

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

FILED
DES MOINES, IOWA
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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

U S WEST COMMUNICATIONS, INC.,	*	
	*	
Plaintiff,	*	CIVIL NO. 4-97-CV-70082
	*	
v.	*	MEMORANDUM OPINION,
	*	RULING GRANTING AT&T'S
	*	AND MCI'S MOTION FOR
ALLAN T. THOMS et al.,	*	RECONSIDERATION AND
	*	ORDER AMENDING JUDGMENT
Defendants.	*	
	*	

AT&T Communications of the Midwest, Inc. ("AT&T") and MCImetro Access Transmission Services, Inc. ("MCI") bring this motion for reconsideration in light of an intervening change in the controlling law regarding the interpretation and application of the Telecommunications Act of 1996 (the "Act").¹ In its order "Affirming Some Provisions of the Interconnection Agreements and Remanding Others" (hereinafter "Initial Decision"), this court relied on the law as it existed after the Eighth Circuit Court of Appeals decision in Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997) ("IUB I"). Remarkably, about one hour after this court filed its opinion the United States Supreme Court issued its decision in AT&T v. Iowa Utilities Board, 119 S. Ct. 721 (1999) ("IUB II"), affirming in part and reversing in part the judgment of the Eighth Circuit Court of Appeals in IUB I.

AT&T and MCI filed their motion for reconsideration within 10 days of entry of the judgment on this court's order, and they recite that they file it pursuant to Fed. R. Civ. P. 59. Although the Federal Rules of Civil Procedure do not recognize a

¹ The provisions of the Act most pertinent to these proceedings are located at 47 U.S.C. §§ 251-252. On page two of its initial ruling filed on January 25, 1999, however, this court mistakenly referred to title 28 of the United States Code when discussing provisions of the Act. Thus, the citations to 28 U.S.C. § 251(c), 28 U.S.C. § 251(c)(1), and 28 U.S.C. § 252, are amended to read, respectively, 47 U.S.C. § 251(c), 47 U.S.C. § 251(c)(1), and 47 U.S.C. § 252.

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motion for reconsideration, per se, see Sanders v. Clemco Indus., 862 F.2d 161, 168 & 170 (8th Cir. 1988) (noting that a motion for reconsideration is not described by any particular rule of federal civil procedure), generally a motion for reconsideration that is filed within 10 days of the entry of judgment is treated as a motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e). See id. at 168-171 & n.11; see also In re Trout, 984 F.2d 977, 978 (8th Cir. 1993) (construing a motion to reconsider filed within ten days of the filing date of the initial order to be a 59(e) motion); DeWit v. Firststar Corp., 904 F. Supp. 1476, 1494 (N.D. Iowa 1995) (construing a motion to reconsider filed within ten days after the judgment to be a 59(e) motion); 12 James Wm. Moore et al., Moore's Federal Practice § 59.30[7] (3d ed. 1998) (same); cf. Retired Chicago Police Ass'n v. City of Chicago, 76 F.3d 856, 862 n.1 (7th Cir. 1996) (same). Because AT&T and MCI filed their motion for reconsideration within 10 days of the entry of judgment in this case, the motion is a timely filed rule 59(e) motion.²

A motion to alter or amend a judgment is appropriate when there has been an intervening change in the controlling law. See Laughlin v. Jensen, 148 B.R. 315, 315 (D. Neb. 1992) (recognizing that rule 59(e) motion may be based on intervening change in controlling law); see also Atlantic States Legal Found., Inc. v. Karg Bros., Inc., 841 F. Supp. 51, 53 (N.D.N.Y. 1993) (same); Gregg v. American Quasar Petroleum Co., 840 F. Supp. 1394, 1401 (D. Colo. 1991) (recognizing that motion for reconsideration under 59(e) is proper where there has been a significant change or development in the law since the submission of the issues to the court); 12 James Wm. Moore et al., Moore's Federal Practice § 59.30[5][a][i-ii] (3d ed. 1998). There is no doubt that the Supreme Court's IUB II decision constitutes an intervening change in controlling law. The question is, therefore, what issues addressed in this court's Initial Decision need to be readdressed

² Fed. R. Civ. P. 59(e) provides: "Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment."

in light of the intervening change in the law. The parties have filed briefs addressing this question and the motion is submitted.

