al., *Antitrust Laws and Trade Regulation* § 161.03, at 161-18 (2d ed. 1998) (standing to seek injunctive relief requires sufficient allegations of "proximate cause").

Plaintiffs' speculative claims fail not only antitrust standing criteria but also prudential and constitutional principles applicable in all injunctive proceedings. See, *e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (affirming dismissal for lack of standing because plaintiffs must suffer "concrete and particularized" injury, not "conjectural" or "hypothetical" injury; "there must be a causal connection between the injury and the conduct complained of"; and it must be "likely" as opposed to "merely speculative" that the injury will be "redressed" by an injunction); *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 43 (1976) ("It is equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such services").

Second, there is no merit to plaintiffs' contention that the district court's dismissal of their request for injunctive relief was improperly "based on factual assumptions." Br. 10. The district

court made no factual assumptions, but simply looked at plaintiffs' allegations in the context of the legal and regulatory landscape and concluded that *any* injunction would require the court to "stick its nose into [a] complicated morass of regulatory review." A25. See *General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1080 (7th Cir. 1997) (court may consider "matters of public record" on motion to dismiss). The only suggestion that plaintiffs offer of a non-disruptive injunction is an order requiring Ameritech "to make 'shared transport' available to competitors." Br. 12. But the complex issue of *what* constitutes "shared transport" and *how* it is to be provided is currently being litigated before administrative bodies throughout the country. See *Southwestern Bell. Tel. Co. v. FCC*, 153 F.3d 597, 604-05 (8th Cir. 1998) ("Until the state commissions exercise their authority to determine how shared transport will be priced (*i.e.*, whether on a flat, use-sensitive, or other basis, and at what price), we could do no more than conjecture as to whether the unbundled sale of shared transport" comports with the 1996 Act). Throwing plaintiffs' requested injunction into that "complicated morass" would certainly disrupt the efforts of courts and regulators now wrestling with those issues. And any such injunction would necessarily be too inflexible to account for the rapid pace of technological change in the telecommunications industry. See *infra* pp. 33-34 & n.18.

Third, plaintiffs contend that injunctive relief actually would be consistent with the 1996 Act because it would overcome a supposed lack of incentive on the part of Ameritech's competitors to obtain interconnection agreements that benefit competition. Br. 20-21. That argument reveals the full dimension of plaintiffs' quarrel with the terms and purposes of the 1996 Act. Plaintiffs would have a court override provisions of interconnection agreements that carriers

voluntarily negotiated. See Br. 22 (an injunction "would help ensure that the agreements are negotiated to benefit competition, rather than the competitors"). Under plaintiffs' regime, the following would be a perfectly appropriate court order: *Although Ameritech and Carrier X freely negotiated an agreement — approved by the state PUC as consistent with the public interest — to do A, B, and C, they committed an antitrust violation by not agreeing to do D and E, so they must do D and E.* Yet, the voluntary negotiation of agreements — supplemented by arbitrated terms imposed by state regulators — is precisely what Congress mandated. See *Iowa Utils. Bd.*, 120 F.3d at 801 (the structure of the 1996 Act shows "Congress's preference for voluntarily negotiated interconnection agreements").[17]

An analogy may be useful. The good faith negotiation and arbitration framework under the 1996 Act is borrowed from the collective bargaining process. Both posit good faith bargaining among sophisticated parties under the watchful eye of expert administrative agencies. The Supreme Court long has held that the antitrust laws cannot be applied to modify the process or results of collective bargaining. See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 242 (1996); *Associated General*, 459 U.S. at 526-27 (alleged misconduct "in the context of the bargaining relationship between the parties [is] plainly not subject to review under the federal antitrust laws"). The same principle applies even more strongly here. Permitting a jury or court to modify

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17/ The "give-and-take process" that the Eighth Circuit recognized as "essential to successful negotiations" (120 F.3d at 801) would be thwarted if Ameritech, having given something to and accepted something from Carrier X in the negotiations, could be sued for an antitrust violation for accepting what X voluntarily gave.

the terms of carrier relationships at the behest of parties not even involved in the bargaining process would wholly frustrate the statutory design.

Fourth, plaintiffs contend that only a judicial injunction can deal with Ameritech's alleged misconduct, because "[e]ach state commission has intrastate authority only." Br. 22. Of course, Congress was well aware of the scope of the state commissions' authority when it delegated enforcement authority over interconnection obligations to them, as well as the state-specific conditions and policies that would make court-ordered injunctions inappropriate. Moreover, plaintiffs simply ignore the specific oversight authority that the 1996 Act confers, not only on the state PUCs, but also on the FCC and the federal courts. *E.g.*, 47 U.S.C. §§ 251(e), (g), 252(e)(5), (6), 271(d), 272(d).

Plaintiffs seek a return to a type of "government by injunctive decree" that Congress sought to eliminate when it replaced the AT&T consent decree with the 1996 Act. See 47 U.S.C. § 152 notes at 601(a) (upon enactment, the conduct of the Bell Companies "shall not be subject to the restrictions and the obligations imposed by such Consent Decree"). Plaintiffs would have antitrust courts sit like super-regulators, making complex legislative and regulatory choices about when and under what circumstances an incumbent carrier must cooperate with its competitors. See *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 378 (7th Cir. 1986) (consumers will suffer if antitrust courts "are allowed to burden a monopolist with a positive duty of assisting competitors"); F. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. L. & Econ. 23, 31 (1983) ("the extensive experience with command-and-control regulation contains little promise of low-cost solutions to the problems of monopoly"). Moreover, plaintiffs

seek to enlist the courts in the least practicable and manageable fashion — not with the input of industry or governmental experts, but through lawsuits by unknowledgeable local service subscribers, and for no evident societal purpose. See Areeda & Hovenkamp *Antitrust Law* ¶ 785b, at 277 ("the obligations created under the Telecommunications Act are significantly broader than those created under Sherman § 2 [and] may render separate § 2 treatment superfluous"). If these plaintiffs can seek injunctive relief, Congress's effort to promote efficient competition through a carefully calibrated, step-by-step process will be undermined. The district court properly avoided that destructive consequence.[18]

3. The antitrust savings clause does not confer standing on plaintiffs.

Finally, plaintiffs argue (Br. 16) that they must have standing because the 1996 Act provides that the Act does not modify, impair, or supersede the applicability of any of the antitrust laws. 47 U.S.C. § 152, notes at § 601(b). But the *applicability* of the antitrust laws and the *standing of particular plaintiffs to enforce them in a particular case* are two different questions.[19]

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[18] Congress's decision to substitute supervision by expert agencies, with judicial review under specialized statutory criteria, in preference to the prior regime of rigid control through antitrust injunction, reflects the practical reality that agencies have "power far exceeding and different from the conventional judicial modes for adjusting conflicting claims." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-143 (1940). As Justice Frankfurter explained for the Court: "Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services." *Ibid.*

[19] For the same reason, plaintiffs' argument (Br. 15) that they "have alleged a viable cause of action under the elements of Section 2 of the Sherman Act" has no bearing on whether they have standing to litigate any such violation.

It is well established that an antitrust savings clause of the kind included in the Act saves antitrust defenses as well as theories of liability; it does not permit plaintiffs to bring antitrust suits for which they do not have standing. See, *e.g.*, *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1266 (3d Cir. 1994) (antitrust savings clause in regulatory statute preserves "both theories of liability and defenses"); *Nugget Hydroelec., L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 433 (9th Cir. 1992); *McCleneghan v. Union Stock Yards Co.*, 298 F.2d 659, 669 (8th Cir. 1962) (Blackmun, J.); *Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F. Supp. 1194, 1203-04 (W.D.N.Y. 1995).

As the district court observed, the Act's antitrust savings clause saves "the principles of antitrust standing [that] limit the class of plaintiffs to those best positioned to seek redress for anticompetitive conduct." A24. Because plaintiffs have not alleged the requisites of antitrust standing, the antitrust savings clause does not save their lawsuit.[20]

II. THE FILED RATE DOCTRINE BARS PLAINTIFFS' CLAIM FOR DAMAGES.

The district court dismissed plaintiffs' damages claims under the "filed rate doctrine." A9-18. Seeking to reverse that decision, plaintiffs mischaracterize applicable law and the allegations in their own Complaint. But plaintiffs cannot deny that, at bottom, they are seeking treble dam-

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20/ A general savings clause would not, in any event, be construed to preserve private claims inconsistent with the administrative scheme. See *Pan Am. World Airways v. United States*, 371 U.S. 296, 310, 321 (1963) (finding antitrust claims repugnant to the administrative scheme even though the statute contained a broadly-worded saving clause); *AT&T v. Central Office Tel., Inc.*, 118 S. Ct. 1956, 1965 (1998) (in interpreting a savings clause, "the act cannot be held to destroy itself"); *International Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987) ("we do not believe Congress intended to undermine this carefully drawn statute through a general savings clause"); *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998).

ages based on their claim that the rates they paid for local telephone service were too high. Complaint, ¶ 49 (seeking damages based on "payment of supracompetitive prices for telephone services"); *id*., ¶ 50 (claiming damages from "having to pay telephone bills that were and are higher than they would be with the competition that would be generated but for the defendant's unlawful acts and conduct"). They seek damages based on the difference between the rates they paid Ameritech — Ameritech's filed tariff rates — and the hypothetical lower rates that they purportedly would have paid absent the alleged misconduct. The filed rate doctrine bars such claims.

A. The Filed Rate Doctrine Bars All Claims That Filed Rates Are Too High.

The filed rate doctrine is a substantive rule that bars suits seeking damages from a utility based on allegations that the utility's rates, as reflected in an effective tariff filed with a regulatory agency, are too high or otherwise unreasonable, or that the plaintiff was entitled to rates or service that differed from the filed tariff. *AT&T v. Central Office Tel., Inc.*, 118 S. Ct. 1956, 1962-64 (1998) ("*COT*"); *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 422 & n.28 (1986); *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 160-64 (1922). "Simply stated, the doctrine holds that any 'filed rate * * * is per se reasonable and unassailable in judicial proceeding brought by ratepayers." *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994). Consequently, "overcharge actions by consumers based on claims that a 'filed' rate constitutes an antitrust violation will be dismissed." Areeda & Hovenkamp, *Antitrust Law* ¶ 247a, at 109-10. This Court has repeatedly applied that doctrine. See *Cahnmann v. Sprint*

Corp., 133 F.3d 484 (7th Cir. 1998); *In re Wheat Rail Freight Rate Antitrust Litig.*, 759 F.2d 1305, 1311-13 (7th Cir. 1985).

The rationale for the filed rate doctrine is straightforward: the legal relationship between a utility and its customers is defined entirely by the applicable tariff, and a customer who has paid the tariffed rate therefore has not suffered any cognizable injury. *Square D*, 476 U.S. at 417; *Keogh*, 260 U.S. at 163. Two key principles require strict application of the doctrine, even in cases where the results may seem harsh or inequitable. *Marcus v. AT&T*, 138 F.3d 46, 58-61 (2d Cir. 1998).

