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, and AVE M. BIE, ROBERT M. GARVIN, and JOSEPH P. METTNER, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE COMMISSION,[1]

and

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

Defendants.

OPINION AND ORDER

98-C-0011-C

- -

This civil case for declaratory and injunctive relief is before the court on remand from the Court of Appeals for the Seventh Circuit. Plaintiff Wisconsin Bell, d/b/a Ameritech

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

Wisconsin, contends that defendant Public Service Commission of Wisconsin erred in making certain determinations during an arbitration of issues related to an interconnection agreement between Ameritech Wisconsin and MCImetro Transmission Services, Inc., a wholly owned subsidiary of MCI Telecommunications Corporation. (For simplicity, I will refer to both of the MCI defendants simply as MCI.) Ameritech Wisconsin asks the court to 1) hold that the interconnection agreement approved by the Public Service Commission does not meet the requirements of the Act; 2) declare that the Act does not permit the commission to require local carriers to provide combinations, superior quality or collocation of switching equipment; 3) order reformation of the agreement to meet the requirements of the Act and 4) enjoin the defendant commissioners from enforcing any provisions of the interconnection agreements that are inconsistent with the declaratory relief Ameritech Wisconsin is seeking. (In its amended complaint, Ameritech Wisconsin had argued that defendant commission had erred in a ruling involving dark fiber but it has abandoned this contention.)

The parties' dispute arises under the Telecommunications Act of 1996, 110 Stat. 56 (1996) (codified in scattered sections of 47 U.S.C.), an act intended to open the telecommunication market to competition. To accomplish this goal and to break the lock that incumbent local exchange carriers such as Ameritech Wisconsin had on telecommunications, Congress made it the obligation of the local carriers to accommodate

competing local exchange carriers' entry into the markets. Among other requirements, the Act directs incumbent local exchange carriers to provide interconnection between their network facilities and the network facilities of their competitors "that is at least equal in quality to that provided by the incumbent local carrier to itself," 47 U.S.C. § 251(c)(2), and to provide competitors wishing to lease all or part of its network access to "network elements on an unbundled basis . . . in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service." § 251(c)(3). The Act requires incumbent local exchange carriers to provide for "physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier." 47 U.S.C. § 251(c)(6).

Congress contemplated that carriers would enter into interconnection agreements through negotiation, § 252(a), or through arbitration, § 252(b). Negotiated agreements are to be submitted to the commission for approval, § 252(e), but the commission's reviewing authority over such agreements is limited to determining that the agreement does not discriminate against a telecommunication carrier that is not a party to the agreement or the implementation of the agreement is not consistent with the public interest, convenience and necessity.

If the parties are unable to reach agreement on all of the issues that arise during their negotiations, they may request arbitration of any open issues. (The time period for

requesting arbitration is limited; the request must be made during the period between the 134th through the 160th day following receipt of a request for negotiation by the incumbent local exchange carrier. § 252(b)(1).) If carriers are dissatisfied with the results of the arbitration, they may ask the federal court to review the state commission's determination. § 252(e)(4), (e)(6). The federal court's reviewing jurisdiction extends only to determining whether the agreement meets the requirements of §§ 251 and 252.

MCI contends that Ameritech Wisconsin is not entitled to any of the relief it seeks with respect to combinations and quality because it negotiated those issues rather than reserving them for arbitration. Also, it argues, Ameritech Wisconsin's objection to the commission's ruling on collocation is baseless because the commission is free under state law to impose greater restrictions on carriers than the federal law permits, so long as the restrictions advance the purpose of the Telecommunications Act and are not prohibited by the Act. Defendants commission and commissioners contend that this action must be dismissed because it is not ripe for review, that Ameritech Wisconsin is not an aggrieved party entitled to review under 47 U.S.C. § 252(e)(6) and that Ameritech Wisconsin has not stated a claim upon which relief may be granted.

I conclude that Ameritech Wisconsin's objections to the provisions it negotiated with MCI are not properly before this court. Ameritech Wisconsin is not contending that the commission erred in finding that the provisions did not discriminate against a third party

and that implementation of them would not be consistent with the public interest, convenience and necessity; therefore there is nothing for this court to review. I conclude also that Ameritech Wisconsin's challenge to the Public Service Commission's determination that Ameritech Wisconsin must allow collocation of remote switching devices is ripe for determination, that the Public Service Commission's determination must be vacated because it does not meet the requirements of § 251(c)(6) and that the issue must be remanded to the commission for reconsideration.

From the record, I find the following facts material to the parties' dispute.

RECORD FACTS

In 1996, MCI initiated negotiations with Ameritech Wisconsin for an interconnection agreement. On August 30, 1996, MCI filed a petition for compulsory arbitration with the Public Service Commission of Wisconsin in an effort to resolve disputes that had arisen over certain provisions of the proposed interconnection agreement. Collocation was one of a number of issues listed in the petition. Ameritech Wisconsin filed a response and draft interconnection agreement.

At the time Ameritech Wisconsin filed its response, the Federal Communications Commission's regulations provided, among other things, that an incumbent phone company would have to combine unbundled elements it had provided to a competitor if the

competitor requested combination, 47 C.F.R. § 51.315(c)-(f), and that the local companies would not only have to provide a competitor unbundled access and interconnection that was nondiscriminatory or equal in quality to what the local companies had themselves but superior if a competitor requested it. 47 C.F.R. § 51.305(a)(4); § 51.305(c). Ameritech Wisconsin's and MCI's draft agreement provided for such combinations and for different quality. In its petition for arbitration, MCI identified as an open issue whether Ameritech Wisconsin should be required to combine network elements upon request by MCI. In its September 24, 1996 response to MCI's petition, Ameritech Wisconsin denied that the issue was open, saying, "There appears to be no issue for the arbitration panel here." R. 442. It added that it had agreed to combine network elements for MCI and it submitted a draft agreement to the commission, which contained both the combinations and quality provisions. The quality provision read as follows:

> 3.6 **Nondiscriminatory Interconnection.** Interconnection shall be equal in quality to that provided by the Parties to themselves or any subsidiary, Affiliate or other person. For purpose of this **Section 3.6**, "**equal in quality**" means the same technical criteria and service standards that a Party uses within its own network. If MCImetro requests an Interconnection that is of a different quality than that provided by Ameritech to itself or any subsidiary, Affiliate or other person, such request shall be treated as a Bona Fide Request and established upon rates, terms and conditions consistent with the Act.

The relevant provision on combination read as follows:

> 9.3.3 Upon MCImetro's request, Ameritech shall perform the functions necessary to combine Ameritech's Network Elements, even if those elements are not ordinarily

> combined in Ameritech's Network; provided that such combination is (i) technically feasible and (ii) would not impair the ability of other Telecommunications Carriers to obtain access to unbundled Network Elements or to Interconnect with Ameritech's network. In addition, upon request that is consistent with the above criteria, Ameritech shall perform the functions necessary to combine Ameritech's Network Elements with elements possessed by MCImetro in any technically feasible manner to allow MCImetro to provide a Telecommunications Service.

Ameritech Wisconsin said in its response that it disagreed with many of the FCC's rules but believed it had an obligation to propose "an interconnection Agreement that adheres to and follows the applicable provisions of the Act, the Regulations, [and] the Order . . . even those parts with which Ameritech Wisconsin disagrees." R. 2 at 399. In a footnote, it reserved its right to amend the terms of its contract with MCI and to seek a surcharge, in the case of price terms, if the FCC's rules were revised or reversed on rehearing or appeal. Id. at 400 n.1.

The Public Service Commission appointed an arbitration panel to hear the disputes MCI and Ameritech Wisconsin had identified. The panel conducted hearings and issued an initial arbitration award on December 26, 1996, R. 68, which was followed by an additional arbitration award on October 17, 1997, after the panel had held a second hearing. R. 54. The hearings did not address the issues of combination or superior quality. After making the second award, the panel directed MCI to serve on Ameritech Wisconsin a revised draft of an interconnection agreement incorporating the panel awards and to submit the draft to the panel by October 31, 1997. R. 54 at 6283-84. The panel directed Ameritech Wisconsin

to advise the panel by the same date whether it agreed with MCI's revised draft. Id. at 6284.