The Supreme Court's Decision

In its IUB II decision, the Supreme Court changed the law in three respects potentially affecting this court's Initial Decision. First, the Supreme Court reversed the Eighth Circuit Court of Appeals and concluded that the Federal Communications Commission ("FCC") has jurisdiction to design a pricing methodology, thereby reinstating federal pricing regulations previously vacated by the court of appeals.³ See IUB II, 119 S. Ct. at 729-33. Second, the Supreme Court vacated 47 CFR § 51.319, previously upheld by the court of appeals, which gave competitive local exchange carriers ("CLECs") blanket access to a laundry list of network elements. The Court vacated this rule because it concluded that the FCC granted blanket access to the listed elements based upon an improper interpretation of the "necessary" and "impair" standards contained in 47 U.S.C. § 251(d)(2). See id. at 734-736. Although the Court did not specifically vacate 47 CFR § 51.317, the rule articulating the FCC's interpretation of the "necessary" and "impair" standards as it applies to other non-listed network elements, the Court's analysis of rule 319 apparently sounds the death-knell for rule 317 as well. Finally, the Supreme Court reinstated 47 CFR § 51.315(b), previously vacated by the court of appeals, which prevents incumbent local exchange carriers ("ILECs"), except upon request, from separating requested network elements that the ILEC currently combines. See id. at 736-738. The impact of these changes in the law on issues previously decided by this court are discussed, in turn, below.

³ The pricing rules previously vacated by the court of appeals on jurisdictional grounds include: 47 C.F.R. §§ 51.501-51.515 (inclusive, except for section 51.515(b) which was not vacated by the court of appeals), 51.601-51.611 (inclusive), & 51.701-51.717 (inclusive). See IUB I, 120 F.3d at 800 n.21.

Issues to be Reconsidered

I. The Pricing Issues

In its previous order, this court addressed two pricing issues raised by MCI: (1) the failure of the Iowa Utilities Board (the "Board") to set cost-based interconnection and access to unbundled network element rates, and (2) the failure of the Board to de-average unbundled network element rates. In both instances, this court affirmed the approach taken by the Board. The Board's approach to these issues, although consistent with the general code language, see 47 U.S.C. §§ 251(c) & 252(d), did not comply with the FCC regulations applying those code provisions. At the time the Board rendered its pricing decision, it was under no obligation to comply with the FCC's rules because they had already been vacated by the court of appeals in IUB I. Now that the Supreme Court has reinstated the FCC's pricing rules, however, the Board's approach to both of these pricing issues is inconsistent with federal law.

The FCC's rules regarding the pricing of interconnection and access to network elements are located in 47 CFR §§ 51.501-515. These rules provide that the state commission, i.e., the Board, must establish the rates either pursuant to the forward-looking economic cost-based pricing methodology set forth in §§ 51.505 and 51.511, or consistent with the proxy ceilings and ranges set forth in § 51.513. See 47 CFR § 51.503. The forward-looking economic cost-based pricing methodology referenced in the first option is the sum of the total element long-run incremental cost ("TELRIC") of the element, as described in section 51.505(b), and a reasonable allocation of forward-looking common costs, as described in section 51.505(c). See 47 CFR § 51.505(a). The Board adopted neither the TELRIC option nor the proxy option in establishing rates for interconnection and access to unbundled elements. Indeed, the Board specifically rejected the TELRIC methodology because the Board was unwilling to accept two of its underlying assumptions. See Board's Final Decision and Order, at 13-14 (April 23, 1998), as modified by order on June 12, 1998. In its stead, the court adopted an incremental cost approach. See id. at 14-15. By adopting a pricing methodology other than

those specified in the FCC's pricing rules, the Board's pricing approach is inconsistent with current federal law. Accordingly, this pricing issue will be remanded to the Board with direction to comply with the FCC's pricing rules.

The FCC's pricing rules reinstated by the Supreme Court also address the de-averaging issue. Section 51.503(b) of code of regulations provides that an ILEC's rates for each element it offers must comply with the rate structure rules set forth in section 51.507. See 47 CFR § 51.503(b). Subsection (f) of section 51.507 requires state commissions, i.e., the Board, to "establish different rates for elements in at least three defined geographic areas within the state." 47 CFR § 51.507(f). In its Final Decision and Order, the Board refused to establish different rates for different areas of the state, deciding instead to adopt a statewide average rate for each particular element. See Board's Final Decision and Order, at 33-35. Although this court, in its Initial Decision, accepted the Board's approach as being cost-based, albeit a statewide average cost, the Board's approach is inconsistent with the FCC's pricing rules reinstated by IUB II. Accordingly, the Board is ordered on remand to readdress the de-averaging issue and to, at a minimum, comply with the requirements of the FCC's rules.⁴

