UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. WESTERN ELECTRIC COMPANY, INC., and AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendants.	)	Civil Action No. 82-0192 HHG

RESPONSE OF THE UNITED STATES TO MOTION OF BELLSOUTH CORPORATION TO REMOVE SECTION II(D) FROM THE DECREE

BellSouth Corporation's ("BellSouth") motion[1] seeks to relitigate issues which have previously been decided by the Court. BellSouth's requested relief - wholesale removal of the remaining line-of-business restrictions in section II(D) - is clearly subsumed within the relief currently sought in the Motion to Vacate.[2] This Court has established a schedule for the briefing and resolution of that motion, and there is no reason to depart from that schedule to entertain this latest BellSouth motion. The "significant changes of circumstances" which BellSouth cites are either not changes at all or fall well short of that necessary to sustain their burden for justifying modification of a decree. Accordingly, BellSouth's motion should be denied.

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[1] Motion of BellSouth Corporation To Remove Section II(D) From The Decree, Civ. No. 82-0192 (D.D.C. filed April 18, 1995) ("BellSouth Motion").

[2] *See* Motion of Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation and Southwestern Bell Corporation to Vacate The Decree, Civ. No. 82-0192 (D.D.C. filed July 6, 1994) ("Motion to Vacate").

I. BellSouth's Motion Seeks Relief Previously Requested In The Motion To Vacate

BellSouth's motion raises many of the same issues previously raised in the Motion to Vacate. This Court's prior order[3] established a schedule for resolution of these claims for lifting of the remaining line-of-business restrictions. BellSouth's motion attempts to circumvent this schedule and force the Court and the parties to entertain an essentially duplicative motion without the benefit of the full and complete discovery and analysis that was contemplated by the Court's scheduling order. This attempt should be rejected.

On July 6, 1994, BellSouth and several BOCs filed a motion to vacate the MFJ on the grounds, *inter alia*, that changed circumstances rendered further enforcement of the decree contrary to the public interest. More particularly, as part of this motion, BellSouth and the other BOCs argued that the line-of-business restrictions place an unjustified burden on the BOCs in light of changes in telecommunications markets and technologies, and that the Court, "at a bare minimum," should eliminate the remaining II(D) restrictions.[4] By Order dated August 18, 1994, this Court established a schedule for the briefing and resolution of the Motion to Vacate which provided an appropriate time frame for the Department of Justice ("the Department") to conduct an investigation and analysis of the issues raised in the motion. BellSouth now desires to revisit this decision and, moreover, asks the Court to decide the ultimate issues on a shorter time frame and without benefit of the Department's investigation.[5] Such action clearly is not warranted.

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[3] *See* Order of August 18, 1994, Civ. No. 82-0192 (D.D.C.).

[4] Motion to Vacate, at 3 n. 1.

[5] Moreover, due to BellSouth's failure to cooperate in the Department's investigation, the United States was compelled to file a motion seeking an order from the Court directing BellSouth to comply with certain requests for information on or before a date certain. *See* Motion Of The United States To Amend This Court's August 18, 1994 Scheduling Order, Civ. No. 82-0192 (D.D.C. filed April 19, 1995).

BellSouth does not offer any legitimate justification for this procedural maneuvering. BellSouth's suggestion that the "changed circumstances" referred to in SBC Communications, Inc.'s ("SBC") recent motions[6] "independently warrant modification of the Decree," does not change the fact that the ultimate relief sought is clearly duplicative. The Department has or will respond to SBC's purported "changed circumstances" in its responses to those motions.[7] Regardless, these motions do not supply any basis for BellSouth's attempt to sidestep the Court's schedule for timely disposition of the BOCs' claims for relief. Accordingly, the motion should be denied.

II. There Are No Significant Changes of Circumstances Warranting Modification of the Decree

BellSouth's proposed modification of the decree should be rejected on the additional ground that BellSouth has failed to establish its entitlement to such extraordinary relief. BellSouth contends that modification of the decree is justified in light of significant changes in facts or law under the standard announced in *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992). BellSouth Motion, at 3. However, close examination reveals that there are no significant changed circumstances meriting modification of the decree and no evidence that such changes have rendered the decree unworkable. Moreover, BellSouth's proposed relief is not

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[6] *See* Motion of SBC Communications Inc. to Modify Procedures for Waiver of the Line of Business Restrictions, Civ. No. 82-0192 (D.D.C. filed April 4, 1995) ("SBC waiver motion"); Motion of SBC Communications Inc. to Eliminate AT&T's Ability to Alter the Standard for Waivers of the Line of Business Restrictions, Civ. No. 82-0192 (D.D.C. filed April 4, 1995).

[7] The Department has previously responded to SBC's arguments concerning the continued vitality of the waiver process. *See* Response Of The United States To Motion Of SBC Communications To Modify Procedures For Waiver Of The Line-Of-Business Restrictions, Civ. No. 82-0192 (D.D.C. filed April 18, 1995).

suitably tailored to the purposes of the decree. Accordingly, there is no basis upon which to grant BellSouth's motion to remove the Section II(D) restrictions.

BellSouth initially argues that the MFJ, "unlike virtually all other modern antitrust decrees," does not include any sunset provision. BellSouth Motion, at 5-6. Whatever might be said about this particular feature of the decree, there can be no question that it is not a "changed circumstance" warranting modification of the decree. Secondly, BellSouth asserts that the Department's breach of its obligation to perform triennial reviews likewise makes the waiver process unworkable. BellSouth Motion, at 6. However, the Court has indicated that "the Department has complete discretion on the question whether and when to file another report," *United States v. Western Elec. Co*., slip opinion at 4-5 (D.D.C. July 17, 1989), and the report to be issued by the Department in connection with the Motion To Vacate will serve substantially the same purpose as a triennial review. Given these considerations, neither of these factors constitute sufficient changed circumstances to merit modification of the decree.