On October 14, 1997, about two weeks before Ameritech Wisconsin was to advise the panel of its position on the revised draft, the Court of Appeals for the Eighth Circuit issued a decision addressing rules adopted by the FCC to implement the Telecommunications Act. Iowa Utilities Bd. v. FCC, 120 F.3d 753, 813 (8th Cir. 1997). The court held that the FCC had violated the plain terms of the Act when it adopted regulations requiring incumbent local exchange carriers to provide their competitors with superior quality interconnection or to give superior quality access to network elements to requesting carriers upon demand. Id. at 812. With respect to combinations, the court said it could not square with the Act the FCC's rule requiring incumbent local exchange carriers to recombine network elements purchased by the requesting carriers on an unbundled basis. Id.

In a letter dated October 31, 1997, Ameritech Wisconsin informed the Public Service Commission's arbitration panel of the decision by the Eighth Circuit and asserted that the draft agreement MCI had filed would have to be modified to reflect the intervening change in law. R. 54 at 6580-81. Ameritech Wisconsin submitted its own revised draft agreement reflecting the change. R. 61. The panel did not rule on Ameritech Wisconsin's request but submitted MCI's draft to the Public Service Commission for approval or rejection. The commission solicited comments from the parties on the proposed agreement.

In its comments, Ameritech Wisconsin reiterated its request to delete the provisions on combinations and superior quality from the agreement in light of the Eighth Circuit's decision on those issues. R. 61. The commission issued an order approving the agreement on December 8, 1997, without making the modifications Ameritech Wisconsin had asked for. R. 64. Four days earlier, the parties executed their interconnection agreement. According to the agreement, it became effective on December 4, 1997, which was also the date on which it was signed. The agreement contained the following provision.

> This Agreement . . . was arrived at through voluntary negotiations, pursuant to 47 U.S.C. § 252(a), and through arbitration pursuant to 47 U.S.C. § 252(b). For those portions of the Agreement arrived at through arbitration, the Commission considered and applied the standards of review set forth in 47 U.S.C. § 252(e)(2)(B).
>
> After reviewing the voluntarily negotiated portions of the Agreement and the written comments filed concerning the Agreement, and discussing the issues addressed in those comments, the Commission determined that this portion of the Agreement does not discriminate against a telecommunications carrier not a party to this Agreement; and that implementation of this portion of the Agreement is not inconsistent with the public interest, convenience, and necessity. Accordingly, the Commission rejected the "redlined" version of the Agreement offered by Ameritech Wisconsin that was filed with the Arbitration Panel on October 31, 1997.

(The parties do not explain why this agreement was signed before the commission's final ruling approving the agreement.) The commission adopted the panel's recommendation on the open issue of collocation, ruling that Ameritech Wisconsin was required to allow MCI to collocate remote switching modules on Ameritech Wisconsin's premises. On December 31, 1997, MCI filed a complaint in the United States District Court for the Eastern District

of Wisconsin, naming Ameritech Wisconsin, the commission and the individual commissioners in their official capacities and alleging that the approved agreement violated the 1996 Act in several respects. On January 17, 1998, Ameritech Wisconsin filed its complaint in this court challenging the commission's determinations. MCI's action was transferred to this court on March 2, 1998 and consolidated with Ameritech Wisconsin's action. In May 2001, MCI was granted leave to voluntarily dismiss the action it had initiated.

OPINION

A. Constitutional Arguments

When the Telecommunications Act was first implemented, many state commissions objected to being sued in federal court and brought challenges to the constitutionality of the legislation, asserting their immunity to suit under the Eleventh Amendment. In a consolidated decision, MCI Telecommunications Corp. v. Illinois Bell Telephone Co., 222 F.3d 323 (7th Cir. 2000), the Court of Appeals for the Seventh Circuit held that the Eleventh Amendment was not infringed by allowing carriers to bring suit against the state commission or its commissioners under the Act because states voluntarily waive their Eleventh Amendment immunity when they accept the federal government's invitation to act as regulators of the local telephone market. Alternatively, the carriers could avoid the bar

of the amendment by suing individual commissioners under the doctrine of Ex Parte Young, 209 U.S. 123 (1909). Defendant Public Service Commission filed a petition for certiorari together with the Illinois commission; the petition was denied. MCI Telecommunications Corp. v. Illinois Bell Tel. Co., 121 S. Ct. 896 (2001). Recently, however, the Supreme Court granted certiorari in a case from the Fourth Circuit raising a similar challenge. Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc., 240 F.3d 279 (4th Cir. 2001), cert. granted in part by Verizon Maryland, Inc. v. Public Service Comm'n of Maryland, 121 S. Ct. 2548 (2001) (limited to deciding whether state waives sovereign immunity when it accepts Congress's invitation to participate in implementing federal regulatory scheme under Telecommunications Act). It may be that the Supreme Court will decide that the Eleventh Amendment is a bar to suits against public service commissions. Until that should happen, I am bound to follow the settled law in this circuit that the Public Service Commission and its commissioners are subject to suit in federal court.

Defendants commission and commissioners have re-argued their constitutional challenge on Tenth and Eleventh Amendment grounds in their briefs, solely to preserve the issue should the Supreme Court rule in their favor. As I understand their Tenth Amendment argument, it is not intended to stand on its own but merely as an additional reason for finding that the state did not waive its sovereign immunity when it assumed responsibility for regulating telecommunications under the Act. Defendants argue that their activities

under § 252 cannot amount to an unequivocal waiver of their sovereign immunity because those activities are coerced in violation of the Tenth Amendment. Moreover, they contend, § 252 commandeers state commission resources in a manner that exceeds the tolerable limits of congressional use of encouragement when seeking state cooperation in a joint federal-state regulatory endeavor.

This new aspect of defendants' Eleventh Amendment immunity argument adds little. It is difficult to accept the premise that state resources have been "commandeered" when the commission and commissioners choose to participate in the regulatory tasks set out in the Telecommunications Act. Defendants' real objection is to the review scheme the Act adopted. Whatever deficiencies that scheme has, commandeering resources is not one of them.

B. Reviewability of Agreed Upon Provisions

Ameritech Wisconsin challenges what it characterizes as the Public Service Commission's determinations that it must provide MCI with combinations of unbundled elements and that it must provide interconnections superior in quality to its own. Its challenge is somewhat misleading because the commission never made these determinations. Rather, they were agreements Ameritech Wisconsin entered into voluntarily during the course of negotiations with MCI that never required any action or determination by the

commission.

The Telecommunications Act limits the federal court's authority to the review of actions and decisions of the commission. Ameritech Wisconsin has not explained how that limited authority would extend to reviewing privately negotiated agreements that were never before a commission for a ruling of any kind. It does not argue, for example, that the commission reviewed the negotiated agreement and erred in determining that it was or was not discriminatory to a third party or inconsistent with the public interest, convenience or necessity. § 252(e)(2)(A). During the time that this matter was pending before the commission, Ameritech Wisconsin never identified the negotiated provisions covering combinations of unbundled elements and superior quality as matters to be arbitrated by the state commission. As a consequence, the commission made no determination about these matters. Therefore, there is no commission action for this court to review.

The agreement that Ameritech Wisconsin and MCI executed includes a provision anticipating changes in the law. In § 29.3, the parties agreed that either one could require the other to negotiate in good faith any provision affected by a change in the Act. This option is still open to the parties. They can attempt to renegotiate the terms of their agreement as they relate to combinations and quality; if their efforts fail, they can ask the Public Service Commission to arbitrate the questions. If Ameritech Wisconsin should lose before the commission it would it be an aggrieved party within the meaning of § 252(e)(6)

and it would have an adverse decision that this court could review.

Ameritech Wisconsin denies that it has the option of renegotiating the terms of the agreement. It argues that the procedures for doing so that were set out in § 29.3 apply to changes in the law after the "effective date" of the agreement and that because the Eighth Circuit's opinion was issued on October 4, 1997, two months before the agreement's effective date, the provision does not apply to the changes in the law regarding combinations and quality. This is a dubious argument. Section 29.3 provides that the agreement is "based on the text of the Act and the rules and regulations promulgated thereunder by the FCC and the Commission as of the Effective Date." R. 65 at 7139. As of December 4, 1997, the rules and regulations were those that the FCC had promulgated. Although the Eighth Circuit had held some of the rules to be improper interpretations of the Act, the court's decision was not yet final but was subject to review by the Supreme Court.

There would be little to Ameritech Wisconsin's argument that this court should review the voluntarily negotiated provisions of its interconnection agreement if it were not for a recent decision by the Court of Appeals for the Fourth Circuit, AT & T of Southern States, Inc. v. BellSouth Telecommunications, Inc., 229 F.3d 457 (4th Cir. 2000). The issue in AT & T was whether the district court had acted properly in striking from the parties' interconnection agreement a provision similar to the one at issue in this case that the parties had negotiated. The provision tracked the terms of the FCC's Rule 315 requiring incumbent

local exchange carries to provide unbundled elements to a competitor and to combine the unbundled elements upon request, even if the local carrier did not ordinarily combine the elements in its own network. Relying on the language in § 252(a)(1) that "[u]pon receiving a request for interconnection services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers *without regard* to the standards set forth in subsections (b) and (c) of section 251 of this title," (emphasis added), the incumbent carrier argued that this negotiated provision was not voluntary because it had been negotiated *with regard* to FCC rules that had been vacated by the Eighth Circuit. The district court agreed with incumbent, holding that "[i]t would stretch the bounds of imagination to construe Paragraph 30.5 as a voluntary agreement to override § 251(c)(3)." AT & T Communications of Southern States, Inc. v. BellSouth Telecommunications, Inc., 7 F. Supp. 2d 661, 670 (E.D.N.C. 1998). Both the district and appellate courts found that the negotiation could not have taken place "without regard" to the § 251 standards and the FCC's interpretation of those standards. "Where a provision plainly tracks the controlling law, there is a strong presumption that the provision was negotiated with regard to the 1996 Act and controlling law." AT & T, 229 F.3d at 465. In the courts' view, such a provision was not a voluntary agreement that would override § 251(c)(3) (the statutory duty to provide unbundled access). Therefore, it was properly subject to review by the district court

"for consistency with the 1996 Act and law thereunder." Id. at 466.

With respect, I find the AT & T decision unpersuasive, beginning with its basic premise that a negotiated agreement will not be deemed voluntary if it tracks a requirement of § 251 or an FCC regulation. This is an unusual interpretation of "voluntary," particularly in a statutory scheme that provides a mechanism for arbitrating disputed issues. The logical reading of § 252(a)(1)'s "without regard to" language is that it means simply that carriers are free to negotiate any terms they wish in their agreements and are not limited by the requirements of the statute or the regulations.

Under the Fourth Circuit's interpretation, there would be three different ways in which an interconnection agreement could be achieved: a voluntary agreement, a semi-voluntary agreement that tracks one or more regulations or an agreement arrived at through arbitration by the state commission. One of the flaws in this approach is that the statute provides for only two methods of arriving at an agreement: voluntary negotiation or arbitration. The statute makes no provision for commission review of "semi-voluntary" agreements, with the result that these agreements would come to the federal court bereft of any commission analysis or administrative record that a court could review. Alternatively, state commissions would take on the task of reviewing every aspect of every agreement on the chance that it was not negotiated voluntarily. Obviously, this is not what Congress intended when it established two tracks for achieving an interconnection agreement, with

the idea that carriers would be able to negotiate many of their disputes and thus reduce the arbitration burden upon state commissions.

Nothing in the statute suggests that Congress wanted federal courts giving de novo review to provisions that were the product of negotiation. Such review would be an anomaly in an administrative scheme that is designed to utilize the knowledge and experience of administrators who know the field far more intimately than a court can.

Equally anomalous is the idea that courts should intervene to make changes in an agreed upon contractual arrangement. Contracts exist as a whole; they represent a careful and hard fought balancing of the interests and needs of the contracting parties. Intervening in that process runs the risk of upsetting the entire balance.

A number of courts have rejected the approach the Fourth Circuit adopted. In Southwestern Bell Telephone Co. v. Waller Creek Communications, Inc., 221 F.3d 812 (5th Cir. 2000), for example, the court of appeals refused to allow an incumbent to reopen for arbitration a provision it had negotiated to provide combinations of unbundled network elements. The incumbent had agreed to the combinations provision before the Court of Appeals for the Eighth Circuit had vacated the combination rule adopted by the FCC and was resisting the decision of the Texas Public Utilities Commission to allow a second competing carrier to "opt in" to the same provision, pursuant to 47 U.S.C. § 252(i). The Texas commission refused to review the provision; the district court affirmed the

commission's decision and the Fifth Circuit affirmed the district court. Neither the commission nor the courts were persuaded by the incumbent's argument that it should be allowed to reopen the issue because its earlier agreement had not been truly voluntary. See also Indiana Bell Telephone Co. v. McCarty, 30 F. Supp. 2d 1100 (S.D. Ind. 1998) (refusing to resolve dispute between incumbent and competing carriers over interpretation of negotiated terms in interconnection agreement on ground that commission had never had occasion to interpret issues in dispute; case did not involve vacation of FCC rules by subsequent court ruling); AT & T Communications of Ohio, Inc. v. Ohio Bell Telephone, 29 F. Supp. 2d (S.D. Ohio 1998) (statutory scheme of Telecommunications Act does not permit district court to review disputes arising out of interconnection agreements not previously subject to action by state commission).

In this case, Ameritech Wisconsin knew that the two matters at issue (quality and combinations of unbundled elements) were not settled. After all, it was a party to a suit challenging the FCC's interpretation of the rules governing these matters as well as others. If Ameritech Wisconsin had truly wanted to preserve its right to challenge the FCC ruling as it related to its contract with MCI, it could easily have identified the matters for arbitration, thereby reserving its opportunity to take the matters to court if the commission ruled against its position.

C. Collocation

At the outset, defendant commission argues that this issue is not ripe for adjudication. "Ripeness" refers to the policy that agency determinations are not to be subjected to judicial review until they are final and the effects of them are "'felt in a concrete way by the challenging parties.'" Mountain States Tel. and Tel. Co. v. FCC, 939 F.2d 1021, 1028 (D.C. Cir. 1991) (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967)). The arbitration panel award provided expressly that Ameritech Wisconsin might object to any equipment placements on a case-by-case basis if it believed that any particular placement was not authorized by the 1996 Act. R. 68 at 12058. At this time, MCI has not asked Ameritech Wisconsin to install any of the equipment that could be the subject of a dispute. The commission maintains that without a specific request involving specific equipment, the dispute between the parties is not sufficiently "concrete" to permit a reasoned review.

In fact, the commission's arbitration decision places Ameritech Wisconsin under a present obligation: it must permit MCI to collocate switching equipment. R. 65 at 7096. Although Ameritech Wisconsin will have opportunities to object to particular pieces of equipment or to the method of installation, this is its opportunity to object to the requirement that it permit any switching equipment at all to be located on its premises. This is a sufficiently concrete dispute to permit resolution by the court.

Ameritech Wisconsin's objection to the collocation obligation rests on its contention

that the 1996 Act authorizes only *necessary* collocation and that necessary means what the Court of Appeals for the District of Columbia Circuit said it meant: "that which is required to achieve a desired goal." GTE Service Corp. v. FCC, 205 F.3d 416, 423 (D.C. Cir. 2000). GTE was a challenge to an order issued by the FCC that addressed collocation, entitled Deployment of Wireline Services Offering Advanced Telecommunications Capability, 14 FCC Rcd 4761 (1999). In this collocation order, the FCC took the position that "necessary" meant that "an incumbent [local exchange carrier] may not refuse to permit collocation of any equipment that is 'used or useful' for either interconnection or access to unbundled network elements, regardless of other functionalities inherent in such equipment." Id. at 4776-77. Certain incumbent local carriers challenged the order, arguing that it imposed physical collocation requirements on them that were impermissible under the Act. The court of appeals agreed, holding that the FCC had erred in interpreting necessary as used or useful and in deciding to permit competitors to collocate equipment that might do more than what is required to achieve interconnection or access. "[T]he FCC's Collocation Order impermissibly invites unwarranted intrusion upon [local exchange carriers'] property rights . . . . The Collocation Order as presently written seems overly broad and disconnected from the statutory purpose enunciated in § 251(c)(6)." GTE, 205 F.3d at 422. In reaching this conclusion, the court relied upon the Supreme Court's comments in AT & T Corp. v. Iowa Utilities Board, 525 U.S. 366, 388 (1999), that the word "necessary," as used in §

251(d)(2), had to have "some *limiting* standard, rationally related to the goals of the Act."

