ARGUMENT SCHEDULED FOR JANUARY 19, 1996

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

No. 95-5137
and consolidated cases

UNITED STATES OF AMERICA,
Plaintiff-Appellee-
Cross-Appellant,
v.

WESTERN ELECTRIC CO., INC., et al.,
Defendants-Appellees,

PACIFIC TELESIS GROUP, et al.,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AS APPELLEE AND CROSS-APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

To counsel's knowledge, the information required by Rule 28(a)(1) is provided in the Brief for the Bell Company Appellants and the Brief for Appellants BellSouth Corporation and SBC Communications Inc., except that, 1) on August 31, 1995, after those briefs were filed, the district court denied the July 7, 1995 motion of four of the BOCs for clarification of the April 28, 1995 order that is the subject of this appeal, and 2) several other motions concerning the interpretation and application of the new section VIII(L)(2)(a) also are pending in the district court.

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STATUTES AND RULES

MISCELLANEOUS

GLOSSARY

BOC	-	Bell Operating Company. The BOCs are also known as Regional Companies, Regional Holding Companies, or Bell Companies
CAP	-	Competitive Access Provider
LATA	-	Local Access and Transport Area
LEC	-	Local Exchange Carrier
MFJ	-	Modification of Final Judgment (reprinted in the Addendum to this brief)
MTSO	-	Mobile Telephone Switching Office
PCS	-	Personal Communications Services
POP	-	Point of Presence
SBC	-	Appellant SBC Communications Inc.
SMR	-	Specialized Mobile Radio
JA	-	The deferred Joint Appendix in this case
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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

These are appeals from an order of the United States District Court for the District of Columbia (Judge Harold Greene), granting in part and denying in part motions by the seven Regional Bell Operating Companies ("BOCs" or "Regional Companies") for modification or removal of the AT&T antitrust

consent decree's prohibition on BOC interexchange services, as applied to calls originating from cellular and other "wireless" systems (JA 10-13). The Brief for the Bell Company Appellants ("BOC Br.") and the Brief for Appellants BellSouth Corporation and SBC Communications Inc. ("BellSouth-SBC Br.") correctly set forth the jurisdictional statement required by Fed. R. App. P. 28(a)(2).

ISSUES PRESENTED FOR REVIEW

1. Whether the decree applies to BOC wireless services.

2. Whether the district court was required to remove the decree's equal access requirements as applied to BOC wireless services.

3. Whether the district court erred in conditioning its order allowing the BOCs to provide interexchange services from wireless systems on safeguards that the Department of Justice had concluded were necessary to prevent abuses of BOC local exchange market power and to ensure continued BOC compliance with the decree's equal access and nondiscrimination provisions.

4. Whether the condition the court imposed, sua sponte, which limits the interexchange services that BOCs may provide from wireless systems to the very few areas in which interexchange carriers use non-BOC facilities to connect to wireless systems, should be vacated.

STATUTES AND REGULATIONS

There are no statutes or regulations directly pertinent to the issues presented for review. The AT&T antitrust consent

decree as entered in 1982, United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 226-34 (D.D.C. 1982) ("decree" or "Modification of Final Judgment" ("MFJ")), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983), and §VIII(L) of the decree, as added by the order under review, are reprinted in the Addendum to this Brief.

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings in the District Court

This is a proceeding on motions by the BOCs for modification of restrictions imposed by the 1982 consent decree entered in the government's antitrust case against AT&T. In a joint motion, all seven BOCs sought partial removal of the decree's interexchange services prohibition to allow them to provide interexchange services to customers of cellular and other "wireless" exchange systems; they agreed that BOC wireless systems would continue to provide equal access to all interexchange carriers and would not discriminate against other interexchange carriers. The United States supported the BOCs' request to provide such interexchange services, provided that the court imposed additional safeguards, which the BOCs opposed.[1] The BOCs also sought expansion of their cellular exchange areas (i.e., the areas within which the BOC,

[1]Att. 2 to the Reply of the Bell Companies to Comments on Their Motion for a Modification of Section II of the Decree To Permit them To Provide Cellular and Other Wireless Services Across LATA Boundaries (Sept. 2, 1994) ("Proposed Order Comparison") (JA 837-51), compares the BOCs' Proposed Order to the United States' Proposed Order.

rather than the customer's chosen interexchange carrier, carries calls). The United States suggested that the district court deny or defer action on this aspect of the motion pending action by the Federal Communications Commission on its proposed equal access rules.

In addition, BellSouth Corporation and SBC Communications Inc. (formerly Southwestern Bell Corporation) each filed a separate motion for removal of all decree restrictions on wireless services, including the equal access requirements as well as the interexchange services prohibition. The United States opposed the BellSouth and SBC motions.

The other decree party, AT&T, opposed all of the BOC motions, as did MCI Communications Corp.

The district court granted the BOCs' joint motion in part and with conditions, adding a new section VIII(L) to the decree; it denied the separate BellSouth and SBC motions. United States v. Western Elec. Co., 890 F. Supp. 1, 10-13 (D.D.C. 1995) (JA 10-13). Section VIII(L)(3) allows the BOCs to provide interexchange service for calls originating from a Wireless Exchange System (as defined in §VIII(L)(1)(d)), and other interexchange services, to subscribers of Wireless Exchange Services (as defined in §VIII(L)(1)(c)).

The modification of the interexchange restriction is subject to the conditions consented to in the BOCs' joint motion, and to other conditions that the United States proposed and the BOCs

opposed. In addition, the court, sua sponte, limited the authorized services to:

> areas where [the Regional Company] demonstrates (i) that there are no legal or regulatory barriers to the provision of access services by non-Regional Companies from the MTSOs [mobile telephone switching offices] to the interexchange carriers' points of presence; and (ii) that there is at least one such non-Regional Company providing such alternative access.

§VIII(L)(2)(a) ("2(a) condition"), 890 F. Supp. at 10 (JA 10).

All of the BOCs appealed. The United States appealed in order to challenge the 2(a) condition.[2] No party has appealed to challenge the district court's order to the extent it granted the BOC motion.

After the BOCs' appeals were filed, the BOCs and AT&T disputed the meaning of the 2(a) condition, and the United States moved for clarification. Denying the motion, the district court explained that 2(a) requires

> bypass . . . "from the MTSOs to the interexchange carriers' points of presence." The mere fact that a Competitive Access Provider exists in a given area is not enough to satisfy the requirement.

United States v. Western Elec. Co., No. 82-0192, slip op. at 2-3 (D.D.C. June 23, 1995) (quoting Order) (JA 15-16). The court added that "non-Regional Companies" must provide the bypass; "[a]ny argument that a Regional Company can provide the bypass is

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[2]This Court has held that "the United States must file a cross appeal if it intends to challenge any portion of the district court's decision." United States v. Western Elec. Co., No. 90-5333 (D.C. Cir. Mar. 25, 1991) (order).

. . . foreclosed." Id. The district court also denied a subsequent motion by four of the BOCs for further clarification. United States v. Western Elec. Co., No. 82-0192 (D.D.C. Aug. 31, 1995) (JA 977).

B. Statement of Facts

1. The Decree Provisions at Issue

The 1982 AT&T antitrust consent decree required AT&T to divest its local telephone operating companies, the BOCs.[3] MFJ §I, 552 F. Supp. at 226-27. Under the decree, the BOCs may provide local "exchange" and "exchange access" telecommunications services, but they are prohibited from providing "interexchange" (long distance) telecommunications services; thus, they may carry telephone calls only within and not between the exchange areas ("LATAs")[4] established pursuant to the decree. MFJ §II(D)(1), §IV(G), 552 F. Supp. at 227-29.[5] The decree also requires the

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[3]AT&T retained its long distance service and manufacturing operations and was allowed to enter other businesses.

[4]Because the term "exchange area" has a variety of meanings in the telecommunications industry, the term "LATA" (local access and transport area) is used to refer to the exchange areas established pursuant to section IV(G) of the decree. See 552 F. Supp. at 229; United States v. Western Elec. Co., 569 F. Supp. 990, 993-94 n.9 (D.D.C. 1983).