First, the filed rate doctrine prevents discrimination among a utility's customers. If customers could recover damages by alleging that a filed rate was "too high," they would effectively receive the same service at a lower rate than all other customers. *COT*, 118 S. Ct. at 1962-63; *Keogh*, 260 U.S. at 163.[21]

Second, the filed rate doctrine reflects the limited ability of courts to determine the reasonableness of filed rates. "[C]ourts are not institutionally well suited to engage in retroactive rate setting," and allowing antitrust attacks on the reasonableness of filed rates would "unnecessarily enmesh the court in the rate-making process." *Wegoland*, 27 F.3d at 19. Unlike courts, regulators may "employ their peculiar expertise to consider the whole picture regarding the rea-

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21/ The availability of class action lawsuits does not remove this danger. *Square D*, 476 U.S. at 423; *Taffet v. Southern Co.*, 967 F.2d 1483, 1494 (11th Cir. 1992) (en banc); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485, 494 (8th Cir. 1992). For example, class members could opt out of the proceeding, which "likely would result in the application of different rates to the class and the opting out members." *Marcus* v. AT&T, 938 F. Supp. 1158, 1171 (S.D.N.Y. 1996), aff'd, 138 F.3d 46 (2d Cir. 1998).

sonableness of a proposed rate" and "make hundreds if not thousands of discretionary decisions" in approving a rate as part of an overall rate structure. *Id.* at 21. Thus, applying the concept of rate reasonableness is exclusively a "function of the Commission." *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951); see *Keogh*, 260 U.S. at 164.

This is especially true with respect to rates for local telephone service, where regulators must consider multiple factors — such as keeping telephone service affordable for everyone pursuant to "universal service" policies — that may be inconsistent with the policies underlying the antitrust laws.[22] See *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 65 n.25 (1985) (state commission may set rates based on factors that "bear no discernible relationship to the prices that would be set by a perfectly efficient and unregulated market"). These public policies are critical to a state PUC's analysis of proposed rates, and should not be upset by an antitrust court's review. "An antitrust rule that seeks to promote competition but nonetheless interferes with regulatory controls could undercut the very objectives the antitrust laws are designed to serve." *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.).[23]

B. The Filed Rate Doctrine Bars Plaintiffs' Overcharge Claims.

The filed rate doctrine applies here. Ameritech's tariffs for local telephone services —

22/ See Kellogg et al., *Federal Telecommunications Law*, *supra*, §§ 9.4, 9.7; 220 ILCS 5/1-102(d)(viii); Ind. Code § 8-1-2.6-1; Mich. Comp. Laws § 484.2101(2)(a); Wisc. Stat. § 196.03(6)(d) and (g).

23/ While ratepayers are precluded from challenging the reasonableness of filed tariffs, governmental bodies, such as the Department of Justice, remain free to pursue such suits in appropriate circumstances. See *Wegoland*, 27 F.3d at 22.

the tariffs that apply to and are the basis for plaintiffs' alleged damages — must be filed with and overseen by the PUC in each state, as must the tariffs of every provider of local service.[24] Those tariffs define the rates, terms, and conditions on which Ameritech *must* provide local telephone service to any subscriber.[25] The filed rate doctrine prohibits plaintiffs from seeking damages on their claim that Ameritech charged "supracompetitive prices" or issued "telephone bills that were and are higher than they would be with * * * competition" (Complaint, ¶¶ 49-50). See *Keogh*, 260 U.S. at 160 (filed rate doctrine barred damages based on claims that rates were "higher than the rates would have been, if competition had not been thus eliminated"). Ameritech had no legal right to charge, and plaintiffs had no legal right to pay, anything other than the tariffed rate. *Ibid*.; *Marcus*, 138 F.3d at 60-61; *H.J.*, 954 F.2d at 488.[26]

Any computation of damages based on plaintiffs' allegations would raise the specter of discrimination among similarly situated customers and thrust the trial court into the complicated realm of utility rate-setting. Not only would the court have to determine, retroactively, what Ameritech's or its competitors' rates "should" have been, it would have to do so based on some estimate of how prices would have been affected if Ameritech had not performed the alleged anticompetitive acts specified in the Complaint. For example, the court would have to decide how Ameritech's local service rates would have changed, if at all, if Ameritech offered "dark

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[24] See 220 ILCS 5/13-501, 13-503, and 13-509, and 83 Ill. Adm. Code §§ 745.10 to 745.300; Ind. Code §§ 8-1-2-38 and 39; Mich. Compiled Laws §§ 484.2202(b) and 484.2402; Ohio Rev. Code § 4905.30 and Ohio Adm. Code § 4901:1-5-04; Wisc. Stat. §§ 196.19 and 196.194.

[25] See 220 ILCS 5/9-240 and 243; Ind. Code §§ 8-1-2-44 and 106; Ohio Rev. Code § 4905.33; Wisc. Stat. § 196.22.

[26] The filed rate doctrine applies whether the hypothetical lower rates would be those of Ameritech or a competitor. Any computation of damages necessarily would involve a comparison between Ameritech's current filed rates and the filed rates of both Ameritech and its competitors absent the alleged misconduct. See *Marcus*, 138 F.3d at 61; *H.J.*, 954 F.2d at 493-94.

fiber" as an unbundled network element, or provisioned unbundled loops more rapidly, or offered dialing parity for applicable calls. See Complaint, ¶ 33. Any such estimates, of course, would be doubly hypothetical, as the court would have to estimate, first, any impact those actions might have had on the rates of competing local exchange carriers and, second, any further impact on Ameritech's local service rates. The filed rate doctrine prevents such fruitless conjectures. See *supra*, Section I.B.

C. Plaintiffs Mischaracterize The Filed Rate Doctrine.

Although plaintiffs strenuously argue that their Complaint does not concern Ameritech's filed tariffs, they do not deny that the damages they seek are predicated on those rates. Complaint, ¶¶ 49-50. Thus, allowing this suit to proceed would violate the filed rate doctrine by requiring the court to "reconstitut[e] the whole rate structure" of Ameritech's filed tariffs and compute damages based on a "hypothetical" reasonable rate. *Keogh*, 260 U.S. at 164. Plaintiffs' arguments against application of the filed rate doctrine mischaracterize applicable law.

1. The filed rate doctrine is not limited to "rate-setting activity" and, in any event, plaintiffs' Complaint directly implicates Ameritech's filed rates.

Plaintiffs' argument that they "have not challenged the reasonableness of any rate filed with a state PUC or any conduct associated with the filing or approval of rates" (Br. 25) is both

false and irrelevant. *First*, as explained above, the *sole* basis for plaintiffs' damages request is that such rates were allegedly "supracompetitive." Complaint, ¶ 49. Although plaintiffs try to hide that fact by focusing on alleged "misconduct" by Ameritech, such artful pleading cannot avoid the filed rate doctrine. Indeed, the Eighth Circuit has rejected plaintiffs' very argument:

> The H.J. class seemingly departs from its request for damages contained in its first amended complaint and says that it is not challenging the reasonableness of any rate the Commission previously approved, but instead, is seeking damages due to Northwestern Bell's RICO violations. * * * We are unpersuaded * * * [T]he H.J. class's claim is simply that its members have been injured because they paid too much for telephone services * * * a damage concept that falls squarely within the filed rate doctrine.

H.J., 954 F.2d at 492, citing *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 578-79 (1981); see also *Cahnmann*, 133 F.3d at 490; *County of Stanislaus v. Pacific Gas & Elec. Co.*, 114 F.3d 858, 866 (9th Cir. 1997) ("In reality, though framed as a challenge to access [to a gas pipeline], this claim, too, is little more than a challenge to rates that FERC approved"). The same analysis applies here.

Second, the filed rate doctrine is not limited to "rate-setting activity." The doctrine applies whenever "the effect of the suit would be to challenge a tariff." *Cahnmann*, 133 F.3d at 488. In *COT*, for example, the Supreme Court reversed the Ninth Circuit, which had refused to apply the filed rate doctrine on the ground that the case did "not involve rates or ratesetting" but rather "the provisioning of services." 118 S. Ct. at 1963. The Supreme Court squarely rejected that reasoning — repeated by plaintiffs here — because "[a]ny claim for excessive rates can be couched as a claim for inadequate services and vice versa." *Ibid*.

