In re Bell Atlantic Corp., No. 96-5001 (D.C. Circuit.)

NOT SCHEDULED FOR ORAL ARGUMENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-5001

In re: BELL ATLANTIC CORPORATION, et al.,

Petitioners

RESPONSE OF THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS

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Bell Atlantic Corporation, SBC Communications Inc., and NYNEX Corporation (three of the Bell Operating Companies or "BOCs" subject to the AT&T antitrust consent decree) petitioned for a writ of mandamus to compel the district court to act on pending motions before anticipated telecommunications reform legislation displaced the decree. They apparently hoped that expedited judicial rulings on the eve of enactment would allow them, under the legislation's "grandfather clause," to engage in unspecified activities prohibited by the decree that otheriwse would continue to be prohibited by the legislation.[1/]

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[1] In addition, they asked this Court to rule directly on motions submitted to the Department of Justice in November and December 1995, pursuant to the district court's established procedures, that have not been filed with the district court. Pet. at 2, 8-9.

This Court should deny the BOCs' petition. On Thursday afternoon, February 1, 1996, the House and Senate both passed the Telecommunications Act of 1996; the President has endorsed the Act and stated that he will sign it. The Act will moot the motions on which the BOCs seek to compel judicial action, thereby mooting the BOCs' mandamus petition, as well. The Act will amend the Federal Communications Act of 1934 in significant respects, opening communications markets to additional competition, prospectively supplanting the decree restrictions, and eliminating both the judicial waiver procedures to which the BOCs object and the court-imposed restrictions that their pending motions seek to modify.

STATEMENT

1. The United States' response in opposition to Bell Atlantic's prior mandamus petition describes the background of the decree and the procedures established by the district court for BOC line-of-business waiver requests. See US Response to BA at 2-6.[2] The Department of Justice has continued to review waiver requests as expeditiously as possible without jeopardizing the public interest in competition, see id. at 17;[3] in 1995, it

[2] Tab B of the BOCs' Appendix to Petition for a Writ of Mandamus (filed Jan. 16, 1996) includes the US Response.

[3] The United States has not opposed appropriate modifications to the waiver process, including direct filing with the court and court-supervised timetables for the Department's review. See US Response to BA at 18.

completed review of forty waivers;[4/] many of these were complex, involving difficult issues and substantial proposed modifications of the interexchange restriction. While the BOCs submitted more new requests in 1995 than in the three previous years combined, the number of pending waivers remained constant.

2. In the summer of 1995, the House and Senate passed comprehensive telecommunications reform bills (H.R. 1555 and S. 652). After this Court denied Bell Atlantic's mandamus petition in October 1995, the conference committee completed its work; on February 1, 1996, the House and Senate overwhelmingly approved the final bill; the President praised the bill and indicated that he will sign it when it is presented to him. The Act amends the Communications Act of 1934, significantly altering the current legal framework. Most importantly for purposes of this petition, from the date of enactment, the amended Communications Act -- and not the decree -- prospectively governs the BOCs' activities:

> Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the AT&T Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and shall not

[4] This is more than twice the number completed in 1994, the largest number in any year except 1988 (46), and more than in 1992, 1993, and 1994 combined. It is worth noting that the BOCs' list of waivers pending before the Department (Pet. App. C) is not entirely accurate.

> be subject to the restrictions and the obligations imposed by such Consent Decree.

§601(a)(1).

The Act does not merely displace the decree, however; it is designed to foster fundamental and procompetitive changes throughout the telecommunications industry. It would open all communications markets, including local exchange services, to more competition and preempt state entry barriers. As part of this reform package, the legislation allows the BOCs to provide out-of-region interLATA services and "incidental interLATA services" immediately upon enactment. Other BOC in-region interLATA services would be prohibited, however, until the BOCs meet specified conditions and obtain FCC approval.

The statutory restrictions on the BOCs are subject to a "grandfather clause." Section 271(f) provides:

> Neither subsection [271](a) [the Act's restrictions on BOC interLATA services] nor section 273 [the Act's manufacturing provisions] shall prohibit a Bell operating company or affiliate from engaging, at any time after the date of the enactment of the Telecommunications Act of 1996, in any activity to the extent authorized by, and subject to the terms and conditions contained in, an order entered by the United States District Court for the District of Columbia pursuant to section VII or VIII(C) of the AT&T Consent Decree if such order was entered on or before the such date of enactment, to the extent such order is not reversed or vacated on appeal. Nothing in this subsection shall be construed to limit, or to impose terms or conditions on, an activity in which a Bell operating company is otherwise authorized to engage under any other provision of this section.

ARGUMENT

It is undisputed that once the President signs the bill that has now been passed by both houses of Congress, the pending motions for changes in decree waiver procedures and the motions for modification of decree restrictions will be moot. The Act's restrictions and provisions for removal of those restrictions will control. See §601(a)(1)(supra p.3). Thus the BOCs' mandamus petition will become moot, as well.