Defendants do not deny that the court of appeals rejected the FCC's definition of necessary that the Public Service Commission used in deciding the collocation issue between Ameritech Wisconsin and MCI. They argue that the GTE decision is essentially irrelevant because the Telecommunications Act authorizes state commissions to impose requirements that go beyond those mandated by the Act. Although defendants are correct that the Act gives this authority to state commissioners, § 252(b)(4), and that state commissions have the authority to create or enforce their own regulations, §§ 252(d)(3), 252(e)(3), 261(b) and (c), they gloss over the corollary to this proposition, which is that any requirements that state commissions impose must be consistent with the Act. In this instance, the state commission has imposed a requirement upon Ameritech Wisconsin, using a standard that has been held to be improper. Such a requirement cannot be said to be consistent with the Act. Therefore, the state commission's ruling cannot stand.

Ameritech Wisconsin argues that the commission's ruling on collocation can be vacated without remanding the matter because MCImetro presented no evidence during arbitration of this issue to rebut Ameritech Wisconsin's evidence that remote switching modules are not necessary for collocation under § 251(c)(6). I believe that the matter should be remanded to allow the commission to reconsider it, using a more stringent definition of "necessary."

Defendant commission argues that it based its decision on state law. Even if I agreed with the commission that state law would enable it to use a definition of necessary that has been held to be an improper interpretation of that term as used in § 251(c)(6), I would find this argument lacking. Nothing in the arbitration decision suggests that defendant commission considered state law when it ruled on Ameritech Wisconsin's obligation to collocate. R. 68 at 12056-58. Thus, even if it had the authority under state law to require Ameritech Wisconsin to collocate, its decision could not stand because it did not rest on state law.

Defendants argue that a number of other courts of appeals have held to the contrary. They cite two decisions from the Court of Appeals for the Ninth Circuit, US West Comminications, Inc. v. Hamilton, 224 F.3d 1049 (2000); MCI Telecommunications Corp. v. U.S. West Communications, 204 F.3d 1262 (2000). In the MCI case, the court of appeals upheld the district court's denial of US West's motion to strike a provision of its agreement with MCI to collocate remote switching units. US West argued that the state commission had used the FCC's definition of necessary ("used or useful" for interconnection) and that this definition could not stand in light of the Supreme Court's disapproval of the FCC's definition of necessary in another provision of the Act. The court of appeals held that its only role in reviewing the actions of the state commission was to decide whether a provision failed to meet the requirements of the Act and that, "[a]lthough

the Act may not require the provision, it certainly does not proscribe it. Sections 251 and 252 of the Act are designed to provide some flexibility in fixing the provisions of interconnection agreements." MCI, 204 F.3d at 1269. MCI was decided before the ruling in GTE. In the Hamilton case, which was decided after GTE, the court of appeals did not discuss the collocation issue. It noted only that "[w]e settled this question in MCI Telecommunications Corp. v. U.S. West, 204 F.3d 1262 (9th Cir. 2000), where we held that the Act permits a state commission to require collocation of [remote switching units] on the [incumbent local exchange carrier's] premises." Illinois Bell v. WorldCom Technologies, Inc., 179 F.3d 566 (7th Cir. 1999), is cited for the proposition that state commissions may impose requirements that exceed those required by the Act. In fact, however, in that case the FCC had ruled explicitly in a declaratory ruling issued on February 26, 1999, that state commissions were free to make their own decisions on reciprocal compensation provisions of interconnection agreements until the FCC had held hearings on the issue and reached a final determination.

I am not persuaded that the Act allows the imposition of requirements that have been found to be improper under the Act. To read the Act to allow state commissions to impose such requirements would read out of the Act the provision that the additional requirements must comport with the purposes and provisions of the Act.

ORDER

IT IS ORDERED that Ameritech Wisconsin's request for a declaration that the Telecommunications Act does not permit a state commission to require local carriers to provide combinations or superior quality is DENIED on the ground that this challenge is not properly before the court because Ameritech Wisconsin is not an aggrieved party. FURTHER, IT IS ORDERED that the decision of defendant Public Service Commission of Wisconsin to require Ameritech Wisconsin to allow collocation of switching equipment is VACATED and the matter is REMANDED to the commission for further proceedings and defendant commissioners Ave M. Bie, Robert M. Garvin and Joseph P. Mettner are ENJOINED from enforcing the current collocation provision of Ameritech Wisconsin's interconnection agreement with defendant MCImetro.

Entered this 17th day of October, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge