

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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

Plaintiff,

v.

PUBLIC SERVICE COMMISSION OF
WISCONSIN, AVE M. BIE, ROBERT M.
GARVIN AND JOSEPH P. METTNER,

Defendants.

OPINION AND ORDER

97-C-0566-C

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

Plaintiff,

v.

PUBLIC SERVICE COMMISSION OF
WISCONSIN, AVE M. BIE, ROBERT M.
GARVIN AND JOSEPH P. METTNER, IN
THEIR OFFICIAL CAPACITIES AS
MEMBERS OF THE COMMISSION,

and

OPINION AND ORDER

98-C-0011-C

MCI TELECOMMUNICATIONS
CORPORATION and MCIMETRO ACCESS
TRANSMISSION SERVICES, INC.,

Defendants.

Defendants Public Service Commission of Wisconsin, Ave M. Bie, Robert M. Garvin and Joseph P. Mettner have moved to alter or amend the judgment entered in Case No. 97-C-0566-C on October 19, 2001. Fed. R. Civ. P. 59(e). The same defendants, together with defendants MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc., have moved jointly to alter or amend the judgment entered in Case No. 98-C-0011-C, also on October 19, 2001. Both motions are timely because they were filed within ten days of entry of judgment. Id.

Defendants are asking the court to reinstate the portion of defendant commission's decision of December 8, 1997, requiring plaintiff to allow collocation of MCI's remote switching modules on plaintiff's premises (Case No. 98-C-0011-C) and that portion of defendant commission's earlier decision requiring plaintiff to offer collocation as part of its Statement of Generally Available Terms (Case No. 97-C-0566-C). I vacated both decisions in opinions and orders entered on October 17, 2001, because I found defendant commission's decisions inconsistent with the Telecommunications Act of 1996, as interpreted by the Court of Appeals for the District of Columbia. Defendants argue that this

finding was erroneous in light of the ruling issued by the Federal Communications Commission on August 8, 2001, In re Deployment of Wireline Services Offering Advanced Telecomms. Capability (Collocation Remand Order), Fourth Report and Order, FCC 01-204, CC Docket No. 98-147, codified at 47 C.F.R. § 51.323.

When defendant commission first considered the matter of collocation as it related to plaintiff, it made two separate determinations. In 1997, it required plaintiff to offer collocation of remote switching modules as part of the Statement of Generally Available Terms plaintiff filed with the defendant commission in order to comply with the requirements of § 251 of the Telecommunications Act. In December 1997, in an arbitration of issues related to an interconnection agreement between plaintiff and defendant MCImetro, defendant commission adopted a panel recommendation to require plaintiff to allow defendant MCImetro to collocate remote switching modules on plaintiff's premises. (Case No. 98-C-0011). In making each determination, defendant commission found that the remote switching modules were *necessary*, using a definition of "necessary" that the Court of Appeals for the District of Columbia held subsequently was improper because it was too broad. According to the court, the FCC's definition improperly prohibited a local exchange carrier from refusing to allow collocation of any equipment that was "used or useful" for either interconnection or access to unbundled network elements. GTE Service Corp. v. FCC, 205 F.3d 416, 423 (D.C. Cir. 2000). The court of appeals held that "necessary" meant only

“that which is required to achieve a desired goal.” Id. In the October 17 order, I remanded the issue of collocating remote switching modules to defendant commission for reconsideration using the correct definition of “necessary.”

Defendants contend that the remands were erroneous because the FCC had revised its definition of “necessary” equipment before the October 17 opinion was entered. Under the revision, equipment is “necessary” if an inability to deploy it “would, as a practical, economic, or operational matter, preclude the requesting carrier from obtaining interconnection or access to unbundled network elements.” Collocation Remand Order at ¶ 21. In the same order, the FCC held that “switching or routing capability is necessary to access all the features, functions, and capabilities of unbundled local loops,” id. ¶ 45, and that remote switching modules would meet its new collocation standard. Id. ¶¶ 47 and n.133, 48. In an opinion issued on November 2, 2001, the Court of Appeals for the Third Circuit held that the FCC’s August order was sufficient to support the Pennsylvania Utility Commission’s determination that remote switching modules had to be collocated, despite the fact that when the state commission made its collocation decision it had used the definition of necessary the Court of Appeals for the District of Columbia had found to be erroneous. MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania, 271 F.3d 491, 518-19 (3d Cir. 2001). The court found it significant that two other circuits had held that remote switching modules are used for interconnection and can be a necessary piece of

equipment that an incumbent local exchange carrier can be required to collocate. See U.S. West Communications, Inc. v. Hamilton, 224 F.3d 1049, 1056 (9th Cir. 2000); AT & T Virginia, Inc. v. Bell Atlantic-Virginia, Inc., 197 F.3d 663, 669 (4th Cir. 1999).

Opposing defendants' Rule 59(e) motion, plaintiff does not argue that defendant commission's decision is inconsistent with the law as promulgated by the FCC. Plaintiff asserts only that defendants are attempting to reargue the case and that this is not an instance in which the law changed after the court issued its initial opinion. Rather, it is one in which the change came before the opinion issued and after the court had been informed of the change through a motion for leave to file supplemental authority. Neither argument is persuasive. First, the parties have not had a chance to argue the effect of the FCC's Collocation Remand Order because it was not issued until after briefing had been completed in both cases. Although defendants brought the order to the court's attention, they had no opportunity to argue its significance. Second, the grounds for granting a Rule 59(e) motion are not limited to cases in which there has been an intervening change in the law. That is only one of the "four basic grounds upon which a Rule 59(e) motion may be granted." 11 Charles Alan Wright et al., Federal Practice and Procedure § 2810.1 at 124-25. The others are the need to correct manifest errors of law or fact, discovery of newly discovered or previously unavailable evidence and the need to prevent manifest injustice. Id. at 124-27.

It is not only proper, but advisable for a court to grant a Rule 59 motion when a legal

error has been committed. See Knapp v. Smiljanic, 847 F. Supp. 1428, 1436 (W.D. Wis. 1994), aff'd, 54 F.3d 1272 (7th Cir. 1995). If it was error not to appreciate the effect of the FCC's order as curing the problem plaintiff had identified in the commission's initial consideration of the collocation issue, it makes sense to correct that error as soon as possible and perhaps avoid the need for appellate review.

I am persuaded that it was an error not to discuss the FCC's order and not to find in favor of defendants on the collocation issue. Ordinarily, remand is the proper course of action when an agency has acted under one reading of the law and a new version is in effect. However, as the Third Circuit held in MCI, 271 F.3d 491, the specificity of the FCC's new order requires a federal court to uphold a state commission's determination that an incumbent local exchange carrier like plaintiff must offer and permit collocation of remote switching modules, regardless of the commission's previous reliance on an improper definition of "necessary." Therefore, I will grant defendants' motions to alter or amend the judgments in both cases.

In Case No. 97-C-0566-C, the FCC's promulgation of a new regulation re-defining "necessary" has mooted plaintiff's challenge to defendant commission's requirement that it offer collocation of remote switching modules. Now that the FCC has defined necessary equipment as including remote switching modules, plaintiff cannot base a challenge to defendant commission's erroneous reliance on state law to support its conclusion. Therefore,

I will direct the clerk of court to amend the October 19, 2001 judgment in that case by deleting the last four lines of the judgment and substituting the following three lines:

with respect to dark fiber and the decision of defendant Public Service Commission of Wisconsin requiring plaintiff to offer collocation of remote switching modules in its Statement of Generally Approved Terms is AFFIRMED and this case is closed.

In Case No. 98-C-0011-C, I will direct the clerk of court to amend the October 19, 2001 judgment by deleting the last six lines of the judgment and substituting the following two lines:

require plaintiff Ameritech Wisconsin to allow collocation of remote switching modules is GRANTED and this case is closed.

ORDER

In Case No. 97-C-0566-C, IT IS ORDERED that the motion of defendants Public Service Commission of Wisconsin, Ave M. Bie, Robert M. Garvin and Joseph P. Mettner to alter or amend this court's judgment of October 19, 2001, is GRANTED. The clerk of court is directed to amend the October 19, 2001 order by deleting the last four lines of the judgment and substituting therefor the following three lines:

with respect to dark fiber and the decision of defendant Public Service Commission of Wisconsin requiring plaintiff to offer collocation of remote switching modules in its Statement of Generally Available Terms is AFFIRMED and this case is closed.

In Case No. 98-C-0011-C, IT IS ORDERED that the motion of defendants MCI

Telecommunications Corporation and MCImetro Access Transmission Services, Inc., Public Service Commission of Wisconsin, Ave M. Bie, Robert M. Garvin and Joseph P. Mettner to alter or amend this court's judgment of October 19, 2001, is GRANTED. The clerk of court is directed to amend the October 19, 2001 order by deleting the last six lines of the judgment and substituting therefor the following two lines:

require plaintiff Ameritech Wisconsin to allow collocation of remote switching modules is GRANTED and this case is closed.

Entered this 4th day of January, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge