ORAL ARGUMENT SCHEDULED FOR NOVEMBER 16, 1994

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

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No. 94-5252

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

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

BELLSOUTH CORPORATION,

Appellant.

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# BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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## CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

The information required by Circuit Rule 26 appears in the Brief of Appellant BellSouth Corporation.

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## GLOSSARY

BOC: Bell Operating Company. Section IV(C) of the MFJ, 552 F. Supp. at 228 (J.A. 68), defines "Bell Operating Companies" and "BOCs" as "the corporations listed in Apendix A" of the decree, i.e., the Bell Operating Companies as of 1982, "and any entity directly or indirectly owned or controlled by a BOC or affiliated through substantial common ownership."

MFJ: Modification of Final Judgment. The antitrust consent decree entered in the government's case against AT&T in 1982. United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 226-34 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983) (J.A. 64-82). The MFJ modified and superceded the antitrust consent decree entered against AT&T in 1956.

RHC: Regional Holding Company. One of the seven holding companies (Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Telesis, Southwestern Bell and US West) that acquired the stock of the BOCs upon divestiture. An RHC is also a "BOC" as defined in the decree. The RHCs are sometimes referred to as "Regional Companies," "Regional Bell Operating Companies," or "RBOCs."

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## ISSUE PRESENTED FOR REVIEW

Whether the district court properly granted AT&T's motion, which the United States supported, for a limited modification of an antitrust consent decree.

## JURISDICTION

This is an appeal from the district court's August 25, 1994 order modifying the consent decree entered in the government's antitrust case against AT&T, United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983) ("Modification of Final Judgment," "MFJ" or "decree") (J.A. 64-82). The district court, which entered that decree, had jurisdiction to modify it under

28 U.S.C. §1337, Fed. R. Civ. P. 60(b), and section VII of the decree, 552 F. Supp. at 231 (J.A. 74). BellSouth, a party to the decree, filed a notice of appeal on September 13, 1994. This Court has jurisdiction of the appeal under 28 U.S.C. §§1291 and 1292(a).

## STATUES AND REGULATIONS

The only applicable regulation, Fed. R. Civ. P. 60(b), is set forth in the Brief of Appellant BellSouth Corporation.

## STATEMENT

This is an appeal by BellSouth Corporation from the district court's order granting AT&T's motion to modify section I(D) of the MFJ. The modification permits AT&T to acquire from McCaw Cellular Communications, Inc. ("McCaw") interests in certain cellular telephone systems that fall within the MFJ definition of "Bell Operating Company" or "BOC."

1. The 1982 consent decree entered in the government's antitrust case against AT&T required AT&T to divest its local telephone operating companies, the Bell Operating Companies ("BOCs"). 552 F. Supp. at 226-27 (J.A. 64-67). Section I(D) of the decree provides that, after the divestiture, "AT&T shall not acquire the stock or assets of any BOC." 552 F. Supp. at 227 (J.A. 67). Section IV(C), 552 F. Supp. at 228 (J.A. 68), defines "Bell Operating Companies" and "BOCs" as "the corporations listed in Appendix A" of the decree, i.e., the Bell Operating Companies as of 1982, "and any entity directly or indirectly owned or controlled by a BOC or affiliated through substantial common

ownership." The decree definition of "BOC" thus includes the seven regional holding companies ("RHCs") that acquired AT&T's local exchange operations upon divestiture, as well as entities in which any RHC or other BOC holds a controlling interest. United States v. Western Elec. Co., 797 F.2d 1082, 1087 (D.C. Cir. 1986), cert. denied, 480 U.S. 922 (1987).

2. The Federal Communications Commission has authorized only two carriers to provide cellular telephone service in each designated geographic area. When the Commission began to issue cellular licenses prior to the AT&T divestiture, it divided the frequencies allocated to cellular service into two blocks. The initial "B" block licenses were reserved for local "wireline" exchange carriers; the "A" block licenses were reserved for cellular service providers not affiliated with local exchange carriers. At divestiture, the Bell System cellular systems, all of which were "B" block licensees, were assigned to the BOCs, rather than AT&T. (See J.A. 40-41, 126-28.)

In 1986, the FCC began to allow the BOCs (and other local exchange carriers) to purchase controlling interests in "A" block cellular systems outside the areas where they provide local wireline exchange service. See Applications of James F. Rill, Trustee for Comet, Inc., and Pacific Telesis Group, 60 Rad. Reg. 2d (P & F) 583 (1986), recon., 1 FCC Rcd. 918 (1986) (see also J.A. 127). Shortly thereafter, this Court, reversing the district court, held that the MFJ does not prohibit the BOCs from providing cellular exchange service (or other exchange services)

outside of their regions. United States v. Western Elec. Co., 797 F.2d at 1089-91; (see also J.A. 127). Following that decision, several of the BOCs, including appellant BellSouth, purchased interests (including some controlling interests) in "out-of-region" block "A" cellular systems. Because the decree treats all cellular systems in which an RHC or other BOC holds a controlling interest as BOCs, such systems, pursuant to section II(A) of the decree, must provide "equal access" to interexchange carriers and information service providers.[1] (See J.A. 129 n.4, 973-76.) See also United States v. Western Elec. Co., 673 F. Supp. 525, 551 (D.C. Cir. 1987), aff'd in part and rev'd in part on other grounds, 900 F.2d 283 (D.C. Cir.), cert. denied, 498 U.S. 911 (1990); United States v. Western Elec. Co., 578 F. Supp. 643, 650 n. 28 (D.D.C. 1983).

3. McCaw holds ownership interests in several "A" block cellular systems that are BOCs under the decree definition because they are controlled by RHCs or other BOCs. (See J.A. 1011-17.) In August 1993, AT&T announced that it had entered into an agreement to acquire McCaw. BellSouth sought a declaration from the district court that AT&T's acquisition of

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[1] Section II(A), 552 F. Supp. at 227 (J.A. 66), provides:

> Subject to Appendix B, each BOC shall provide to all interexchange carriers and information service providers exchange access, information access, and exchange services for such access on an unbundled, tariffed basis, that is equal in type, quality, and price to that provided to AT&T and its affiliates.

McCaw's interests in BOC cellular systems would violate section I(D) of the decree. (J.A. 463.) AT&T then sought a declaration that the section I(D) prohibition did not apply to these cellular systems, even though they are BOCs within the meaning of the decree. (J.A. 735-42, 795-801.) In the alternative, AT&T sought an "expedited waiver" to permit the McCaw acquisition. (J.A. 778.) The court rejected AT&T's construction of the decree, agreeing with the United States, (J.A. 841), that section I(D) prohibits AT&T from acquiring cellular systems in which a BOC holds a controlling interest, absent a modification (or "waiver") of the decree. (J.A. 125.) The district court also held that modification of the section I(D) prohibition is governed by Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748 (1992), and that under Rufo:

> [A] party seeking an opposed modification of a consent decree "bears the burden of establishing that a significant change in circumstances warrants revision of the decree." [112 S. Ct.] at 760. Such a change may be either a "significant change in factual conditions or in law." Id. Modification may also be appropriate when "enforcement of the decree without modification would be detrimental to the public interest." Id.

(J.A. 139.) The court held that AT&T had "thus far failed to meet" the applicable standard, (J.A. 147 n.28), and denied its waiver request "without prejudice," (J.A. 148).

4. AT&T filed a renewed motion for modification, (J.A. 990), which the Department of Justice reviewed along with the various responses. At the same time, the Department was

investigating the entire AT&T-McCaw acquisition to determine whether it would violate federal antitrust law.