BellSouth's argument that the procedures set up to allow for removal of the line-of-business restrictions have ceased to function has no factual basis and does not constitute a significant changed circumstance. BellSouth maintains that the procedure whereby all waiver requests are referred to the Department for review no longer serves its intended purpose. This argument (which was most recently raised in the SBC waiver motion) ignores the extraordinary and far-reaching changes which have been achieved as a result of the waiver process, while simultaneously presenting a distorted and incomplete description of how current waiver procedures are working.[8] The Department has previously responded in considerable detail to

[8] BellSouth's suggestion that this referral process violates due process is also not well taken. This Court's decision to establish the referral procedure to facilitate a full review of waiver requests (continued...)

these allegations and, rather than burdening the Court with a reiteration of these arguments, hereby incorporates them by reference herein. *See* Response of the United States To Motion Of SBC Communications Inc. To Modify Procedures For Waiver Of The Line-Of-Business Restrictions, Civ. No. 82-0192 (D.D.C. filed April 18, 1995) ("Response to SBC Waiver Motion").[9]

Even assuming, *arguendo*, that there is any support for a modification to the decree based on the referral procedures, BellSouth's motion reaches too far. *See Rufo*, 112 S. Ct. at 761 (proposed modification must be "suitably tailored"). Any perceived deficiencies in the waiver process do not justify the extreme remedy of wholesale abolition of the line-of-business restrictions.[10] While these complaints might, at most, convince the Court to consider possible

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does not constitute relinquishment of the Court's judicial role and has been held consistent with the decree. *See United States v. Western Elec. Co.*, 777 F.2d 23, 30 (D.C. Cir. 1985).

[9] One particular aspect of BellSouth's argument on this point necessitates a separate response. BellSouth seeks to attribute much of the "delay" associated with waiver requests to the fault of the Department, and cites as an example of this problem certain correspondence pertaining to the BOCs' request for a generic waiver with regard to the provision of information services. BellSouth Motion, at 7 (*citing* Letters of Donald J. Russell, Chief, Telecommunications Task Force to Michael K. Kellogg, counsel for the Bell Operating Companies dated April 14, 1994). The fact is that in this particular circumstance, as is often the case, the BOCs voluntarily chose to modify and narrow their original waiver request in an effort to obtain Department support for the proposal. Such modifications were negotiated over a period of time and eventually resulted in adoption of a waiver proposal which the Department supported. However, the BOCs were free to submit their original request to the Court for review at the time the Department informed them of its initial position, and thereby avoid any further delay. To now characterize these events as evidence of "increased delay" by the Department, and to suggest such delay was somehow designed to serve the interests of AT&T, is disingenuous to say the least.

[10] Although BellSouth suggests that the Department is unsuited to perform its role in the waiver process because, for example, it has no incentive to comply with any court imposed briefing schedule, such arguments are sheer nonsense. The Department is fully aware of its responsibility to act in accordance with court orders and the public interest. There is no basis to assume anything to the contrary. *See also* Response Of The United States To BellSouth's Motion To Amend This Court's August 18, 1994 Scheduling Order, Civ. No. 82-0192 (D.D.C. filed April 18, 1995) (refuting (continued...)

modifications to the current procedures, they do not provide a basis for the relief requested in BellSouth's motion.[11]

Finally, BellSouth seeks to improperly characterize an interpretation of the decree by the Court of Appeals as a "changed circumstance" warranting relief. The interpretation in question is a holding by the court of appeals that AT&T's opposition, standing alone, is enough to preclude application of the "public interest" standard to a BOC waiver request. BellSouth Motion, at 9-11. While significant changes in existing law may warrant modification of a decree, *Rufo*, 112 S. Ct. at 760, the Court of Appeals decision cited by BellSouth cannot constitute such a change because it was explicitly an interpretation of the original decree. *See United States v. Western Elec. Co.*, 969 F.2d 1231, 1240 (D.C. Cir. 1992) (decree as written not ambiguous and grants right to AT&T to object to waiver request and thereby invoke section VIII(C) standard). Such a construction of the language of the decree does not qualify as a significant change in existing law and does not provide justification for modification of the decree.

III. Conclusion

BellSouth's attempt to sidestep or relitigate the Court's prior scheduling decision should be rejected. The issue of proposed modifications to the decree should be resolved in the context of the pending Motion to Vacate, and only after full investigation and analysis as contemplated

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(...continued)
notion that Department has adopted policy of delaying action on decree to further its legislative agenda).

[11] The Department has previously suggested modifications which would address the concerns raised by BellSouth while at the same time preserving the integrity of the waiver process for the Court's consideration should this be deemed appropriate. *See* Response to SBC Waiver Motion, at 21-23.

by this Court's scheduling order. BellSouth's motion fails to provide sufficient justification for any proposed modification and seeks relief which is overbroad. For this and all of the foregoing reasons, BellSouth's motion should be denied.

Respectfully submitted,

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Dated: May 1, 1995

CERTIFICATE OF SERVICE

I, Kathy L. Cuff, hereby certify under penalty of perjury that I am not a party to this action, that I am not less than 18 years of age, and that I have on this day caused the **Response Of The United States To Motion Of BellSouth Corporation To Remove Section II(D) From The Decree** to be served on defendants, intervenors, and other interested persons by mailing a copy, postage prepaid, to each of the individuals and organizations on the attached service list.

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Kathy L. Cuff

Dated: May 1, 1995