II. The "Necessary" and "Impair" Standards

In 47 U.S.C. § 251(d), Congress authorizes the FCC to establish regulations to implement the requirements of section 251. That authorization includes a grant of authority to determine what network elements should be made available to CLECs on an unbundled basis pursuant to section 251(c)(3). Congress requires the FCC, in making that determination, to consider, at a

⁴ This court is well aware that the FCC pricing rules have yet to be approved by the Eighth Circuit Court of Appeals on their merits. The court cannot, however, refuse to apply the law as it currently exists based upon the possibility that the law may be changed by subsequent court opinion. Of course, if the parties truly wish to avoid such uncertainty, they should take their duties to negotiate in good faith to heart and reach a mutual agreement as to all of these contested issues. See 47 U.S.C. § 251(c)(1). I strongly encourage them to do so.

minimum, whether "(A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2) (emphasis added). Pursuant to this grant of authority, the FCC established a list of network elements that satisfied the necessary and impair standards, and therefore had to be made available by ILECs upon request, and listed those elements in 47 CFR § 51.319. See IUB II, 119 S. Ct. at 734-36 (outlining the approach taken by the FCC in its First Report and Order). The Supreme Court rejected this list of network elements, however, because the Court concluded that the FCC did not properly interpret and/or apply the necessary and impair standards contained in section 251(d)(2) when developing the list. See IUB II, 119 S. Ct. at 734-35.

In 47 CFR § 51.317, the FCC articulated its standards for identifying network elements, other than those listed in section 51.319, which, upon request, must be made available to CLECs on an unbundled basis. The standards articulated by the FCC in section 51.317 are the same interpretation of the necessary and impair standards the Supreme Court found wanting in its analysis of section 51.319. Accordingly, the standards articulated in section 51.317 no longer appear to be good law.

The only network element required by the Board to be provided on an unbundled basis pursuant to the standards articulated in section 51.317, and challenged by a party to the interconnection agreement, is the "dark fiber" element. In its Final Arbitration Decision on Remand, the Board concluded that dark fiber should be provided as a network element because it satisfies the FCC's test for a nonproprietary element "that denial of unbundled access to the network element would decrease the quality or increase the cost to a CLEC of providing a service." Board's Final Arbitration Decision on Remand, at 31-32 (citing the IUB I decision which upheld the FCC's interpretation of the impairment standard). This court affirmed the Board's finding based upon the Board's application of the now-defunct

impairment standard articulated by the FCC. See Initial Decision, at 40-41. Because the Board and this court relied on an improper interpretation of the impairment standard in requiring the ILEC to provide dark fiber on an unbundled basis, the dark fiber issue is remanded to the Board for a re-determination as to whether the ILEC must provide access to its dark fiber, a network element, on an unbundled basis.⁵

MCI urges this court to not remand this issue to the Board, but instead hold the question in abeyance, pursuant to the doctrine of primary jurisdiction, until the FCC has completed its rulemaking process and adopted a revised interpretation of the impairment standard. This court declines to do so. It is extremely unlikely that the FCC's new regulations would allow this court, as MCI suggests, to adjudicate the dark fiber issue on the record as it exists. Rather, this court would eventually have to remand the issue to the Board for a determination, in the first instance, of whether the provision of dark fiber satisfies the new standard. This court would then review, upon request, the Board's decision. See 47 U.S.C. § 252(e)(6) (establishing that it is this court's duty to review determinations made by state commissions, not to make such determinations in the first instance). It is precisely because the Board is better equipped to handle such a determination in the first instance that this court remands the issue to the Board at this time. See MCI's Brief in Support of Motion to Reconsider, at 18 (citing Far East Conf. v. United States, 342 U.S. 570, 574-75 (1952), for the proposition that agencies are better equipped than courts by specialization, insight gained by experience, and more flexible procedures to resolve specialized or technical issues). On remand, the Board can determine whether there is another basis for requiring the ILEC to provide dark fiber, whether it should delay the determination until after the FCC's new rules are

⁵ The Supreme Court's decision in IUB II did not affect the Board's and this court's determination that dark fiber is a network element. Accordingly, the Board need not reexamine that issue on remand.

released, or whether it should take another course of action.

III. The Combination of Elements Issue

The initial interconnection agreement arbitrated and accepted by the Board required the ILEC to provide network elements individually, and in combination with other network elements. See Original Agreement § 37. This approach was called into question by the court of appeals in IUB I. In that decision, the court of appeals vacated subsections (b)-(f) of 47 CFR § 51.315, which speak to the issue of an ILEC's duty to provide network elements in combination. Subsection (b) of section 51.315 prohibits an ILEC, except upon request, from separating requested network elements that the ILEC currently combines. See 47 CFR § 51.315(b). Subsections (c)-(f) of section 51.315 require the ILEC, upon request, to combine other network elements, even if those elements are not ordinarily combined in the ILEC's network, provided that certain conditions are met. See 47 CFR § 51.315(c)-(f). The court of appeals in IUB I vacated subsection (b) of section 51.315 because section 251(c)(3) of the Act provides for access to network elements only on an unbundled basis, not a combined basis. See IUB I, 120 F.3d at 813. In addition, the court of appeals concluded that allowing CLECs to purchase the ILEC's elements on a combined basis would obliterate the distinction between access to unbundled network elements and the purchase of an ILEC's retail services for resale. See id. The court of appeals vacated subsections (c)-(f) of section 51.315 because the court concluded that the language of section 251(c)(3) of the Act—" [an ILEC] shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements"— unambiguously indicates that requesting carriers, not incumbents, have the responsibility of combining those network elements provided by the ILEC on an unbundled basis. See id.

In light of the court of appeals' decision, the Board modified the interconnection agreement on remand to provide:

The ILEC shall offer each Network Element individually or may, in the ILEC's sole discretion except where Network Elements are inextricably combined, e.g.

switching and signalling, offer them in combination * * *.

* * * *

For each Network Element, the ILEC shall have only the following options with regard to recombining with other Network Elements:

- (1) The ILEC can elect to not separate the Network Element from other Network Elements with which it is combined;
- (2) The ILEC can provide its own personnel to the CLEC to recombine the Network Element with other Network Elements as requested by the CLEC;
- (3) The ILEC can elect "recent change" technology, which is switching software somewhat like an on/off switch that allows the CLEC to recombine some Network Elements;
- (4) The ILEC can elect to have a third-party technician acceptable to both the ILEC and the CLEC recombine the Network Elements; and
- (5) The ILEC can elect to allow the CLEC's technician recombine the Network Elements.

Where options 4 or 5 are selected, ILEC may require that ILEC personnel accompany the third-party or CLEC personnel as they do the recombining of Network Elements. Where ILEC personnel accompany the third-party or CLEC personnel, ILEC shall bear the expense of its personnel, and CLEC shall bear the recombining expense of the third-party or its own personnel.

Interconnection Agreement on Remand § 37. This approach was consistent with IUB I, in that the ILEC was not required to provide network elements in combination nor required to recombine unbundled elements on behalf of the CLEC. Accordingly, in its Initial Decision, this court affirmed the Board's approach. See Initial Decision, at 28-30.

In IUB II, however, the Supreme Court reversed the court of appeals' decision as it related to subsection (b) of 47 CFR § 51.315. See IUB II, 119 S. Ct. at 737 (finding rule 315(b) to be a reasonable interpretation of the Act). In so doing, the Court concluded that the language of section 251(c)(3) of the Act—" [an ILEC] shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements"—merely forbids ILECs from sabotaging unbundled network elements in such a way as to preclude them from ever being recombined. See IUB II, 119 S. Ct. at 737. This language does not, the Court

reasoned, "say, or even remotely imply," that the ILEC must provide the network elements only in an unbundled, and never a combined, form. See id. Accordingly, the Court found section 251(c)(3) of the Act to be ambiguous on whether leased network elements may or must be separated, and concluded that the FCC's interpretation contained in section 51.315(b) had a rational basis in the Act's nondiscrimination requirement. See id. Indeed, the Court cited with approval the FCC's rationale for the rule—the rule "is aimed at preventing incumbent LECs from 'disconnect[ing] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants.'" Id. (quoting Reply Brief for Federal Petitioners 23).

The change in law brought about by the Supreme Court's IUB II decision renders the Board's approach to the combination issue, at least in part, inconsistent with federal law. To the extent section 37 of the Interconnection Agreement on Remand allows the ILEC to choose to unbundle network elements that it currently combines, even in the face of a request from a CLEC for the elements to be provided in their combined form, the agreement is inconsistent with current federal law. See 47 CFR § 51.315(b). Thus, the combination issue will be remanded to the Board to modify the interconnection agreement so as to prevent the ILEC from unbundling network elements that it currently combines in contradiction of 47 CFR § 51.315(b).⁶

It should be noted that the Supreme Court reversed only the court of appeals' decision as it related to subsection (b) of section 51.315; it did not address subsections (c)-(f), which were also vacated by the court of appeals. See IUB II, 119 S. Ct. at 736-38. Accordingly, the Board's approach to combining

⁶ The Board apparently predicted such a change in the law, as it included a clause in section 37 of the Interconnection Agreement on Remand notifying the parties that the combination approach adopted by the Board was subject to modification in the event the Supreme Court reversed the combinations portion of the IUB I decision. See Interconnection Agreement on Remand § 37.

network elements not currently combined in the ILEC's network system—allowing the ILEC to choose between combining the elements for the CLEC, utilizing recent change technology, allowing a third party to combine the elements, or allowing the CLEC to combine the elements—remains a viable approach under the law. The Board need only modify the agreement so as to eliminate any suggestion that the ILEC can choose to unbundle elements that it currently combines in its own system, in contravention of a request from a CLEC for the elements in their combined form. In other words, an ILEC may not be given discretion to deny a request for network elements in a combined form if the ILEC combines those same elements in its own system. If the elements requested by the CLEC are not utilized in a combined form by the ILEC in its own system, the ILEC need only provide the elements in an unbundled form, and the ILEC cannot be required to combine the elements for the CLEC's benefit. The Board should modify the interconnection agreement accordingly.⁷

IV. Other Issues

In its Initial Decision, this court remanded the issue concerning the collocation of remote switch modules ("RSMs")

⁷ US West Communications, Inc. ("US West") contends that this court lacks jurisdiction to revisit its initial ruling on the combination issue because neither AT&T nor MCI, the parties who filed this motion to reconsider, challenged the Board's approach to the combination issue in the initial section 252(e)(6) proceeding. I disagree. Pursuant to MCI's and AT&T's motion to reconsider, this court may reconsider any of its determinations in its Initial Decision which are affected by the intervening change in the controlling law, regardless of which party initially challenged the agreement provision or which party filed the motion to reconsider. For example, upon reconsideration, the court accepted US West's argument and remanded the dark fiber issue even though US West did not file the motion for reconsideration.

Moreover, a practical reason supports a remand of the combination issue at this time. Undoubtedly, this issue would have been revisited pursuant to the renegotiation provision in the interconnection agreements. See Interconnection Agreement on Remand § 20.2. It is this court's conclusion that by immediately remanding the issue to the Board, the court is accelerating the renegotiation of the combination issue, a result consistent with the Act's purpose to bring about effective competition as quickly as possible.

because the Board failed to make an explicit finding that the RSMs were going to be "used for interconnection." See Initial Decision, at 54-57. On remand, the Board may, in its discretion, reconsider whether "used for interconnection" remains the appropriate test after the Supreme Court's decision in IUB II. See IUB II, 119 S. Ct. at 734-36 (disapproving of the FCC's broad interpretation of the word "necessary," as it is used in section 251(d)(2) of the Act); Initial Decision, at 54 (explaining that FCC interpreted the word "necessary," as it is used in section 251(c)(6) of the Act, the collocation provision, to mean "used or useful").

The rest of this court's findings and conclusions contained in its Initial Decision will remain unaltered.⁸

ORDER

MCI's and AT&T's motion for reconsideration is **GRANTED**. Upon reconsideration, all provisions of this court's original order and judgment shall remain unaltered, except **IT IS ORDERED** that the two pricing issues, the dark fiber issue and the network element combination issue are remanded to the Board.⁹

Dated this 19 day of April, 1999.


HAROLD D. VIETOR
Senior U.S. District Judge

⁸ Throughout US West's "Brief on the Effect of the Supreme Court's Decision," US West repeatedly suggests that the Supreme Court's decision somehow changes the number or nature of network elements US West is obligated to provide AT&T and MCI under the interconnection agreement. In its Initial Decision, this court addressed only US West's obligation to provide dark fiber as a network element because that was the only network element that US West claimed it had no duty to provide. This court cannot reconsider a decision it did not make in its Initial Decision nor an issue that was not pursued by any party in the original proceeding. Therefore, US West remains obligated to provide all the unchallenged network elements contained in the Interconnection Agreement on Remand, including operational support systems ("OSSs") and shared transport.

⁹ Nothing in this opinion is intended to limit the procedures available to the Board for resolving these issues on remand, including allowing the parties to negotiate agreement.

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