In its response to AT&T's motion for an MFJ waiver, (J.A. 1559), the United States expressed its concern that AT&T's acquisition of interests in BOC cellular systems "could threaten the continued provision of equal access in the BOC [cellular] systems in which McCaw has an interest if AT&T used McCaw's ownership interests to advocate policies that would subvert equal access [or] advocate[d] policies that would discriminate in favor of AT&T's interexchange service," (J.A. 1563). The United States concluded, however, that an appropriately conditioned order could eliminate this threat. Accordingly, the United States urged the district court to grant AT&T's motion on the conditions that AT&T and McCaw 1) use their ownership interests in BOC cellular systems to oppose proposed changes in the operation of those systems that would violate the decree's equal access (section II(A)) and nondiscrimination (section II(B)) requirements, and 2) promptly report any such proposed changes to the Department of Justice. (J.A. 1565-70.)

The United States noted, (J.A. 1563-65, 1568), that it had filed a complaint alleging that the proposed merger would violate section 7 of the Clayton Act, 15 U.S.C. §18, because it threatened competition in markets for cellular service, cellular infrastructure equipment and interexchange services to cellular customers. United States v. AT&T, No. 94-01555 (HHG) (filed July 15, 1994). The United States and AT&T had filed, simultaneously

with the filing of the complaint, a stipulation and a proposed consent decree ("merger decree") imposing appropriate conditions to prevent those threatened anticompetitive effects.[2] Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. §16 ("Tunney Act"), the district court will review the merger decree to ensure that it is consistent with the public interest in competition.[3] The stipulation provides that AT&T and McCaw will abide by the terms of the merger decree pending its review and entry by the district court. Accordingly, the United States did not seek to block consummation of the merger.

Appellant BellSouth, one of the BOCs, opposed AT&T's motion. (J.A. 1415.) It contended that AT&T had not provided any sufficient justification for a waiver and that the court should "condition any waiver of Section I(D) upon the relief it orders on the BOCs' pending motions for generic wireless relief," (J.A.

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[2] The proposed merger decree expands cellular equal access by requiring AT&T to provide equal access to all interexchange carriers from all McCaw cellular systems, including those that are not BOCs. Its equal access requirements are modelled on, although not identical to, those the MFJ imposes on the BOCs. In order to prevent AT&T from impairing competition between its cellular infrastructure equipment customers and McCaw, the proposed decree restricts AT&T's use of nonpublic information that it gets from such customers, prohibits AT&T from giving preferential treatment to McCaw in the deployment and development of new equipment, and contains provisions that will ameliorate the actual lock-in and the corresponding degree of influence AT&T can exercise over its cellular infrastructure customers. See 59 Fed. Reg. 44158 (Aug. 26, 1994). (See also J.A. 1567-68.)

[3] The Tunney Act proceedings on the merger decree are also before Judge Greene. The period for public comment, which runs for 60 days following Federal Register publication of the proposed decree and competitive impact statement, will expire October 25, 1994.

1438), i.e., modification or removal of the decree's equal access requirements and interexchange prohibitions for BOC cellular systems.[4]

5. After hearing oral argument on AT&T's motion for modification of the MFJ, the district court concluded that AT&T had satisfied the standard described in Rufo. It granted a limited modification of section I(D), subject to the conditions the United States had proposed, (J.A. 59-63), and to a further condition requiring AT&T to divest its interests in the BOC systems if the merger decree is ultimately found not to be in the public interest, (J.A. 63).

Relying on the history of the FCC's cellular licensing (see pp. 3-4, supra), and this Court's conclusion that "'the parties and the district court never considered the possibility that the BOCs might want to provide exchange services outside their geographic region,'" (J.A. 40-42, quoting 797 F.2d at 1091), the court found "little doubt . . . that the current situation -- in which the 'A' block cellular systems at issue have become 'BOCs' within the meaning of the decree -- was unforeseen."[5] The court

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[4] Bell Atlantic supported AT&T's motion. (J.A. 1500.) Other BOCs (NYNEX, Pacific Telesis and Southwestern Bell) argued that AT&T's request should only be granted if BOC cellular systems were relieved of various decree restrictions. (J.A. 1500.)

[5] Because it found significant factual changes, the district court made "no detailed analysis of the 'changed law' inquiry." (J.A. 46.) The court recognized that this Court's holding that the decree does not prohibit BOC acquisition of out-of-region cellular licenses, United States v. Western Elec. Co., (continued...)

found that this unforeseen factual change, which expanded the restriction on AT&T's entry into the cellular market to include not only block "B" licenses but also "A" block licenses in which BOCs hold controlling interests, made compliance with the section I(D) restriction "substantially more onerous." (J.A. 43.)

The court also concluded, based on "the purpose and objective of section I(D)" and "the limited nature of the instant waiver request," that "the waiver is suitably tailored." (J.A. 47-50.) The court emphasized that "the objective of section I(D) was not the separation of AT&T and the Regional Companies merely for the sake of separation[, but rather] to remove the incentive and opportunity for the local bottleneck monopolies to discriminate in favor of AT&T's dominant interexchange services." (J.A. 48.) And it found that

> despite the literal violation with which the Court is now confronted, that [nondiscrimination] objective is not substantially implicated here because (1) the "A" block cellular systems at issue do not constitute bottleneck monopolies, (2) the Regional Companies that own the controlling interests in the systems do not control the local wirelines in the areas served by the cellular systems and thus possess no monopoly power in those areas, and (3) the systems will remain subject to all applicable decree restrictions after the merger because they will continue to be "BOCs."

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5(...continued)
797 F.2d at 1091, did not change existing law. (J.A. 46.) But it left open the possibility that "the decision of the FCC in 1986 to allow the Regional Companies to acquire 'A' block licenses" was such a change. (Id.) The court also concluded that continued enforcement of the decree without modification "would not necessarily be detrimental to the public interest." (J.A. 45.)

(J.A. 48-49.)

The court emphasized that the waiver would not broadly modify section I(D). Moreover, the conditions agreed to by the United States and AT&T and imposed by the modification order, (J.A. 59-63), would protect the decree's equal access conditions: "AT&T is precluded from interfering in any way with the decree responsibilities of the 'BOC' systems following the merger." (J.A. 52.) Finally, the court concluded that there was no reason to delay the waiver pending a decision on the proposed merger decree, or on the BOCs' motions for generic wireless relief. (J.A. 53-54.)

BellSouth appealed, (J.A. 2053), and moved for a stay, which the district court denied, (J.A. 166). On September 19, 1994, this Court also denied BellSouth a stay and set the case for expedited briefing and argument. The acquisition closed on September 19, 1994, after the FCC had approved the license transfers.

## SUMMARY OF ARGUMENT

The district court properly granted AT&T's motion for a limited modification of the MFJ. The record and this Court's prior decision support the court's finding that BOC ownership of "A" block cellular systems was an unforeseen change in factual conditions that made the decree substantially more onerous, imposing restrictions on AT&T's provision of cellular service contrary to the parties' intent. The modification of section I(D) approved by the district court was "suitably tailored" to

this changed circumstance. It was confined to the problem created by the change and subject to conditions that ensure that the modification will further, rather than undermine, the decree's purposes. The court was not required to delay this modification pending resolution of BOC motions seeking relief from decree restrictions on BOC cellular service or Tunney Act review of the proposed consent decree filed to resolve the government's antitrust action against AT&T's acquisition of McCaw.

## ARGUMENT

### THE DISTRICT COURT PROPERLY GRANTED AT&T'S MOTION FOR A SUITABLY TAILORED MODIFICATION OF THE DECREE

#### A. Standard of Review

An order modifying a consent decree is reviewed for abuse of discretion. System Federation No. 91 v. Wright, 364 U.S. 642, 647-48 (1961). See also Rufo, 112 S. Ct. at 765 (O'Connor, J., concurring); United States v. Western Elec. Co., 900 F.2d 283, 293-94 (D.C. Cir. 1990), cert. denied, 498 U.S. 911 (1990); Twelve John Does v. District of Columbia, 861 F.2d 295, 298 (D.C. Cir. 1988). The district court's holdings as to the applicable legal standard are reviewed de novo. See Rufo, 112 S. Ct. at 757-65; United States v. Western Elec. Co., 993 F.2d 1572, 1576-78 (D.C. Cir.), cert. denied, 114 S. Ct. 487 (1993); Harjo v. Andrus, 581 F.2d 949, 953-54 (D.C. Cir. 1978). Its factual findings are reviewed under a clearly erroneous standard. See United States v. Western Elec. Co., 900 F.2d at 293; United States v. Western Elec. Co., 993 F.2d at 1578; Twelve John Does,

861 F.2d at 298. Its decisions as to whether to consolidate cases and the order in which motions are to be decided are reviewed only for clear abuse of discretion. Cf. Aruba Bonaire Curacao Trust Co. v. Commissioner, 777 F.2d 38, 43 (D.C. Cir. 1985), cert. denied, 475 U.S. 1086 (1986) (decision whether to continue consideration of motion will not be set aside "without a clear showing of abuse of . . . discretion").

B. The District Court Did Not Err in Finding Changed Factual Conditions Sufficient To Warrant a Suitably Tailored Modification of Section II(D)

The Supreme Court held in Rufo that "[m]odification of a consent decree may be warranted when changed factual conditions make compliance with the decree substantially more onerous." 112 S. Ct. at 760. The district court correctly found that BOC control of "A" block cellular licensees was an unforeseen change in factual conditions that resulted in restrictions contrary to the decree parties' intent, making compliance sufficiently more onerous to warrant a suitably tailored modification.

1. As the Supreme Court has observed, "[o]rdinarily . . . modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree." Rufo, 112 S. Ct. at 760-61 (citing Twelve John Does, 861 F.2d at 298-99). But a party seeking modification is not required to prove that a change in facts on which it relies "is both unforeseen and unforeseeable." Rufo, 112 S. Ct. at 760. In this case, there was ample support for the district court's conclusion that the parties to the MFJ did not actually

anticipate that the BOCs would control "A" block cellular systems.

As the district court explained, (J.A. 40-42), the FCC originally granted only "B" block licenses to the BOCs and other wireline carriers. Further, as this Court has recognized, the most probable explanation for the decree parties' failure expressly to address the possibility that BOCs would seek to acquire interests in out-of-region cellular systems was that they did not anticipate or foresee such developments. United States v. Western Elec. Co., 797 F.2d at 1091.

The statements by the parties and the district court on which BellSouth relies, (Br. 21-22), do not support its contention that "[t]oday's [s]ituation [w]as [f]oreseen." The references to anticipated BOC acquisitions of "new assets" and provision of new exchange services, (Br. 21-22), contain no explicit or necessarily implied reference to out-of-region cellular services. Similarly, the pre-divestiture FCC proceedings BellSouth cites, Applications of Advanced Mobile Phone Service, Inc., 93 F.C.C.2d 683, 693 (1983), and An Inquiry Into the Use of Bands 825-845 MHz for Cellular Communications Systems, 86 F.C.C.2d 469, 487-88 (1981), (Br. 22), indicate that the Commission did not intend its initial wireline and nonwireline "set asides" to be immutable. But they do not establish that the FCC expected the BOCs to control numerous block "A" systems, much less that when AT&T and the Department of

Justice entered into the MFJ, they foresaw that the BOCs would operate such cellular systems outside their exchange areas.

BellSouth argues that "the unequivocal language of the court-approved order applies to the improbable as fully as it applies to what was likely," (Br. 23), and thus that there has in fact been no significant change in circumstances. But the plain language of the decree establishes only that -- as the district court held -- section I(D) would prohibit AT&T's acquisition of the BOC-controlled cellular systems unless modified. It proves nothing about the likelihood that the parties actually foresaw the changed circumstances found by the court. And, as the Supreme Court emphasized in Rufo, Rule 60(b) does not restrict modifications to situations where the change in facts was both "'unforeseen and unforeseeable'" when the decree was entered. 112 S. Ct. at 760. To the contrary, "[l]itigants are not required to anticipate every exigency that could conceivably arise during the life of a consent decree." Id.

2. The record also supports the district court's conclusion that the restrictions on AT&T's acquisition of "A" block cellular licenses resulting from BOC ownership of such systems made section I(D) more onerous, imposing restrictions on AT&T that the decree parties and the court had expressly rejected.

As the court found, "[i]t is clear that the decree was never intended to prevent AT&T from competing in the cellular marketplace" or from providing other local exchange services. (See J.A. 38 (citing 552 F. Supp. at 170).) Moreover, "[w]ith

respect to cellular services specifically, the [district c]ourt [in entering the decree] rejected the arguments of some that AT&T should be prevented from competing in such potential 'bypass' technologies." (J.A. 38 (citing 552 F. Supp. at 175).)

Until the BOCs acquired out-of-region "A" licenses, the section I(D) prohibition on AT&T's acquisition of "the stock or assets of any BOC" was consistent with this expressed intent. AT&T was prohibited from acquiring interests in "B" block cellular systems that were part of a BOC local exchange monopoly, but the decree did not bar AT&T from acquiring interests in any "A" block cellular systems. Thus, section I(D) did not prevent AT&T from entering any cellular market through acquisition of an interest in an "A" block licensee. As BOCs acquired control of "A" licenses, the reach of section I(D) expanded significantly, barring AT&T from acquiring an interest in either cellular system in any market in which the local BOC holds the "B" license and another BOC holds a controlling interest in the "A" license. This is no trivial matter: the BOCs hold controlling interests in "A" licenses in over half of the twenty-five largest cellular markets,[6] including systems that represent a major part of McCaw's value, (see J.A. 1011-17).[7]

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[6] See Cellular Telecommunications Ind. Ass'n, The Wireless Sourcebook (1993).

[7] The FCC recently has begun to license personal communications services ("PCS") which may, in the future, compete with existing cellular systems. See Amendment of the Commission's Rules to Establish New Personal Communications

(continued...)

The changed circumstance found by the court did not, of course, make AT&T's continued compliance with section I(D) illegal or impossible. But such a showing is not required. See Rufo, 112 S. Ct. at 760-62. Thus, BellSouth's argument, (Br. 24, 32), that AT&T could comply with the decree by modifying its business strategy is simply beside the point. BellSouth's further argument, (Br. 26-27), that a prohibition, as opposed to an affirmative obligation, cannot be "onerous" and therefore cannot be modified, finds no support in either the case law or Rule 60(b). Decrees requiring defendants affirmatively to undertake ongoing programs of remedial action will tend to require fine-tuning more often than decrees imposing simple prohibitions. But in the complex and rapidly changing telecommunications industry, the MFJ's prohibitions also may require suitably tailored modifications to achieve equitable results in unanticipated circumstances.

C. The Modification Is Suitably Tailored

A showing of changed circumstances making compliance more onerous does not automatically entitle a party to relief from decree restrictions. The court must also consider whether a proposed modification is "suitably tailored," i.e., whether, in light of the change, "it is no longer equitable that the judgment should have prospective application" without modification and

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7(...continued)
Services, 8 F.C.C. Rcd 7700, 7710 (1993). Nonetheless, a prohibition on AT&T's acquisition of block "A" cellular licenses significantly restricts its competitive options in a manner the decree parties did not intend.

whether the "terms [of the proposed modification] are just." Fed. R. Civ. P. 60(b)(5); see Rufo, 112 S. Ct. at 761. In particular, where a decree is intended to vindicate the public interest in competition, it may not be changed in the interest of defendants if modification would prevent the decree from fully achieving its purposes. United States v. United Shoe Machinery Corp., 391 U.S. 244, 248 (1968); see also Board of Education of Oklahoma City Public Schools v. Dowell, 498 U.S. 237, 247 (1991)(applying United Shoe in school desegregation case).

In this case, the modification of section I(D) was suitably tailored to further the decree's purposes in the changed circumstances found by the court. As the court emphasized, (J.A. 48-49), the modification did not terminate the decree prohibition at issue. Rather, it carved out an exception carefully confined to the problem created by the change, and it imposed conditions designed to further the decree's purposes.

BellSouth's assertion, (Br. 29), that the modification "was simply a blanket exemption for AT&T from Section I(D)" is simply wrong. The modification order neither terminates section I(D) nor gives AT&T an unlimited right to acquire BOCs, or even BOC cellular systems. The court has allowed AT&T only to acquire McCaw's interests in identified block "A" cellular systems, none of which is part of a BOC local exchange monopoly. Indeed, the court emphasized that "were AT&T seeking a waiver to acquire cellular interests in 'B' block licenses in partnership with a

Regional Company, a wholly different result might be warranted." (J.A. 49 n.18.)

Moreover, the district court's order does not terminate the decree's equal access and nondiscrimination requirements or otherwise undermine its purposes even as to the "BOC" interests it permits AT&T to acquire. The BOC cellular systems in which AT&T is allowed to acquire interests remain BOCs under Section IV(C), and they remain subject to the decree's equal access obligations. (J.A. 56.) The modification merely replaces a part of the section I(D) prohibition with conditions designed to reinforce AT&T's obligation under sections I(C) and III of the decree, (J.A. 66, 67-68), not to undermine or interfere with the equal access and nondiscrimination requirements that the decree imposes on the BOCs. (See J.A. 51-52.)

In determining that the modification is consistent with the decree's purposes and the public interest, the district court properly took into account the views of the Department of Justice, which is responsible for implementing and enforcing the decree. In Rufo, where the decree at issue governed the conduct of governmental defendants, the Supreme Court emphasized that "the public interest and considerations based on the allocation of powers within our federal system require that the district court defer to" the governmental officials responsible for implementing decree requirements. 112 S. Ct. at 764. Deference to the views of a governmental plaintiff representing the public interest that the decree is designed to serve and charged with

enforcement of the decree is at least as essential to a just result. See United States v. Western Elec. Co., 900 F.2d at 297-98.

While BellSouth seeks reversal of the limited and carefully conditioned modification that the district court granted, it incongruously argues, (Br. at 29-30), that the appropriate remedy would be "to modify the decree so that these 'A' block cellular systems would not be deemed to be . . . 'BOCs.'" But such a modification -- in contrast to the modification the district court granted -- would terminate the decree's equal access and nondiscrimination requirements as to those systems and thus would undermine the decree's purposes. BellSouth has provided no justification for such a broad modification; AT&T did not seek it; and the United States opposes pending motions in which BellSouth and Southwestern Bell seek such relief (see pp. 21-22, infra).

D. The District Court Was Not Required To Delay Its Decision on AT&T's Motion for Modification

BellSouth's contention, (Br. 34-37), that the district court erred by rendering a prompt decision on AT&T's I(D) modification motion while related matters remained pending is without merit. District courts have broad discretion in scheduling, and BellSouth cites no case, nor are we aware of any, in which this Court has reversed a district court's decision because of the order in which it decided related matters.

A.L. Mechling Barge Lines, Inc. v. United States, 376 U.S. 375 (1964), (BellSouth Br. 36-37), does not support BellSouth.

In that case, there was "no practical reason why the merits of the several contentions" that a set of rates discriminated against various parties "should not have been reached" in a single proceeding. 376 U.S. at 386. And the Court emphasized that, even as to such closely related claims, consolidation should be denied if it would "inordinately delay" proceedings. Id. In contrast, the district court in this case had ample practical reasons not to delay AT&T's motion for modification of section I(D) until it completed the Tunney Act review proceedings on the proposed AT&T-McCaw merger decree and ruled on the BOCs' motions for "generic wireless relief." And it was not necessary for the court to decide these other issues in order to determine that the I(D) modification was warranted by changed circumstances and equitably tailored to further the decree's purposes.

BellSouth's contention, (Br. 30-33), that AT&T unduly delayed seeking a district court order construing or modifying the decree to permit it to acquire McCaw's BOC cellular systems raises no issue warranting review by this Court. The district court was not required to "adjust[] its schedule to meet the schedule for consummation of the merger set by the private parties who were merging," (BellSouth Br. 37), but neither was it precluded from taking business schedules into account where doing so did not prejudice any party. Once briefing and hearing on AT&T's modification motion were complete, it was well within the court's discretion to decide it without delay.

The Tunney Act proceedings on the proposed merger decree cannot be completed until the 60-day period for public comment has expired, the United States has filed its response, and the court has had an opportunity to review the record and conduct a hearing if it wishes to do so. Thus, it will not be possible for the court to enter the merger decree until November or December of this year, at the earliest. But delaying the I(D) waiver order pending a ruling on the merger decree was not necessary to protect the public interest and ensure proper consideration of both matters. Only AT&T's acquisitions of McCaw's interests in BOC block "A" cellular systems -- not the competitive effects of the broader AT&T-McCaw transaction -- are at issue on the I(D) motion. The conditions imposed in the MFJ modification order, (J.A. 59-63), are fully adequate to ensure that those "BOC" acquisitions do not undermine the MFJ's purposes. Moreover, the modification order provides that in the event the district court does not approve the merger decree after its public interest review, AT&T must divest the BOC cellular interests that the I(D) waiver allowed it to acquire. (J.A. 63.)

The district court also was well within its discretion in deciding AT&T's section I(D) modification motion without first addressing broader questions as to "the degree to which wireless telecommunications services should be regulated by the terms of the Consent Decree" (BellSouth Br. 34-35). The BOCs have filed a series of motions for "generic wireless relief," seeking to modify the decree in several respects; those motions have been

briefed and are pending before the district court. The United States supports, with modifications, that portion of the BOCs' June 20, 1994 motion, (J.A. 1345),[8] seeking a waiver of the MFJ's interexchange services prohibition (section II(D)(1)) to allow the BOCs to provide "cellular and other wireless services" between cellular exchanges, subject to equal access. The government opposes, however, the BOCs' proposed redrawing of cellular exchange areas at this time. The United States also opposes the April 15, 1994 motion of BellSouth (J.A. 917) and the June 20, 1994 motion of Southwestern Bell (J.A. 1317) for removal of the decree's section II(A) equal access provisions and section II(D)(1) interexchange prohibition as applied to wireless services.

The grant of AT&T's section I(D) modification motion, however, does not prejudice the BOCs as to any of their "wireless relief" motions. The conditions imposed in the I(D) order leave the BOC cellular systems' decree obligations unchanged, but they do not preclude modification of these obligations to the extent the BOCs satisfy the standards applicable to the various broad modifications they seek. Thus, there was no reason to delay a decision on the modification sought by AT&T until the complex and different issues raised by the BOCs' requests are fully resolved.

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[8] The BOCs submitted a request for a "generic wireless waiver," without equal access conditions in December 1991. In June 1994, they submitted a revised request that included such conditions.

## CONCLUSION

This Court should affirm the district court's order granting a limited modification of section I(D) of the decree, subject to the conditions specified in that order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 1994, the foregoing BRIEF FOR APPELLEE UNITED STATES OF AMERICA was served by telecopier, with a copy sent by first class mail, upon

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I certify that this brief contains not more than the 6250 words permitted by this Court's Order.

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