Thus, application of the doctrine depends on whether a claim implicates a filed rate, not on the "rate-setting" nature of the conduct challenged. "[T]he underlying conduct does not control whether the filed rate doctrine applies. Rather, the focus for determining whether the filed rate doctrine applies is the impact the court's decision will have on agency procedures and rate determinations." *H.J.*, 954 F.2d at 489; see also *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966-67 (1986); *Town of Norwood v. New England Power Co.*, 23 F. Supp.2d 109, 116 (D. Mass. 1998).

The cases plaintiffs cite do not support their claim that the filed rate doctrine applies only to "rate-setting activity." Br. 25. Plaintiffs first cite *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144 (3d Cir. 1993). Br. 25, 27. That case, however, is distinguishable on several grounds and, as the district court stated (A14), the correctness of *Lower Lake Erie* is "subject to debate." *Lower Lake Erie* involved claims by steel companies that railroads had conspired to impede development of a new technology for unloading ships. 998 F.2d at 1152-53. The steel companies, which were customers of the railroads, sought damages based on the "savings that would have resulted from swifter development of the self-unloader technology." *Id.* at 1154.

Although the railroads' unloading rates were determined by tariffs filed with the ICC, the Third Circuit found that the filed rate doctrine did not bar the steel companies' claims. *Id.* at 1159-60. However, the court never analyzed either the non-discrimination or non-justiciability strands of the doctrine. Instead, it uncritically accepted the steel companies' claim that the filed rate doctrine does not apply to "non-rate activity." As demonstrated above, however, the question

in filed rate cases is *not* whether "non-rate activity" is alleged, but whether the relief sought implicates or requires variation from any of the rates, terms, and conditions in the filed tariffs. See *COT*, 118 S. Ct. at 1963-64; *Cahnmann*, 133 F.3d at 488; *H.J.*, 954 F.2d at 489.

Moreover, *Lower Lake Erie* "distinguished" the Supreme Court cases of *Keogh* and *Square D* on grounds that make it obvious that, even if *Lower Lake Erie* were correctly decided, the instant case falls squarely in line with *Keogh* and *Square D*:

> The *Square D* plaintiffs contended that unlawful conduct caused shipping rates to be higher than a freely competitive market. They sought treble damages measured by that difference. Thus, the *Square D* plaintiffs, like the plaintiff in *Keogh*, grounded their damage claims on the allegation that the motor carriers, a group regulated by the ICC, would have charged a lower rate absent the conspiracy. Here, the question of hypothetical lower rates is ancillary.

998 F.2d at 1159-60. Plaintiffs here — like those in *Square D* and *Keogh* — *do* allege that "unlawful conduct caused [local telephone] rates to be higher than a freely competitive market" and seek "treble damages measured by that difference." See Complaint, ¶¶ 49-50. Thus, the question of hypothetical lower rates is not "ancillary," but lies at the core of plaintiffs' claim.

Lower Lake Erie also distinguished *Keogh* on the ground that the *Keogh* plaintiffs would have had to prove "that the hypothetical lower rate would have conformed to the requirements of the [Interstate Commerce Act]," whereas the steel companies had to show only that the railroads blocked entry of a competitor. 998 F.2d at 1159, quoting *Keogh*, 260 U.S. at 163-64. Plaintiffs in this case stand in the same shoes as the plaintiffs in *Keogh,* because their claim would require proof that a "hypothetical lower rate" of Ameritech or a competitor would have been offered and approved by regulators.