The prospect of legislation displacing the decree -- a result that the BOCs have sought long and loudly -- was good reason for the courts to defer action on decree-related motions. A district court has "broad discretion to control its docket," United States v. Western Elec. Co., 46 F.3d 1198, 1207 n.7 (1993) ("AT&T-McCaw Appeal"), and mandamus is not an available remedy as to matters committed to that discretion, Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980). While a court is not required to await legislation that could moot matters pending before it, there can be no doubt that when legislation appears likely, the court may take account of that circumstance in prioritizing the matters on its docket. See United States v. Western Elec. Co., No. 95-5137 (Order, Jan. 16, 1996) (directing counsel to be prepared to address the possibility that legislation may moot the appeal).

Now that the Telecommunications Act of 1996 needs only the anticipated Presidential signature to become law, there will never be any need for the district court to rule on any of the

motions that are now pending before it or on any that the Department is now reviewing, nor should there be appeals to this Court concerning such motions. Contrary to the BOCs' contention (Pet. at 2), however, the Act does not deprive the BOCs of an opportunity for relief from existing restrictions. To the contrary, the Act and the FCC proceedings it mandates give the BOCs very substantial relief from the restrictions under which they now operate -- although not everything they want as quickly as they would like.

The BOCs no doubt would prefer to take full advantage of the freedom and oportunies the Act will provide and also to seek further relief from the courts. The BOCs' apparent hope in filing this mandamus petition was that, because the legislation would "grandfather" activities authorized by the district court before enactment, see §271(f) (supra p.4), rulings on the eve of enactment would afford them greater relief than Congress otherwise provided. But neither the district court nor this Court should accommodate the BOCs' wishes in this regard.

The BOCs did not explain what additional activities they wanted the district court to authorize, much less why this Court should compel such relief. Most of the activities that would have been authorized if the pending motions listed in Pet. App. C had been granted also appear to be permitted under the Act, without regard to the grandfather clause. And even if the

district court had ruled, it reasonably could have limited relief to the same or less than the Act will provide.[5/]

Congress presumably intends the grandfather clause to avoid disruption of on-going BOC activities, not to invite an end-run of Congressional policy judgments through last-minute judicial waivers. Congress knew that waiver motions would be pending at enactment, but decided to grandfather only those that had been granted by the court.

3. There never has been any reason for this Court to grant the BOCs' request that it "take jurisdiction over and approve" the blunderbuss BOC motions for generic me-too relief, filed in November and December 1995 (Pet. at 9). Under the district court's me-too waiver procedures, which have been in effect since March 13, 1986,[6/] the Department was reviewing these motions to determine whether, as the BOCs claim, they "raise no factual or legal issues that are significantly different from those raised by the previously approved waiver[s]" and otherwise conform to the court's order.[7/] This is no simple task. Well over one

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[5] If the district court denied relief, the BOCs could be expected to seek expedited "emergency" review from this Court in whatever time might remain before the President signs the Act. If the district court granted motions that would allow additional BOC activities under the grandfather clause (which does not apply to orders reversed on appeal, even if the reversal comes after enactment, see §271(f)), opposing parties or intervenors likely would appeal.

[6] See US Response to BA, App. 3, reprinted in Pet. App. B.

[7] During the time these motions have been pending, the Department's normal operations were suspended for nearly a month due to furloughs and a blizzard.

hundred waivers are involved, and some of them were based on circumstances unique to a particular BOC or on the premise that only one BOC would participate in a particular activity authorized by the waiver. Thus the BOCs' assertion that "these motions raise no new legal or factual issues" (Pet. at 9) is open to serious question, as AT&T and MCI have argued in timely comments to the Department.

The district court's established me-too procedure affords the Department a proper opportunity to evaluate the generic me-too motions, which are considerably more complex than the usual me-too waivers. This matter is not yet ripe for decision by either the district court or this Court.

Further, with respect to the me-too waivers as well as the motions pending before the district court, the BOCs have failed to specify activities that would be authorized only if their motions were granted and grandfathered, or to give any good reason why those additional activities should be permitted. Indeed, the legislative grandfather clause itself does not provide "me-too" relief; it covers only the BOC or BOCs to which a particular waiver was granted.

* * *

In sum, the BOCs' petition never presented grounds for the extraordinary writ of mandamus to issue, and Congress now has substituted comprehensive telecommunications reform legislation for the decree's judicial waiver process. This Court should reject the BOCs' plea that the courts race to grant them

additional relief before the President signs the legislation Congress has passed.

CONCLUSION

This Court should deny the petition for a writ of mandamus.

Respectfully submitted,

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February 2, 1996

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 1996, before 4:00 p.m., the foregoing RESPONSE OF THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS was served on counsel for petitioners

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