[5]The decree also prohibited the BOCs from providing information services, manufacturing or providing telecommunications equipment, manufacturing customer premises equipment and engaging in most other businesses, except local exchange telecommunications, "directly or through any affiliated enterprise." MFJ §II(D), 552 F. Supp. at 227-28. The decree has been modified to eliminate the nontelecommunications business prohibition, United States v. Western Elec. Co., 673 F. Supp. 525, 597-99, 602-03 (D.D.C. 1987) ("Triennial Review"), aff'd in (continued...)

BOCs to provide "equal access" to interexchange carriers, i.e., access to BOC exchange services "on an unbundled, tariffed basis, that is equal in type, quality, and price to that provided to AT&T and its affiliates," and it prohibits the BOCs from discriminating between AT&T and other persons in providing products and services. MFJ §II(A) & (B), 552 F. Supp. at 227.

Section VIII(C) of the decree provides that the interexchange prohibition and other section II(D) line-of-business restrictions "shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." 552 F. Supp. at 231.[6] The court has ordered that BOC requests for such "waivers" or modifications of the line-of-business restrictions be submitted first to the Department of Justice, which receives and reviews comments from interested persons, conducts any necessary investigation of probable competitive effects, and presents its conclusions to the court by motion or in response to a BOC motion. See United States v. Western Elec. Co., 592 F. Supp. 846, 873-74 (D.D.C.

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[5](...continued)
relevant part, rev'd in part and remanded on other grounds, 900 F.2d 283 (D.C. Cir.), cert. denied, 498 U.S. 911 (1990), and the information services prohibition, United States v. Western Elec. Co., 767 F. Supp. 308 (D.D.C. 1991), aff'd, 993 F.2d 1572 (D.C. Cir.), cert. denied, 114 S. Ct. 487 (1993).

[6]BOC motions for relief from the line-of-business restrictions that are not opposed by any party to the decree are reviewed under the public interest standard. United States v. Western Elec. Co., 900 F.2d 283, 305-07 (D.C. Cir.) ("Triennial Review Appeal"), cert. denied, 498 U.S. 911 (1990).

1984), appeal dismissed, 777 F.2d 23 (D.C. Cir. 1985); United States v. Western Elec. Co., No. 82-0192 (D.D.C. July 30, 1991). Section VIII(C) applies only to the line-of-business restrictions; other decree provisions, including the section II(A) and (B) equal access and nondiscrimination requirements, are subject to modification under the common law standards incorporated in section VII of the decree, 552 F. Supp. at 231, and Fed. R. Civ. P. 60(b). See United States v. Western Elec. Co., 46 F.3d 1198, 1202-04 (D.C. Cir. 1995) ("AT&T-McCaw Appeal").

2. The Services at Issue

The motions at issue on this appeal involve interexchange calls that originate on cellular and other "wireless" or "mobile" exchange systems. The parties generally use the term "wireless" services to refer to "commercial mobile services as defined in 47 U.S.C. §332(d)(1)."[7] See MFJ §VIII(L)(1)(c), Proposed Order

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[7]47 U.S.C. §332(d)(1) defines "commercial mobile service" as

> any mobile service (as defined in section 153(n) of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the [Federal Communications] Commission.

47 U.S.C. §153(n) defines "mobile service" as

> a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations

(continued...)

Comparison at 3 (J.A. 839).[8] Cellular, which is currently the most important wireless service and was the primary focus of these motions, is a radio telephone service in which frequency is reused by dividing a service area into "cells." A mobile telephone switching office ("MTSO") transfers cellular calls from one cell to another as the subscriber moves through the area covered by the system. To allow calls originated on the cellular system to be terminated anywhere, the MTSO is connected to the local landline telephone network, and to interexchange carriers' networks through their points of presence ("POPs"). See generally 890 F. Supp. at 3-4 (JA 3-4).

Beginning in the early 1980s, the Federal Communications Commission licensed two carriers to provide cellular service in each geographic area. The "block B" system licenses were granted to local exchange carriers, usually BOCs. The FCC later allowed local exchange carriers to purchase "block A" systems in areas where they do not provide local telephone service. See AT&T-McCaw Appeal, 46 F.3d at 1200-01. The FCC's rules require that BOCs and other local exchange carriers provide cellular service through subsidiaries separate from their landline exchange

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[7](...continued)
communicating among themselves, . . .

In their separate motions, BellSouth and SBC used broader definitions. See BellSouth Proposed Order (JA 409-10); SBC Proposed Order (JA 480).

[8]Conventional telephone services are referred to as "wireline" or "landline" services.

systems. See Illinois Bell Tel. Co. v. FCC, 740 F.2d 465, 469 (7th Cir. 1984).

The wireless services at issue also include personal communications services ("PCS"), recently authorized by the FCC. See Amendment of the Commission's Rules to Establish New Personal Communication Services, 8 F.C.C.R. 7700 (1993) (Second Report and Order), 9 F.C.C.R. 4957 (1994) (Mem. Opinion and Order).[9] No PCS systems are yet in operation, and their precise technologies remain to be determined. Unlike cellular services, PCS may be integrated with local exchange services under the FCC's rules. 8 F.C.C.R. at 7751 & n.98.

The decree allows the BOCs to provide cellular and other wireless services within but not between LATAs. United States v. Western Elec. Co., 797 F.2d 1082, 1089-91 (D.C. Cir. 1986) ("Out-of-Region Exchange Services"); United States v. Western Elec. Co., 578 F. Supp. 643, 645-46 (D.D.C. 1983) ("Mobile Services"); Triennial Review, 673 F. Supp. at 551. The decree's equal access requirements also apply to BOC cellular systems. See Mobile Services, 578 F. Supp. at 650 n.28. The parties understood that interexchange carriers, rather than the BOCs, would carry

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[9]The FCC has broadly defined PCS as:

> Radio communications that encompass mobile and ancillary fixed communication services that provide services to individuals and businesses and can be integrated with a variety of competing networks.

8 F.C.C.R. at 7713.

interLATA calls between mobile service areas, id., and by early 1987, the BOCs were providing equal access to all their cellular systems for which interexchange carriers had requested such services, see Report of the United States to the Court Concerning the Status of Equal Access at 1-3, 15-17 (Oct. 31, 1986)(JA 94-96, 97-99).

The district court has recognized, however, that for various technical and consumer convenience reasons, some LATA boundaries established for landline services should be adjusted for mobile systems. See Mobile Services, 578 F. Supp. at 647-49. Accordingly, the court has granted more than fifty "cellular geography waivers" allowing BOCs to expand their cellular exchange areas. E.g., Mobile Services, 578 F. Supp. at 653; United States v. Western Elec. Co., No. 82-0192 (D.D.C. June 26, 1995); United States v. Western Elec. Co., No. 82-0192 (D.D.C. Aug. 9, 1995). Under these waivers, interexchange carriers still "carry inter-LATA calls between different mobile service areas or between mobile service areas and different LATAs." Mobile Services, 578 F. Supp. at 650 n.28; see also Triennial Review, 673 F. Supp. at 551-52.

3. The BOC Motions

The BOC motions for "generic wireless relief" that are at issue on this appeal sought different and broader modifications of the decree than the court had previously granted. In the request originally submitted to the Department (JA 157), the BOCs contended that their cellular systems and other wireless services

should not be confined by the decree's interexchange restrictions and should not be required to provide equal access. The Department of Justice investigated this proposal, considering comments from interested persons and the BOCs' replies. The Department did not consent to removal of the BOCs' equal access obligations, but it informed the BOCs that it would support removal of the interexchange restriction for calls originating on wireless systems (and certain incidental related services), provided appropriate safeguards were imposed.

When the BOCs filed their joint motion with the court, they incorporated some equal access conditions, but they omitted other conditions the Department had sought; the BOCs also proposed substantial expansion of their cellular exchange areas. See Proposed Order Comparison (JA 837-51). In addition, BellSouth and SBC filed separate motions for complete and unconditional relief from all decree restrictions for all wireless services, including services that might be closely integrated with the landline local exchange (JA 362, 477).

The United States responded that the court should deny the BellSouth and SBC motions to remove the equal access requirements, but that it should remove the decree's interexchange restriction for calls originating on wireless systems (and specified incidental services), subject to appropriate conditions. See Memorandum of the United States in Response to the Bell Companies' Motions for Generic Wireless Waivers (July 25, 1994) ("US Response") (JA 584). The United

States proposed a set of conditions designed to satisfy the VIII(C) standard for removal of the line-of-business restrictions and to ensure that the BOCs' landline and wireless exchange systems would comply with their equal access and nondiscrimination obligations. Id. at 27-42 (JA 613-28).

AT&T and MCI urged the court to deny the BOCs' motions, arguing that the safeguards the Department proposed were inadequate or otherwise objectionable (JA 763, 645).

4. The Relief Granted and the Conditions Imposed by the Court at the United States' Request

The district court modified the interexchange restriction, subject to conditions proposed in the joint BOC motion and to three further conditions that the United States had sought and the BOCs had opposed. The disputed conditions, which the BOCs challenge on appeal, are: (1) a BOC may provide interexchange services only from "corporations that have been established as separate subsidiaries from the Regional Company's local exchange telephone companies," §VIII(L)(1)(c); (2) the authorized interexchange services are "limited to the resale of switched interexchange services procured pursuant to tariff from unaffiliated interexchange carriers, and not more than 45% of any Regional Company's . . . interexchange minutes of use shall be purchased from any one interexchange carrier, "§VIII(L)(2)(b); and (3) the BOCs must "unbundle" wireless exchange services and interexchange services, i.e., a BOC must "state separately to its customers the prices, terms, or rate plans for (i) Wireless Exchange Services and (ii) interexchange telecommunications

services," §VIII(L)(4)(a)(2), and must comply with various restrictions on joint marketing of interexchange and local services, §VIII(L)(4)(g).[10]

Rejecting the BOCs' contention that they have no "bottleneck" in the provision of access services to cellular systems, the district court found that local exchange carriers provide and control virtually all of the lines and switches used for interexchange carriers' MTSO-to-POP connections (as well as for the MTSO-to-landline connections). 890 F. Supp. at 3-4 (JA 3-4). Currently "the overwhelming majority of calls proceed [from the MTSO to the interexchange carriers' POPs] through some sort of facility provided by the local exchange carrier, usually one of the Regional Companies." Id. An MTSO may be connected to a POP on a switched basis, through the local exchange access tandem, which also carries landline interexchange calls to the POP. Alternatively, interexchange carriers sometimes use dedicated access services to provide a direct MTSO-to-POP connection, but these also, almost invariably, "are still controlled by the local exchange carrier." Id. at 4 (JA 4). Competitive access providers ("CAPs"), i.e., carriers not affiliated with the local exchange carrier, "carry at this time only a relatively small portion of the calls that proceed from mobile switches to interexchange carriers"; their services "are

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[10]The BOCs consented to some marketing restrictions, but opposed others. See Proposed Order Comparison at 9-12 (JA 845-48).

often quite expensive"; and CAPs "do not even exist in most areas." Id. at 4-5 (JA 4-5).

The court found that the separate subsidiary condition was justified because it would reduce the risk of discrimination and cross-subsidization. 890 F. Supp. at 7 (JA 7). It concluded that restricting the BOCs to reselling interexchange services would minimize their "incentive or ability to favor their own facilities" and make discrimination more difficult and less likely because

> if a Regional Company were to discriminate against other interexchange sellers, it would have to do so in collusion with the entity selling its interexchange service to the Regional Company -- a somewhat risky enterprise. Additionally, because each Regional Company would be required to purchase interexchange service from at least three different sellers, the chances of effective, non-detected collusion would be reduced.

Id. at 8 (JA 8). The court deemed the unbundling provision "probably the most important of the [Department's] proposed conditions." Id. It found that unbundling "will help to prevent monopolization and aid the consumer" by "provid[ing] interexchange carriers with a genuine opportunity to compete for customers' business" and "allow[ing] customers to compare the Regional Companies' long distance offerings with the service offered by competing long distance carriers." Id.[11]

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[11]The United States does not challenge the district court's rejection of its proposed general nondiscrimination condition, which the court found duplicative, and its proposed civil fines provision.

5. The Court's Sua Sponte "Bypass" Condition and Its Effects

In adopting most of the conditions the Department had proposed, the court characterized them as "salutary . . . in effect" but not "a panacea." 890 F. Supp. at 8 (JA 8). While the court made no findings contrary to the Department's competition analysis, it concluded that the Department's conditions were insufficient because they "would not eliminate the risk of discrimination, but instead would merely reduce the risk to 'acceptable levels'." Id. In the court's view, therefore, the only alternative to complete denial of the waiver was to limit it to "areas where Competitive Access Providers are already in service," providing access services from the MTSOs to the interexchange carriers' points of presence. Id. at 9 (JA 9). Thus the court imposed the §VIII(L)(2)(a) condition (JA 10) (quoted supra p. 5), which limited the authorized BOC interexchange services to areas in which non-BOCs provide MTSO-to-POP connections. See 890 F. Supp. at 8-9 (JA 8-9).

To implement the conditions of the Order, the court required the BOCs to submit compliance plans to the Department, which has 90 days to review and approve or reject each plan. §VIII(L)(5) (JA 13); see 890 F. Supp. at 8-9 (JA 8-9). Five different BOCs have submitted a total of eight compliance plans to the Department since the Order was entered. None of these plans has

represented that any interexchange carrier currently uses an MTSO-to-POP connection provided by a competitive access provider, nor did the BOCs identify any CAP connections in place but not in use between an MTSO and any POP. Accordingly, as required by section VIII(L)(5)(a), the Department has informed the BOCs that three of the four plans it has reviewed thus far do not meet the 2(a) condition. The Department has approved only Bell Atlantic's request to provide interexchange service from the Connecticut/Western Massachusetts cellular system jointly owned by Bell Atlantic and NYNEX. In that area, the Southern New England Telephone Company ("SNET"), a "non-Regional Company" local exchange carrier, provides access between that cellular system's MTSO and interexchange carriers' POPs, thereby satisfying the 2(a) condition.[12] With that one exception, no BOC currently has authority to provide interexchange services from wireless systems.

SUMMARY OF ARGUMENT

The district court correctly interpreted the decree, and, in all respects save one, its decision was faithful to its dual obligations to maintain restrictions necessary to effectuate the decree's procompetitive purposes and to modify or remove restrictions that unnecessarily impede BOC entry into new markets.

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[12]See BAMS Certification and Compliance Plan (May 31, 1995, supp. Aug. 28, 1995); Letter from Donald J. Russell, Department of Justice, to S. Mark Tuller, Bell Atlantic Mobile Systems (Aug. 29, 1995).

The court properly rejected BellSouth's and SBC's contentions that the decree should be construed to exempt wireless services from the interexchange prohibition and the equal access and nondiscrimination requirements that, under the plain language of the decree, apply to all BOC exchange telecommunications services. Further, because the decree's equal access and nondiscrimination requirements remain necessary for effective interexchange competition, the court properly denied the BellSouth and SBC motions to modify the decree to remove those basic obligations from BOC wireless services.

The court also properly exercised its equitable powers under the decree in modifying the line-of-business restrictions to permit the BOCs to provide interexchange services from wireless systems, subject to a set of conditions proposed by the Department of Justice. The structural separation, resale, and unbundling and marketing safeguards are tailored to address decree concerns that arise from BOCs' competing with interexchange carriers to serve cellular subscribers. Taken together, these conditions ensure that the BOCs will continue to comply with their equal access and nondiscrimination obligations; thus they are essential to prevent the BOCs from using their power in landline or cellular exchange markets to impede interexchange competition. The district court also properly refused to grant the BOCs' request for an across-the-board expansion of local cellular service areas, which would have eliminated equal access competition in significant geographic areas.

The district court erred, however, in imposing sua sponte a condition limiting the BOCs' authority to provide interexchange service for wireless customers to areas in which interexchange carriers currently use non-BOC facilities to connect to cellular systems (§VIII(L)(2)(a)). As a practical matter, this condition, imposed without opportunity for comment by the decree parties, precludes the BOCs from providing interexchange services from wireless systems in most areas of the country. Thus, it effectively denied the BOCs the modification to which they are entitled under section VIII(C) of the decree. Moreover, this condition affords interexchange carriers the opportunity to impede competition by blocking BOC entry into interexchange markets. Accordingly, this condition should be vacated.

ARGUMENT

I. STANDARDS OF REVIEW

The district court's construction of the decree is subject to de novo review. E.g., United States v. Western Elec. Co., 12 F.3d 225, 229, 233 (D.C. Cir. 1993) ("Affiliated Enterprise"). Its factual determinations are reviewed under the "clearly erroneous" standard. Id. at 233. An abuse of discretion standard applies to review of orders modifying a consent decree under Rule 60(b)(5), see AT&T-McCaw Appeal, 46 F.3d at 1208, but the district court does not have discretion to deny motions for removal of the line-of-business restrictions that meet the VIII(C) standard, Triennial Review Appeal, 900 F.2d at 293.

II. THE DECREE APPLIES TO BOC WIRELESS SERVICES

In their joint brief, the BOCs concede that section II(D)(1) of the decree "restricts the BOC wireless systems to the same local exchange calling areas (known as 'LATAs') that define the permissible scope of Bell company landline telephone operations" (BOC Br. at 6), and they do not contest the applicability of the decree's section II(A) and (B) equal access and nondiscrimination provisions to BOC cellular systems. BellSouth and SBC, however, contend that the decree "was never intended to apply to wireless services" (BellSouth-SBC Br. at 6-16).

This contention is contrary to the language of the decree and is refuted by the "aids to construction" provided by the parties' contemporaneous statements and surrounding circumstances. See United States v. ITT Continental Baking Co., 420 U.S. 233, 238 (1975); Affiliated Enterprise, 12 F.3d at 229-33; Out-of-Region Exchange Services, 797 F.2d at 1089. In agreeing to the decree, the parties recognized and intended that it would allow the BOCs to provide cellular and other mobile services and that its restrictions would apply to such services.

To identify the AT&T assets and functions to be divested and to limit the businesses in which the divested BOCs could engage, the decree drew a single line; it separated "exchange telecommunications" and "exchange access functions" from "other functions" including interexchange telecommunications. See MFJ §I(A), 552 F. Supp. at 227. The decree broadly defines "telecommunications" as "transmission . . . by means of

electromagnetic transmission medium." MFJ §IV(O), 552 F. Supp. at 229. The "exchange telecommunications" permitted to the BOCs encompass "all telecommunications services within an exchange area . . . without regard to the type of transmission facilities used." Competitive Impact Statement, 47 Fed. Reg. 7170, 7176 (Feb. 17, 1982). Neither the assets divested to the BOCs nor the exchange telecommunications services the BOCs could provide after divestiture were limited to "wireline" services or "bottleneck monopoly" services. Indeed, these terms do not appear in the decree; the parties used them only in discussing the absence of any decree distinctions among exchange services.

Moreover, since the decree prohibited the BOCs from engaging in any business not specifically permitted to them, MFJ §II(D)(3), 552 F. Supp. at 227-28, they would have been precluded from providing wireless services that did not come within the definition of exchange telecommunications. The parties were careful to emphasize, however, that the decree would not restrict the BOCs' use of new technologies in the provision of exchange services. Competitive Impact Statement, 47 Fed. Reg. at 7176 n.23; Response of the United States to Public Comments on the Proposed Modification of Final Judgment, 47 Fed. Reg. 23320, 23335 (May 27, 1982). The United States specifically explained that the decree

> would not prohibit the BOCs from offering either cellular radio or land mobile radio. These types of services fall within the definition of exchange telecommunications.

US Response to Comments, 47 Fed. Reg. at 23335. See also id. at 23347; Brief of the United States in Response to the Court's Memorandum of May 25, 1982, at 36 n.* (June 14, 1982) (noting that the decree does not prohibit the BOCs from "providing competitive exchange services").[13]

The district court's approval of AT&T's plan of reorganization confirms that the decree does not distinguish between "wireline" and "wireless" exchange services. AT&T's cellular assets were divested to the BOCs pursuant to the plan; had intraLATA cellular service not been an exchange service, the court could not have approved that aspect of the plan as "consistent with the provisions and principles of the decree." MFJ §VIII(J), 552 F. Supp. at 232; United States v. Western Elec. Co., 569 F. Supp. 1057, 1131 (D.D.C.) aff'd sub nom. California v. United States, 464 U.S. 1013 (1983). This Court also has held that cellular and other mobile services within a LATA are exchange services, and that the decree, therefore, does not prohibit the BOCs from providing such exchange services (whether

[13]It was logical for the parties to treat cellular service as presumptively part of the local exchange monopoly to be owned by the BOCs and subject to decree restrictions rather than as an independent, competitive service that should remain with AT&T. In 1982, the FCC was only beginning to license cellular systems, the initial licensees were BOCs and other local exchange carriers, and even at the time of divestiture on January 1, 1984, no competition had developed in cellular markets; the future was uncertain. See AT&T-McCaw Appeal, 46 F.3d at 1206 (referring to "'B' block cellular systems that were part of a BOC local exchange monopoly").

within or outside of their regions) without prior court approval. Out-of-Region Exchange Services, 797 F.2d at 1091.

BellSouth and SBC cannot divorce the decree's broad authorization to the BOCs to provide any and all "exchange telecommunications and exchange access services" from the attendant equal access obligations and line-of-business restrictions. The corollary of the BOCs' receiving AT&T's cellular assets and being allowed to provide intraLATA wireless services without prior court approval is that the BOCs' wireless businesses are subject to the "BOC Requirements" imposed by section II of the decree, 552 F. Supp. at 227-28. If cellular and other wireless services within a LATA are exchange telecommunications services, wireless services that cross LATA boundaries must be "interexchange telecommunications services" prohibited to the BOCs by the decree.[14] Similarly, because BOC cellular services are "exchange services," the equal "exchange access" and "exchange services" requirements of section II(A) apply directly to BOC cellular systems. See United States v. Western Elec. Co., 154 F.R.D. 1, 4 n.4 (D.D.C. 1994); Triennial

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[14]The statement that BellSouth and SBC (Br. at 10) quote from the Department's 1982 Competitive Impact Statement -- that in instances where BOCs were "presently" providing mobile services "through transmission facilities that have the ability to serve an area larger than that comprehended by the exchange area boundary . . ., it is not the intention of the Department to require a divested BOC to discontinue such services, or modify such existing equipment" -- did not imply a blanket exemption for wireless services. Rather, it referred only to minor discrepancies between the decree LATAs and existing mobile services areas. See Mobile Services, 578 F. Supp. at 645 & n.12.

Review, 673 F. Supp. at 551; Mobile Services, 578 F. Supp. at 650 n.28.

The attempt by BellSouth and SBC to challenge an accepted interpretation of the decree "at this late date" should be met with considerable skepticism. See United States v. Western Elec. Co., 969 F.2d 1231, 1241 (D.C. Cir. 1992) ("Common Channel Signaling"), cert. denied, 113 S. Ct. 1363 (1993). The BOCs represented to the court that they would provide equal access from their cellular systems, and they have implemented equal access for cellular systems upon interexchange carriers' requests. See Report of the United States to the Court Concerning the Status of Equal Access at 1-3, 15-17 (Oct. 31, 1986) (JA 94-96, 97-99).

On numerous occasions, the BOCs have sought and obtained district court approval of some limited interLATA cellular services. E.g., Mobile Services, 578 F. Supp. 643; United States v. Western Elec. Co., No. 82-0192 (D.D.C. June 26, 1995); United States v. Western Elec. Co., No. 82-0192 (D.D.C. Aug. 9, 1995). They also have appealed denials of cellular waiver motions, e.g., United States v. Western Elec. Co., No. 92-5065 (D.C. Cir. Nov. 5, 1992), and they have complained about delays in review and adjudication of such motions, see Bell Atlantic Corporation, Petition for a Writ of Mandamus at 26, No. 95-5097 (D.C. Cir., filed June 16, 1995). However, none of the BOCs previously has sought a declaratory ruling that the decree does not apply to wireless services, although they could have done so at any time

under section VII of the decree, 552 F. Supp. at 231. See United States v. Western Elec. Co., 907 F.2d 160 (D.C. Cir. 1990).

Moreover, this Court, as well as the district court, consistently has assumed that the decree restrictions apply to cellular and other wireless services. See, e.g., Out-of-Region Exchange Services, 797 F.2d 1082; United States v. Western Elec. Co., No. 92-5065 (D.C. Cir. Nov. 5, 1992) (remanding interexchange cellular waiver motion); AT&T-McCaw Appeal, 46 F.3d 1198; SBC Communications, Inc. v. FCC, 56 F.3d 1484, 1490 (D.C. Cir. 1995) (SBC recently argued to this Court that the decree "prohibits a BOC (and consequently a BOC-owned cellular carrier) from selling interexchange service directly to its customers"). Even if "the point was not directly controverted," these "prior decisions . . . would deter [this Court] from accepting appellants' argument." Common Channel Signaling, 969 F.2d at 1241.

III. THE DISTRICT COURT PROPERLY DENIED BELLSOUTH'S AND SBC'S MOTIONS TO REMOVE ALL DECREE RESTRICTIONS ON WIRELESS SERVICES

BellSouth and SBC contend in the alternative (Br. at 17-23) that, even if the decree originally covered wireless services, the district court abused its discretion in denying their motions for a modification to exempt such services from the section II(D)(1) interexchange prohibition and the section II(A) equal access requirement. The district court concluded that the BOCs were entitled to removal of the interexchange restriction for services provided to wireless customers on an equal access basis

and subject to certain conditions. But the court properly denied the BellSouth and SBC motions insofar as they sought unconditional removal of the interexchange restriction for wireless services -- including services integrated with the landline local exchange -- and elimination of the requirement that BOC wireless systems provide equal access.

A. The BOCs Are Not Entitled To Termination of Their Equal Access and Nondiscrimination Obligations as Long as Those Decree Provisions Are Necessary To Protect Interexchange Competition

The decree's section II(A) equal access and section II(B) nondiscrimination requirements, 552 F. Supp. at 227, were adopted to protect and promote the interexchange competition that AT&T's monopolistic conduct had thwarted. See 552 F. Supp. at 142-43, 195-97. The court found it "imperative that any disparities in interconnection be eliminated so that all interexchange and information service providers will be able to compete on an equal basis." Id. at 195. The decree's "broad guarantee of equal treatment" was intended to "remove any inter-connection type obstacles to free competition" among interexchange carriers. Id. at 196. To effectuate this purpose, the equal access and nondiscrimination provisions are to be "'construed broadly to encompass all potential areas of favoritism, subtle as well as overt, that may arise in relationship[s] between the divested BOCs and AT&T and its competitors.'" Id. at 142-43 (quoting Competitive Impact Statement); see also United States v. Western Elec. Co., 846 F.3d 1422, 1427-30 (D.C. Cir. 1988)("Access Charge Discrimination").

Unlike the line-of-business restrictions, the equal access and nondiscrimination provisions do not "prevent a potential competitor from entering the market," 552 F. Supp. at 187. Rather, they prohibit conduct that threatens competition by impeding interexchange competitors' access to BOC local exchange facilities. Accordingly, the district court and the parties did not extend to the section II(A) and (B) provisions the more lenient MFJ section VIII(C) standard that applies to the section II(D) line-of-business restrictions. Contested motions to remove equal access obligations are governed by the common law standards incorporated in Fed. R. Civ. P. 60(b)(5), which allows a party to obtain relief only "when 'it is no longer equitable that the judgment should have prospective application,' not when it is no longer convenient to live with the terms of a consent decree." Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 383 (1992) (quoting Fed. R. Civ. P. 60(b)(5)).

A defendant seeking relief from decree obligations bears the initial "burden of establishing that a significant change in circumstances warrants revision of the decree." Rufo, 502 U.S. at 383; AT&T-McCaw Appeal, 46 F.3d at 1203-04. Even if the defendant meets that burden, it must also show that the modification it seeks "is suitably tailored to the changed circumstance." Rufo, 502 U.S. at 383; AT&T-McCaw Appeal, 46 F.3d at 1204-06.

Restrictions in antitrust decrees, which are imposed to protect the public interest in competition, "may not be changed

in the interests of the defendants if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." United States v. United Shoe Machinery Corp., 391 U.S. 244, 248 (1968), cited in Rufo, 502 U.S. at 379; see also United States v. Eastman Kodak Co., 1995-2 Trade Cas. (CCH) ¶71,078 at 75,157-58 (2d Cir. 1995); AT&T-McCaw Appeal, 46 F.3d at 1207. Because the decree's equal access provisions as applied to BOC cellular systems remain necessary to protect interexchange competition, the district court properly denied all BOC motions seeking their removal.

B. Absent Equal Access Safeguards, BOC Market Power in Cellular Exchange Service Could Have Anticompetitive Effects in the Market for Interexchange Service to Cellular Customers

Absent effective competition to provide cellular subscribers with interexchange services, the prices they pay for interexchange calls will be higher.[15] But in order to compete for interexchange traffic from cellular and other wireless systems, interexchange carriers need nondiscriminatory access to those systems.

Because the purpose of the decree's equal access provisions is to ensure that the BOCs will not use their control over exchange services to impede interexchange competition, the district court concluded -- even before divestiture -- that

[15]Interexchange service available from landline telephones is not a good substitute for interexchange service from cellular telephones. Thus, competition in providing interexchange service to landline customers would not constrain interexchange prices to cellular subscribers.

removal of interexchange restrictions and equal access obligations for cellular systems would be "entirely inconsistent with the terms and purposes of the decree, and the Court would not have authorized it." Mobile Services, 578 F. Supp. at 647. In the Triennial Review, 673 F. Supp. at 551, the district court again rejected the BOCs' contention that they should be allowed to provide interexchange services from their cellular systems and to abandon the recently implemented cellular equal access.

In the motions that led to this appeal, BellSouth and SBC again failed to demonstrate that elimination of equal access in BOC cellular systems would not impair interexchange competition under present circumstances. Nor did they present any other arguments that would warrant depriving consumers of the competitive benefits they now enjoy as a result of the implementation of equal access in BOC cellular systems.

Cellular markets have changed in some respects since the decree was entered; the volume and importance of cellular services are considerably greater than was generally predicted at that time. As the United States showed in the district court, however, these changes have neither undermined the rationale for the decree restrictions nor rendered them unnecessary. Contrary to BellSouth and SBC's contentions (BellSouth-SBC Br. at 12), wireless markets are not "highly competitive." BOC cellular systems face only a single competing cellular system. Economic theory predicts and the available evidence confirms that they have substantial market power; absent equal access and effective

safeguards, they could use that power to impede interexchange competition. See US Response at 13-23 (JA 599-609).

Cellular markets are duopolies with (at least until very recently) absolute barriers to entry. The FCC has licensed only two cellular systems in each geographic area. Economic theory generally predicts that prices will be higher in markets that have fewer competitors or are more highly concentrated, absent mitigating factors. See, e.g., IV Philip E. Areeda & Donald F. Turner, Antitrust Law ¶ 910b at 55 (1980); see also US Response at 14 n.22 (JA 600) (citing additional authority). Moreover, in the cellular industry, firms that compete with each other in one market often are partners in another. See US Response at 15 (JA 601). The BOCs' internal documents testify to their understanding that cellular markets are comfortably noncompetitive, an understanding confirmed by pricing data. See id. at 15-19 (JA 601-05).

Absent equal access requirements, the BOCs could use their market power in cellular exchange service to deny interexchange carriers access to cellular systems and thereby impede interexchange competition. See US Response at 19-20 (JA 605-06). As BellSouth and SBC acknowledge (Br. at 20), there are no technical constraints on cellular systems' ability to program their switches to send all interexchange calls to one carrier, foreclosing competition. See US Response at 19-20 (JA 605-06). If cellular subscribers do not have a choice of interexchange carriers, the prices they pay for interexchange service are not

constrained by interexchange competition, but only by the limited competition between cellular carriers. Not surprisingly, therefore, the Department's investigation indicated that cellular subscribers value the choice that equal access gives them. See id.

Facts as well as theory refute the BellSouth-SBC contention (Br. at 22-22) that, even if they have market power in cellular exchange services, they could not further exploit that power by discriminating against interexchange competitors. As the United States explained below, that "one monopoly rent argument" depends on conditions not present here, including fixed proportions of two inputs and a monopolist integrating with a firm in a competitive market; it is not relevant to integrating oligopolists. See US Response at 21-23 (JA 607-09).

Equal access requirements could become unnecessary in fully competitive cellular markets, but such markets do not exist today, and the presence of a single competitor provides an insufficient constraint on exercise of BOC market power. BellSouth and SBC assert (BellSouth-SBC Br. at 22; see also BOC Br. at 5, 33 n.10) that new personal communications services ("PCS") and enhanced forms of specialized mobile radio ("SMR") compete with cellular systems. PCS and enhanced SMR have been discussed for many years, but their competitive potential is uncertain as well as unrealized. See US Response at 24-26 (JA 610-12). Accordingly, the essential fact of BOC market power warrants continued application of the decree's equal access

provisions to BOC cellular systems to protect interexchange competition.

C. The Equal Access Requirements Are Not Substantially More Onerous Than They Were When the Decree Was Entered; Nor Are They Anticompetitive

BellSouth and SBC (Br. at 19-20) also complain that "requiring equal access is onerous." Of course, implementation of equal access has imposed costs on AT&T and the BOCs, but those costs were inherent in the remedy chosen by the parties. The district court found this remedy consistent with the public interest because the costs were warranted by the resulting benefits to competition and consumers. The cellular equal access requirements, moreover, are not substantially more onerous than they were when the decree was entered. Nor are they anticompetitive, as BellSouth and SBC claim.

Cellular equal access has been in place since 1987, and BOC cellular systems have prospered. Because so much of the effort required to implement equal access already has occurred, capital costs associated with cellular equal access should be lower in the future than in the past. BellSouth and SBC (Br. at 19-21) claim that allowing them to select a single interexchange carrier for all their cellular customers' interexchange service usage (rather than giving each subscriber an equal access choice) would produce significant cost savings for consumers. But that contention was disputed, see US Response at 13-26 (JA 599-612), and the district court was not obligated to accept the BOCs' view of the evidence.

The related assertion, that the decree's equal access requirements place BOCs at a competitive disadvantage vis-a-vis other cellular carriers (BellSouth-SBC Br. at 21), also provides no basis for the relief BellSouth and SBC seek. In the vast majority of major metropolitan areas, the local BOC's cellular competitor is subject to equal access requirements. If it is a BOC, it is subject to the MFJ; if it is an AT&T-McCaw system, it is subject to equivalent obligations imposed by the proposed antitrust consent decree in that case, United States v. AT&T Corp., No. 94-01555 (D.D.C. filed July 15, 1994). In addition, the FCC is considering general equal access rules for cellular systems. Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, 9 F.C.C.R. 5408 (1994). In any event, the fact that some other cellular systems do not provide equal access is not in itself a sufficient justification for relieving the BOCs from their decree obligations.

As precedent for the relief they seek, BellSouth and SBC (Br. at 18) point to the decree modification this Court recently affirmed, which allowed AT&T to acquire McCaw's interests in "BOC" cellular systems. AT&T-McCaw, 46 F.3d 1198. That modification, however, stands in sharp contrast to -- and provides no support for -- BellSouth and SBC's request for removal of the decree's equal access provisions. The AT&T-McCaw modification was consistent with the decree's purposes and suitably tailored precisely because the decree restrictions and

equal access obligations continued to apply to BOC cellular systems. See id. at 1207-08.

IV. IN ALLOWING BOCS TO PROVIDE INTEREXCHANGE SERVICES FROM WIRELESS SYSTEMS, THE DISTRICT COURT PROPERLY IMPOSED SAFEGUARDS RECOMMENDED BY THE DEPARTMENT OF JUSTICE

The BOC's joint waiver motion sought relief only from the section II(D)(1) interexchange prohibition. Unlike the BellSouth and SBC motions, the BOCs' joint motion did not seek removal of the BOCs' nondiscrimination and equal access obligations (except within expanded local calling areas, see infra part IV.E), and the accompanying proposed order included basic equal access conditions. See Proposed Order Comparison at 7-12 (JA 843-48).

The decree's equal access and nondiscrimination requirements, however, were originally crafted in contemplation of circumstances in which the BOCs would not themselves be providing interexchange services and thus would have little incentive to discriminate against interexchange carriers. Modification of the decree's interexchange service prohibition to allow the BOCs to provide interexchange services from cellular systems fundamentally alters the circumstances in which the equal access and nondiscrimination provisions will continue in effect and must be enforced. Accordingly, the Department concluded that such a modification requires a set of safeguards specifically tailored to ensure continued equal access and to prevent the BOCs from using their local exchange market power to impede competition, in the new situation where the BOCS would themselves compete in providing interexchange services.

In granting the BOCs' motion, the court imposed the structural separation, resale, and unbundling and marketing conditions that the Department sought. The BOCs objected to these conditions below and now challenge them on appeal. They argue that these safeguards "arise from impermissible considerations" (BOC Br. at 31-37), "were expressly fashioned to promote regulatory policies that have nothing to do with the terms of the decree" (id. at 3-4), and "cannot be justified by any substantial possibility of BOC 'bottleneck' abuses" (id. at 37-46). Contrary to the BOCs' contentions, the purposes of the Department's conditions were proper and the conditions effectively serve those purposes.[16] Indeed, because these conditions are essential, as well as sufficient, to protect competition, the modification allowing the BOCs to provide interexchange services from wireless systems should not be affirmed unless the conditions also are upheld.

A. The Court Has Authority To Impose Conditions To Satisfy the VIII(C) Standard and To Ensure Continued Compliance With Other Decree Provisions

As this Court has recognized, a waiver of the line-of-business restriction may include conditions that address legitimate concerns about potential anticompetitive effects of BOC entry into new markets. See Affiliated Enterprise, 12 F.3d

[16]Opponents of the waiver contended that the Department's proposed conditions were insufficient. See Reply Memorandum of the United States in Response to the Bell Companies' Motions for Generic Wireless Waivers (Sept. 2, 1994) ("US Reply") (JA 879) (responding to criticisms that the Department's recommendation was too lenient).

at 234-37. Thus there can be no doubt of the court's authority to impose conditions intended to prevent the BOCs from using their monopoly power to impede interexchange competition.

Contrary to the BOCs' contentions, moreover, the court's authority to condition line-of-business waivers is not limited to conditions "necessary to prevent the Bell Companies from using their control over landline networks to gain market power in the cellular interexchange market" (BOC Br. at 37-38). The district court properly concluded that the decree's equal access and nondiscrimination requirements for BOC wireless systems should not be removed (see supra part III).[17] Accordingly, it imposed conditions designed by the Department to ensure the BOCs' compliance with those obligations and to facilitate their enforcement as BOCs compete in interexchange markets pursuant to the waiver. In doing so doing, the court acted well within its discretion.

B. Continued Prohibition of BOC Interexchange Services from Wireless Facilities Integrated with the BOCs' Landline Local Exchange Telephone Companies

Under the new §VIII(L), BOCs may provide interexchange services only in conjunction with "Wireless Exchange Services"

> provided by corporations that have been established as separate subsidiaries from the Regional Company's local telephone exchange companies ("LECs"), [where] the principal facilities used to provide Wireless Exchange Services, including the MTSO and radio base

[17]Indeed, the joint BOC motion did not seek removal of these requirements.

> stations, are physically and operationally separate from LEC facilities.

§VIII(L)(1)(c); see 890 F. Supp. at 7 (J.A. 7). The "long distance sales force" for the authorized interexchange services also must be "separate . . . from any sales force that sells products or services of the Regional Company's local telephone exchange companies." §VIII(L)(4)(g)(1). In short, a BOC may not provide interexchange services except from wireless systems that are completely separated from the BOC's landline local exchange telephone company. The BOCs, however, may provide, through their wireless subsidiaries, both local wireless services and interexchange services for wireless calls; the marketing of those services is subject to the safeguards of §VIII(L)(4) (see infra part IV.D).

The BOCs' main objection to the separate subsidiary condition is that it would prevent them from offering interexchange services in conjunction with new personal communications services if they integrate PCS with their landline local exchange, rather than providing PCS through their cellular subsidiaries (see BOC Br. at 43-46).[18] On the present record, however, that is an entirely proper result.

The exchange and exchange access services that cellular systems provide for interexchange calls are quantitatively and qualitatively different from services provided by wireline

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[18]The FCC rules give BOCs the option of providing PCS through their cellular subsidiaries or through their local landline telephone companies. See 8 F.C.C.R. at 7751 & n.98.

networks. The Department did not recommend and the court did not authorize BOC provision of interexchange services for wireless calls from an integrated wireline-wireless system -- as opposed to calls from a separate wireless subsidiary -- because a waiver for such integrated systems would pose many, if not most, of the same problems and threats to competition as a general lifting of the decree's interexchange services prohibition. See US Response at 33 (JA 619).

In the context of the pending motion to vacate the decree,[19] the Department is examining the broader and more difficult issues of the extent to which anticompetitive discrimination and cross-subsidization would be likely if BOCs were allowed to provide interexchange services from landline systems, with which PCS services might be integrated. The record on the motions that are the subject of this appeal, however, was much more narrowly focused on BOC cellular services, which are required by the FCC's rules to be provided through subsidiaries separate from the local telephone company -- a fact on which the BOCs implicitly rely in seeking to distinguish cellular systems from the BOCs' "landline monopolies" (see BOC Br. at 33-37). The BOCs do not seriously attack structural separation as unduly burdensome for cellular systems, under present circumstances, and at this time there is no foundation in the record for a court to conclude that

[19]Motion of Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, and Southwestern Bell Corporation To Vacate the Decree (July 6, 1994). (By notice filed with the court on May 5, 1995, Bell Atlantic withdrew from this motion.)

competition would not be threatened by allowing the BOCs to provide interexchange services from integrated wireline-wireless systems.[20]

In large part because cellular systems are separate from landline local exchanges, the MTSO-to-POP connections that the BOCs currently provide to interexchange carriers are relatively simple and transparent. Maintaining such separation for all wireless systems from which the BOCs will provide interexchange services makes it unlikely that the basic structure of such connections for those systems will change. Therefore, the opportunities for BOCs to discriminate will be limited and attempts will entail significant risks of detection. Integrating wireless services with landline exchanges, however, could lead to far more complex interconnections among wireline, wireless and interexchange facilities. In that situation, it likely would be much more difficult to detect discrimination in various BOC services that might be used for those connections and to enforce the decree's equal access provisions. Accordingly, structural separation is an essential element of the conditions under which BOC provision of interexchange services from wireless systems satisfies the VIII(C) standard and will not undermine other decree provisions.

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[20]Structural separation is among the conditions that have been imposed on previous line-of-business waivers to minimize potential anticompetitive effects. See, e.g., Affiliated Enterprise, 12 F.3d at 236-37.

C. Limitation on BOC Interexchange Services to Resale of Multiple Interexchange Carriers' Services

The interexchange services authorized by the waiver are "limited to the resale of switched interexchange services procured pursuant to tariff from unaffiliated interexchange carriers, and not more than 45% of any Regional Company's Wireless Exchange System's interexchange minutes of use shall be purchased from any one interexchange carrier." §VIII(L)(2)(b). The BOCs contend that this condition is improper because it is based in part on concerns about the cellular duopoly and because it undercuts the benefits of the waiver. Neither objection has merit.

Requiring the BOC to provide services procured from an unaffiliated interexchange carrier reduces the risk that a BOC will use its control of MTSO-to POP connections to discriminate against interexchange carriers with which it will compete in serving cellular customers. See 890 F. Supp. at 7-8 (JA 7-8). As this Court and the district court have recognized, "'[a]nticompetitive activities undertaken by two separate corporations rather than by two components of the same corporation are likely to be far more difficult to accomplish because of increased problems of coordination and the greater possibility of detection.'" Affiliated Enterprise, 12 F.3d at 234-35 (quoting 552 F. Supp. at 191). Thus these conditions help to forestall violations of the BOCs' equal access and nondiscrimination obligations and to protect interexchange competition.

Prohibiting the BOCs from providing interexchange services from their own facilities prevents them from implementing interrelated features in their landland or wireline exchange systems and in their interexchange facilities to allow discrimination that would be difficult to prevent or detect. See US Response at 36-37 (JA 622-23). Further, the prohibition on use of BOC-owned facilities for interexchange services reinforces the structural separation requirement and the continued general prohibition on BOC interexchange services by preventing the BOCs from using facilities for multiple purposes.

Restricting the BOCs to reselling other interexchange carriers' tariffed services also makes it easier to detect violations of the BOCs' equal access and nondiscrimination obligations in pricing MTSO-to-POP connections. The interexchange carriers whose services the BOCs resell will continue to pay tariffed prices for those services. No intracorporate "bookkeeping" transfers between the BOC local exchange company and an affiliated interexchange carrier will be involved.

Requiring the BOCs to purchase interexchange services from several interexchange carriers, rather than allowing a BOC to deal exclusively with a single interexchange carrier, reinforces the salutary effects of the resale requirement. Coordination with multiple unaffiliated interexchange carriers to favor a BOC's (resold) services would be even more difficult than coordination with a single carrier. Indeed, even unilateral

attempts by a BOC to discriminate are less likely if it resells services of multiple interexchange carriers, because of the increased complexity and the diminished return from undetected favoritism toward any one carrier. See 890 F. Supp. at 7-8 (JA 7-8).

In these circumstances, the district court properly rejected the BOCs' contention (Br. at 41) that the resale condition "undercuts the benefits of the waiver" -- at least insofar as competition rather than the BOCs' private interests are concerned. The BOCs told the district court that, if their motion were granted, they would "mostly act as resellers of switched services in this context" (Memorandum of the Bell Companies in Support of Their Motion for a Modification of Section II of the Decree To Permit Them to Provide Cellular and Other Wireless Services Across LATA Boundaries at 16 (June 20, 1994)(JA 426)). Thus they would not have been likely to engage in significant new construction even absent this condition, and their argument (BOC Br. at 41-43) that new construction would provide greater competitive benefits than resale is largely beside the point. In any event, such speculative benefits are outweighed by legitimate concerns that use of BOC-owned interexchange facilities might make it easier to conceal discrimination or cross-subsidization.

The BOCs claim further (BOC Br. at 42-43) that they could obtain lower rates by buying a larger block of wholesale service from a single carrier. That assertion was disputed, however, see

US Response at 37 n.50 (JA 623), and the district court made no such finding. Moreover, the extent to which any such savings would be passed on to cellular consumers would depend on the very competition in interexchange services that is protected by the conditions the BOCs contest.

The BOCs' attack on the resale condition as "indistinguishable in effect from the market division schemes that are considered per se violations of the antitrust laws" (BOC Br. at 42), entirely mischaracterizes this safeguard. No agreement among interexchange carriers to allocate BOC traffic is required or permitted by section VIII(L); the court has merely constrained the BOCs' purchasing decisions in order to prevent exclusive arrangements that could threaten equal access and interexchange competition. No interexchange carrier is guaranteed any particular share of a BOC's business, and there are substantial incentives for interexchange carriers to compete to provide up to 45 percent of that business.

D. Unbundling and Separate Marketing Requirements

As a condition of the waiver, the BOCs must "unbundle" charges for wireless exchange services and the newly authorized interexchange exchange services:

> Each Regional Company or affiliate thereof shall state separately to its customers the prices, terms, or rate plans for (i) Wireless Exchange Services and (ii) interexchange telecommunications services.

§VIII(L)(4)(a)(2). Section VIII(L)(4)(g) provides that "[p]ersons selling the Regional Company's interexchange services

authorized by this section (the 'long distance sales force') may also market and sell Wireless Exchange Services," and it imposes conditions on such marketing to ensure that BOC wireless systems do not discriminate against competing interexchange carriers.

As the court recognized, the unbundling requirement is critical to continued equal access and nondiscrimination in the new situation in which BOCs will compete against the interexchange carriers to which they provide cellular exchange access services. See 890 F. Supp. at 8 (JA 8). A BOC would violate its equal access and nondiscrimination obligations if it offered discounts on cellular exchange services to customers because they also select the BOC's interexchange services. See Access Charge Discrimination, 846 F.2d at 1427 (the decree prohibits "the charging of different rates by a BOC . . . for local exchange access . . . depending upon whether a purchaser . . . buys [other] services from the BOC . . . rather than from AT&T or some other interexchange carrier"). If the BOC offered only a combined price for cellular exchange and interexchange services, however, it would be quite difficult to determine whether the BOC had engaged in such prohibited discrimination.

Contrary to the BOCs' apparent contention (BOC Br. at 30), the waiver order does not prohibit the BOCs from providing "one-stop shopping" and jointly marketing local cellular services and interexchange services for cellular calls. It requires only that the BOC also state separately the prices for those two service elements, that they provide either service separately to

customers that do not desire both, and that they comply with the specified marketing conditions.

The marketing conditions to which the BOCs object are necessary to continued enforcement of the decree's equal access and nondiscrimination provisions. In essence, they prohibit BOC wireless system personnel who have access to facilities or information not available to interexchange competitors from marketing BOC interexchange services. For if they were to do so, the BOC would be discriminating against, and denying equal access to, those competitors. Other BOC wireless system personnel, however, may market both BOC wireless exchange services and BOC interexchange services in accordance with the BOCs' approved equal access plans.

E. Refusal To Reduce Competition by Expanding Cellular Exchange Areas

In addition to objecting to conditions that preserve equal access from BOC cellular systems, and the ensuing benefits to consumers, the BOCs sought to expand the "local calling areas," within which their wireless systems have no equal access obligations (see BOC Br. at 46-47). The areas the BOCs proposed would extend beyond LATA boundaries and beyond the areas permitted under existing cellular waivers. Thus, the BOCs sought to foreclose interexchange carriers from competing for traffic that those carriers currently serve. The amount of interLATA cellular calling that would be converted from equal access to non-equal access under the BOCs' proposal was disputed, but not insignificant. See US Response at 46 & n.57 (JA 632). Indeed,

by the BOCs' own calculation (BOC Br. at 47), "51 MTAs would replace 164 landline LATAs as the areas within which BOCs may carry wireless calls on a 'local' basis," i.e., without equal access.

The district court previously has allowed the BOCs to expand their cellular exchange areas for practical reasons when doing so would not undermine the decree's purposes (see supra p. 11). However, the BOCs presented no justification, beyond their own convenience, for the request now at issue. The interexchange relief the district court properly granted in the new section VIII(L) did not require further inroads on the decree's equal access provisions, and the court properly declined to "take a piece of the interexchange market completely out of competition," Common Channel Signaling, 969 F.2d at 1242.

As the United States noted, the Federal Communications Commission is considering equal access rules for cellular systems, and it may establish local cellular calling areas in conjunction with such rules. Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, 9 F.C.C.R. 5408, 5434-39 (1994); see US Response at 48-49 (JA 634-35). If and when the FCC does so, it may be appropriate for the Department and the district court to consider whether the non-equal access areas for cellular service under the decree should be conformed to the FCC areas. At this time, however, there is no reason for the district court to further consider the BOCs' request for expanded local service areas.

V. THE 2(A) "BYPASS" CONDITION SHOULD BE VACATED

Although the United States supports the district court's decision in all other respects, we believe that section VIII(L)(2)(a), a condition the court imposed without prior notice to the parties, should be vacated. In limiting BOC interexchange services from wireless systems to areas in which interexchange carriers currently bypass the local BOC in connecting to a cellular MTSO, the district court misapplied the decree's section VIII(C) standard. The condition is not necessary to prevent abuse of BOC monopoly power to impede interexchange competition, nor does it serve to ensure that BOC landline and wireless systems will comply with their equal access and nondiscrimination obligations. Moreover, the erroneous imposition of the 2(a) condition is not harmless; its practical effect is to preclude the BOCs from providing interexchange services under the waiver except in a very few areas. See supra pp. 16-17. Accordingly, this condition should be viewed not as an additional safeguard, but as a virtual denial of relief sought under section VIII(C).

The United States does not contend that the district erred in concluding that there is a continuing "Mobile Bottleneck," i.e., that interexchange carriers depend on BOC landline facilities for connections to cellular MTSOs, see 890 F. Supp. at 3-5, 4 n.3 (JA 3-5, 4).[21] Although the BOCs made much of the

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[21]In areas where a particular BOC is not the local exchange carrier (for example, if Bell Atlantic were to provide interexchange cellular service in California), it does not (continued...)

alleged availability of "bypass," they were referring primarily to BOC-provided special access, and to competitive access providers that perhaps could, but do not currently, provide bypass. The court erred, however, in viewing the existence of that bottleneck as sufficient in itself to establish a "risk of discrimination," and in viewing any such risk, even if minimal, as grounds for essentially denying the waiver. See 890 F. Supp. at 8 (JA 8) ("the Department of Justice conceded" that its proposed conditions "would not eliminate the risk of discrimination, but instead would merely reduce the risk to 'acceptable levels.'"). Thus, the district court disregarded this Court's admonition that "the importance of the word 'substantial'" in the VIII(C) standard "should not be minimized," Triennial Review Appeal, 900 F.2d at 295-96. A mere theoretical possibility that a BOC will use its monopoly power to impede competition does not warrant denial of an VIII(C) motion.

The United States based its recommendation on evidence that the BOC-provided connections between interexchange carriers' points-of-presence and cellular MTSOs are relatively simple and direct (see Tr. 33-34) (JA 924-25). Thus with the structural separation and resale conditions the United States proposed, discrimination would be easy to detect and would be a minimal risk (see supra part IV). See US Response at 29-36 (JA 615-22). The conclusion that the waiver should be granted also took into

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[21](...continued)
control the "Mobile Bottleneck." The BOCs, however, did not seek to distinguish out-of-region from in-region services.

account the presence of a second cellular system in each market -- very often another BOC or an AT&T-McCaw system also subject to equal access requirements -- as a constraint on anticompetitive discrimination by BOC cellular systems. See US Reply at 13-14 (JA 891-92).

The court endorsed the United States' conclusions that these safeguards would minimize risks of discrimination and cross-subsidization. 890 F. Supp. at 7-8 (JA 7-8). It gave no specific reason for disputing the Department's further conclusion that in the unique circumstances presented by interexchange service from cellular systems (or other wireless systems) that are completely separated from the landline local exchange, these safeguards would reduce the risk of discrimination to a very minimal level and thus both satisfy VIII(C) and ensure continued equal access. Indeed, the court did not afford the parties any opportunity to address the need for and effects of the additional condition it imposed sua sponte. Cf. United States v. Western Elec. Co., 894 F.2d 430, 437 n.12 (D.C. Cir. 1990) (minimal procedural requirements for modifying the decree include specific notice, opportunity to present evidence, and findings).

In addition to effecting an unwarranted denial of an VIII(C) motion, the 2(a) condition is itself anticompetitive. It gives interexchange carriers that provide services to cellular customers the power to prevent or delay competition from the BOCs and an incentive not to use or to encourage the development of competitive access services. For if CAPs are willing and able to

provide MTSO-to-POP connections, but interexchange carriers continue to use BOC services, the BOCs will be unable to satisfy 2(a).[22] If an interexchange carrier's choice of CAP access allows a BOC to compete with it in providing interexchange services to cellular customers, interexchange carriers are far less likely to use CAPs even when they might otherwise choose to do so. And it seems very unlikely that a CAP would construct an MTSO-to-POP connection unless an interexchange carrier indicated an intention to use it.

The district court may not have intended its condition to foreclose most of the relief the Department has recommended; it may have relied on the BOCs' expansive statements about bypass and underestimated the impact of the 2(a) condition. Nonetheless, because section VIII(L)(2)(a) essentially negates an otherwise proper line-of-business waiver order, that condition is inconsistent with section VIII(C), which gives the district court no discretion to prohibit BOC entry that does not pose a substantial threat to competition. Triennial Review Appeal, 900 F.2d at 293.

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[22]The BOCs argued in their clarification motion that the 2(a) condition is satisfied if the BOC shows that a "CAP is ready, willing and able" to provide MTSO-to-POP connections in the area in question." Request of Four Regional Companies for Further Clarification of the Court's April 28 Order, Proposed Order ¶¶ 1 & 2 (July 7, 1995). The district court denied that motion. United States v. Western Elec. Co., No. 82-0192 (D.D.C. Aug. 31, 1995) (JA 977).

CONCLUSION

The Court should vacate the 2(a) condition and affirm the district court's order in all other respects. Alternatively, the Court should remand the motion to the district court with instructions to enter a revised order. Any order entered by the district court on remand should allow the BOCs to provide interexchange services from wireless systems, subject to the equal access conditions on which the parties agreed, and to the structural separation, resale, and unbundling and marketing conditions the Department sought.

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 28(D)(1) WORD LIMITS

I certify (based on the word count reported by a word processing system) that this brief, including footnotes, does not exceed the 12,500 words permitted by this Court's orders of July 19 and August 16, 1995.

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 1995, the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE AND CROSS-APPELLANT (final copies with JA citations) was served by first-class mail, postage prepaid, on:

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