Plaintiffs cite *Columbia Steel Casting Co. v. Portland General Elec. Co.*, 111 F.3d 1427 (9th Cir. 1996), for the proposition that the filed rate doctrine does not cover "non-rate activity." This adds nothing to their argument. *First*, the opinion's two-paragraph analysis of the filed rate doctrine relies entirely on *Lower Lake Erie*, which is distinguished above. *Id*. at 1446. *Second*, like *Lower Lake Erie*, *Columbia Steel* failed to mention or discuss the non-discrimination and non-justiciability strands of the filed rate doctrine. *Third*, *Columbia Steel* had nothing to do with the alleged preclusion of lower cost competitors. Rather, it concerned one utility's refusal to allow a customer to switch to another utility. Plaintiffs do not allege that Ameritech refused to permit them to switch to other providers.[27]

2. "Meaningful review" of tariffs is not a requirement of the filed rate doctrine.

Plaintiffs also argue that "Ameritech's local telephone rates are not sufficiently regulated to invoke the filed rate doctrine." Br. 28. The applicability of the filed rate doctrine, however, does not depend on any particular level of agency review. For the doctrine to apply, "[t]he rate must merely be filed and technically approved by the agency. It need not have been actively reviewed for accuracy or public interest considerations — indeed, it need not have been reviewed at all in any meaningful sense." Areeda & Hovenkamp, *Antitrust Law* ¶ 247a, at 110. The

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27/ Plaintiffs' remaining cases (Br. 26-27) are equally inapposite. *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), addressed the state-action antitrust immunity doctrine, which is clearly distinct from the filed rate doctrine (see *infra*, p. 46). *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982), and *Transkentucky Transp. R.R. v. Louisville & Nashville R.R.*, 581 F. Supp. 759 (E.D. Ky. 1983), were suits by a competitor of the defendants, and the filed rate doctrine is applied differently in such cases. See Areeda & Hovenkamp, *Antitrust Law* ¶ 247c. Finally, *Litton Sys., Inc. v. AT&T*, 700 F.2d 785 (2d Cir. 1983), involved a claim that there should be no charge for a service at all, not that filed rates were "supracompetitive."

Supreme Court repeatedly has confirmed this principle, explaining that the filed rate doctrine is not to be "narrow[ly] read[]" to apply only where rates have been "investigated and approved"; rather, it applies "whenever tariffs have been filed," even if there was never any hearing or review of those tariffs. *Square D*, 476 U.S. at 417 & n.19; see also *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 374 (1988) (filed rate doctrine does not depend on "whether a particular matter was actually determined in the FERC proceedings"); *Montana-Dakota Utils.*, 341 U.S. at 251 (customer "can claim no rate as a legal rate that is other than the filed rate, whether fixed *or merely accepted* by the Commission") (emphasis added).

Moreover, this Court has squarely rejected plaintiffs' "meaningful agency review" argument. In *In re Wheat Rail Freight Rate Antitrust Litig.*, 759 F.2d 1305 (7th Cir. 1985), recent legislation had limited the ICC's authority to review the reasonableness of a railroad's rates. Shippers and the Department of Justice argued that this "changed regulatory environment" invalidated the filed rate doctrine. *Id.* at 1311. This Court disagreed, ruling that the changes had "not so drastically altered the regulatory environment as to invalidate the principles operating behind the *Keogh* decision." *Id.* at 1311-12. Even though the ICC's power to review rates was restricted, the ICC retained power to ensure that "rates [did] not unjustly discriminate against shippers, commodities, or geographic regions," which justified continued application of the filed rate doctrine. *Id.* at 1311. The PUCs in Ameritech's region all possess that power and more.[28]

[28/] The PUC in each Ameritech state also has authority to approve, reject, or modify rate changes; adjudicate rate complaints; investigate rates on its own motion; and order rate reductions. See 220 ILCS 5/9-250, 10-108, 13-504, 13-514; Ind Code §§ 8-1-2-4, -42, -54 to -58; Mich. Comp. Laws §§ 484.2203, .2205, .2304, .2304a, .2321; Ohio Rev. Code §§ 4905.26, 4909.153, 18-19, .24,

Plaintiffs argue (Br. 29-30) that the *Wheat Rail* court implicitly imposed a "meaningful review" requirement, but the opinion did not even hint that such heightened review is a prerequisite for application of the filed rate doctrine.[29] See also *Cahnmann*, 133 F.3d at 487 (doctrine applies where tariffs are merely "filed with the FCC and subject to modification or disapproval").

Plaintiffs' "meaningful review" argument also confuses the filed rate doctrine with doctrines of antitrust immunity. The "state action" immunity doctrine, for example, requires some level of meaningful agency oversight (*e.g.*, *Southern Motor Carriers*, 471 U.S. at 57), but the state action doctrine and the filed rate doctrine are clearly distinct. See *Square D*, 476 U.S. at 422 and n.28. Plaintiffs' effort to confuse is further revealed by their reliance on *MCI v. AT&T*, 708 F.2d 1081 (7th Cir. 1983), which they cite as "holding" that "filed rates are not exempt from antitrust challenge merely because the rates are filed and subject to review." Br. 29. However, *MCI* did not consider or discuss the filed rate doctrine at all, but simply evaluated AT&T's distinct claims of antitrust "immunity." See 708 F.2d at 1102-05.[30]

.27, 4927.04; Wisc. Stat. §§ 196.196, .20, .26, .28, .37, .499(5) and (6).

[29] Plaintiffs' argument that plaintiffs in *Wheat Rail* "had a reparations remedy before the ICC," whereas they "have no corresponding damage remedy here, outside of this action" (Br. 30 n.14), is baseless. Plaintiffs may challenge the reasonableness of Ameritech's rates before any of the PUCs in Ameritech's region. See *supra* n.28. Alternatively, they can seek intervention in rate-setting proceedings before the PUCs or in other proceedings before the state and federal commissions. Failure to apply the filed rate doctrine to bar suits such as this one would be a recipe for chaos: "Allowing plaintiffs to collect damages measured by the difference between the filed rate and the rate a court finds reasonable would encourage consumers of a utility's services to sit out the state's rate-making process and then to repair to court to play litigation lottery. There could be no end to the number of strike suits that would be brought as eager lawyers, using the class action vehicle, circumvent the state's rate-making mechanisms — all at the expense of consumers." *Taffet*, 967 F.2d at 1492. Accord *Cahnmann*, 133 F.3d at 491.

[30] Other cases cited by plaintiffs for their "meaningful review" argument are equally inapposite. Br. 29. *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332, 337-38 (9th Cir. 1990), involved

Finally, the filed rate doctrine would apply here even if (contrary to existing law) the doctrine actually required some affirmative review of a utility's rates. Each PUC in Ameritech's states exercises comprehensive control over Ameritech's rates to ensure that they are just and reasonable. See *supra* nn.24, 28. Moreover, Ameritech's rates for the basic local telephone services purchased by plaintiffs (Complaint, ¶¶ 4, 28) are subject to price-cap or similar types of regulation and are thereby "dictated" or at least "approved of" by the state commission. See *MCI*, 708 F.2d at 1005. In Illinois, for example, Ameritech must make annual filings to facilitate the Illinois Commerce Commission's oversight of its compliance with the price-cap plan. See 220 ILCS 5/13-506.1(d); *Illinois Bell Tel. Co. v. ICC*, 669 N.E.2d 919, 925-26 (Ill. App. 1996). The presence of such pervasive rate oversight is "incompatible" with a customer's suit for overcharges, and allowing such suits "would disrupt greatly the states' regulatory schemes." *Taffet*, 967 F.2d at 1491; see *Wegoland*, 27 F.3d at 22.

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rates set by a private committee rather than rates filed with a government agency (see Areeda & Hovenkamp, *Antitrust Law*, ¶ 247a, at 111), and *Transkentucky*, *supra* n.27, involved a competitor rather than a ratepaying customer.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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