

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

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

Plaintiff,

OPINION AND
ORDER

97-C-0566-C

v.

PUBLIC SERVICE COMMISSION OF
WISCONSIN and AVE M. BIE, ROBERT
M. GARVIN, and JOSEPH P. METTNER,¹

Defendants.

Plaintiff Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin, has brought this action for declaratory relief. Ameritech Wisconsin seeks an order of this court holding that the Telecommunications Act of 1996 and specifically, 47 U.S.C. § 251(c)(6), does not require or permit defendant commission and its commissioners to require Ameritech Wisconsin to offer collocation of remote switching modules as part of its Statement of Generally Available Terms. (In its complaint, Ameritech Wisconsin sought a ruling on the commission's

¹Pursuant to Fed. R. Civ. P. 25(d)(1), current commissioners Ave M. Bie and Robert M. Garvin are substituted for their predecessors in office.

directive with respect to dark fiber but it has abandoned this request.)

In an opinion and order issued today in Wisconsin Bell v. Public Service Commission, 98-C-0011-C, I vacated an arbitration order of the commission requiring Wisconsin Bell, d/b/a Ameritech Wisconsin, to offer collocation of remote switching modules to MCImetro Access Transmission Services, Inc., and remanded the matter to the commission for further consideration in light of GTE Service Corp. v. FCC, 205 F.3d 416 (D.C. Cir. 2000). Acting as a Hobbs court, that is, as a court designated to hear challenges to FCC rules and regulations, the Court of Appeals for the District of Columbia held in GTE that the FCC had given the word “necessary” in § 251(c)(6) an impermissibly broad interpretation by reading it as meaning nothing more than “used or useful.” GTE, 205 F.3d at 422. The court of appeals held that the word cannot mean anything less than “that which is required to achieve a desired goal.” Id. at 423.

From the court’s holding in GTE, I drew the conclusion that interpreting “necessary” as merely “used or useful” was an improper reading of § 251(c)(6), whether the interpretation was made by the FCC or a state commission. Wisconsin Bell v. Public Service Commission, slip op. at 21 (W.D. Wis. Oct. 17, 2001). Although I agreed with defendants that the statute authorizes state commissions to impose requirements on telecommunications carriers beyond those that are necessary to further competition in the provision of telephone exchange service or exchange access, 47 U.S.C. § 261(c), I did not

agree with their argument that a state commission could read necessary as meaning used or useful once such a reading has been held to violate the Act. Id. Section 261(c) makes it plain that state commissions do not have this authority:

Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements *are not inconsistent with this part* or the [FCC's] regulations to implement this part.

(Emphasis added.)

It follows from the statute that if the FCC cannot impose collocation upon local exchange carriers simply because it is "used or useful," state commissions cannot impose a similar requirement. If they did, their requirements would be inconsistent with the Act as it has been authoritatively construed.

The GTE case has been appealed to the Supreme Court. If the Court grants certiorari, it may be that it will take a different view of the meaning of the word necessary in § 251. Such an outcome is unlikely, given the Court's interpretation of the same word in another section of the Act, § 251(d)(2), see AT & T Corp. v. Iowa Utilities Board, 525 U.S. 388-92 (1999), and the canon of statutory construction that the same word used in one provision of a law means the same thing when used in another provision. United States National Bank of Oregon v. Independent Insurance Agents of America, 508 U.S. 439, 460 (1993).

This case differs from Wisconsin Bell v. Public Service Commission, 97-C-0566-C, in the posture in which it was decided by the commission. Unlike that case, which involved an arbitrated provision of an interconnection agreement between Ameritech Wisconsin and MCImetro, this case involves a commission determination of a Statement of Generally Available Terms, which is a statement that a Bell operating company may file with a state commission in order to comply with the requirements of § 251. This distinction does not change the analysis. In a Statement of Generally Available Terms, a company sets out the terms and conditions that it generally offers within the state. In reviewing Ameritech Wisconsin's statement and determining that the company would have to collocate remote switching modules, defendants relied heavily on state law, something they did not do in approving their arbitration panel's decision concerning Ameritech Wisconsin and MCImetro's interconnection agreement. See Wisconsin Bell, 97-C-0566-C, slip op. at However, this reliance on state law does not change the fact that defendants are imposing a requirement upon Ameritech Wisconsin that has been held to be impermissible. Therefore, it fails the test of consistency with the Act that state requirements must meet.

Defendants have reasserted their Tenth and Eleventh Amendment defenses in the event the United States Supreme Court should decide this issue in their favor when the Court takes up Bell Atlantic Maryland, Inc. v. MCI World Com, 240 F.3d 279 (4th Cir. 2001), cert. granted sub nom. Verizon Maryland, Inc. v. Public Service Commission of

Maryland, 121 S. Ct. 2548 (2001), and Illinois Bell v. WorldCom Technologies, Inc., 179 F.3d 566 (7th Cir. 2000), cert. granted sub nom. Mathias v. WorldCom Technologies, Inc., 121 S. Ct. 1234 (2001). It is not necessary to address these issues in this order.

ORDER

IT IS ORDERED that the request of plaintiff Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin to determine and declare that Ameritech Wisconsin's Statement of Generally Available Terms need not include offerings of dark fiber or collocation of remote switching modules to meet the requirements of 47 U.S.C. §§ 251 or 252 is DENIED as abandoned with respect to dark fiber and this matter is REMANDED to the defendant commission with respect to collocation of remote switching modules for consideration under a more stringent interpretation of "necessary" than simply "used or useful."

Entered this 17th day of October, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge