ORAL ARGUMENT SCHEDULED FOR APRIL 14, 1993

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

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No. 92-5079 and Consolidated Cases

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UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

WESTERN ELECTRIC COMPANY, INC., et al.,

Defendants,

BELL ATLANTIC CORPORATION, et al.,

Appellants.

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

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# BRIEF FOR APPELLANT UNITED STATES OF AMERICA

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

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No. 92-5079
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UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

WESTERN ELECTRIC COMPANY, INC., et al.,

Defendants,

BELL ATLANTIC CORPORATION, et al.,

Appellants.

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

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RULE 11(a)(1) CERTIFICATE OF COUNSEL

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The undersigned, counsel of record for the United States certifies that:

PARTIES AND AMICI

The original parties to the litigation in the district court are:

United States of America
American Telephone and Telegraph Company
Bell Telephone Laboratories, Inc.
Western Electric Company, Inc.

In addition, the Bell Operating Companies ("BOCs") divested from AT&T on January 1, 1984, have been parties since divestiture.

The BOCs (also referred to as "Regional Holding Companies" ("RHCs")) are:

American Information Technologies Corporation ("Ameritech")
Bell Atlantic Corporation ("Bell Atlantic")
BellSouth Corporation ("BellSouth")
NYNEX Corporation ("NYNEX")
Pacific Telesis Group ("Pacific Telesis")
Southwestern Bell Corporation ("Southwestern Bell")
U S West, Inc. ("U S West")

Pacific Telesis, the United States, MCI Communications Corporation and Advanced Telecommunications Corporation participated in the district court proceedings on the motions that are the subject of these appeals.[1] The district court granted the motions of MCI, the North American Telecommunications Association (NATA), the Independent Data Communications Manufacturers Association (IDCMA) and Tandy Corporation for leave to intervene for purposes of appeal.

## RULINGS UNDER REVIEW

The rulings under review are the Memorandum and Order, entered January 31, 1992, and docketed February 3, 1992 (reconsideration denied by Order entered March 3, 1992 and docketed March 5, 1992) and the Memorandum and Order entered March 24, and docketed March 25, 1992, by the Honorable Harold H. Greene of the United States District Court for the District of Columbia. These decisions have not been officially reported.

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[1]The district court has allowed "interested third parties" to respond to motions filed by the parties without first seeking leave of court. See United States v. Western Electric Co., No. 82-0192, slip op. (D.D.C. Oct. 11, 1988) and slip op. (D.D.C. Oct. 19, 1988).

## RELATED CASES

Other Appeals from this Order

On May 5, 1992, the Court consolidated appeals by the BOCs (Nos. 92-5079, 92-5111, 92-5112, 92-5113, and 92-5167) and the United States (No. 92-5168).

Other Appeals in the AT&T Decree Proceedings

Numerous appeals have been taken from other orders in the district court proceedings involving various aspects of the AT&T antitrust consent decree, United States v. Western Electric Co., Inc., No. 82-0192:

In 1982, this Court entered several orders and issued one per curiam opinion in appeals concerning the intervenor status of various entities. United States v. American Telephone and Telegraph Co., No. 82-1321 (D.C. Cir. June 1, 1982); United States v. American Telephone and Telegraph Co., No. 82-1389 (D.C. Cir. Aug. 2, 1982); and United States v. American Telephone and Telegraph Co., 714 F.2d 178 (D.C. Cir. 1983).

A number of intervenors filed notices of appeal from the judgment, entered August 24, 1982 approving the consent decree (Nos. 82-2287, et al.), and from the subsequent order approving the plan of reorganization necessary to implement the decree (Nos. 83-1865, et al.). The district court, on November 10, 1982 and September 7, 1983, certified direct appeals of those orders to the Supreme Court under the Expediting Act, 15 U.S.C. §29(b). The Supreme Court summarily affirmed both orders. Maryland v. United States, 460 U.S. 1001 (1983); California v.

United States, 464 U.S. 1013 (1983). The appeals to this Court were dismissed after the Supreme Court's affirmances.

U S West appealed to this Court from the district court's opinion of July 26, 1984, which described standards and procedures for applications for waivers from various restrictions in the decree. This Court dismissed that appeal for lack of a final order. United States v. Western Electric Co., 777 F.2d 23 (D.C. Cir. 1985).

Bell Atlantic, Pacific Telesis, and U S West appealed from the district court's January 13, 1986 decision which, among other things, held that the decree bars a BOC from providing local exchange service outside of the area it served at the time of divestiture.[2] This Court reversed, holding that the decree does not so limit BOC exchange services. It also dismissed for lack of standing U S West's appeal from the portion of the January 13, 1986 decision holding that Ameritech was prohibited from offering certain communications services to landlords of multi-tenant buildings. United States v. Western Electric Co., 797 F.2d 1082 (D.C. Cir. 1986), cert. denied, 480 U.S. 922 (1987).

The seven BOCs appealed the district court's December 3, 1987 decision, which interpreted the decree's manufacturing restriction to prohibit BOC design and development of

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[2]Bell Atlantic also appealed from a May 14, 1986 district court order based upon this conclusion (No. 86-5480). After this Court reversed the January 13, 1986 ruling, the district court vacated the May 14 order, and this Court dismissed the latter appeal.

telecommunications equipment and design and development of software "integral" to such equipment. On February 2, 1990, this Court affirmed that decision. United States v. Western Electric Co., 894 F.2d 1387 (D.C. Cir. 1990).

Pacific Telesis and BellSouth appealed the district court's August 7, 1986 decision insofar as it required Department of Justice approval for BOC acquisitions of "conditional interests" (Nos. 86-5641, 86-5642). On January 16, 1990, this Court reversed that aspect of the district court decision. United States v. Western Electric Co., 894 F.2d 430 (D.C. Cir. 1990).

On October 22, 1987, this Court granted Bell Atlantic's motion to dismiss its appeal (No. 87-5013) from a district court order entered October 23, 1986, which the United States and Bell Atlantic agreed was moot.

Pacific Telesis and U S West appealed the district court's November 26, 1986, decision requiring U S West to refrain from certain discriminatory pricing of exchange access services (Nos. 87-5063, 87-5064). Bell Atlantic also appealed from the court's order of March 31, 1987, which denied Bell Atlantic's motion for clarification of the November 26, 1986 order and opinion (No. 87-5110). On May 10, 1988, this Court affirmed the district court decision. United States v. Western Electric Co., 846 F.2d 1422 (D.C. Cir.), cert. denied, 488 U.S. 924 (1988).

NYNEX appealed from the district court's November 10, 1987 order, which had denied its request for a waiver of the

decree's line-of-business restrictions to allow it to provide telecommunications equipment (No. 87-5403). On July 13, 1990, this Court reversed and remanded this case to the district court. United States v. Western Electric Co., 907 F.2d 1205 (D.C. Cir. 1990).

The United States, the seven BOCs, the State of California and the California Public Utilities Commission, and the Public Service Commission of the District of Columbia appealed from the district court's September 10, 1987 and March 7, 1988 decisions, which denied in substantial part the motions of the United States and the BOCs for removal or modification of the decree's line-of-business restrictions (Nos. 87-5388, et al.) On April 3, 1990, this Court affirmed the district court's decision in part and reversed and remanded the district court's decision retaining the information services restriction. United States v. Western Electric Co., 900 F.2d 283 (D.C. Cir.), cert. denied, 111 S. Ct. 283 (1990).

BellSouth, Bell Atlantic, NYNEX, and Southwestern Bell appealed from the district court's June 13, 1989 decision, which denied requests for waivers of the decree's information services restriction to permit them to offer electronic yellow pages (Nos. 89-5173, et al.). On December 10, 1990, this Court remanded these appeals to the district court.

Bell Atlantic, U S West, Pacific Telesis, Southwestern Bell, and BellSouth appealed from the district court's January 24, 1989 decision, which held that Bell Atlantic's planned

configuration of an information services gateway would violate the decree's interexchange services prohibition (Nos. 89-5034, 89-5075, 89-5076, 89-5077 and 89-5078). On June 12, 1990, this Court affirmed the judgment of the district court. United States v. Western Electric Co., 907 F.2d 160 (D.C. Cir. 1990), cert. denied, 111 S.Ct. 1018 (1991).

Southwestern Bell (No. 89-5106) and Radiofone, Inc. (No. 89-5126) appealed from the district court's order dated February 16, 1989 and entered February 21, 1989, granting a waiver to permit the BOCs to provide multiLATA one-way paging services, subject to certain conditions. The Radiofone appeal (No. 89-5126) was dismissed by order of this Court dated November 22, 1989.[3] On October 17, 1990, this Court reversed and remanded to the district court on the condition Southwestern Bell had challenged.

Bell Atlantic, NYNEX, and Southwestern Bell appealed from the district court's decision dated September 11, 1989 and entered September 12, 1989 denying Bell Atlantic's request for a declaratory ruling that TDD ("telecommunications device for the deaf") relay service is not prohibited by the decree (Nos. 89-5421, et al.). On January 19, 1990, MCI Communications Corporation, American Telephone and Telegraph Company, and the United States filed motions to dismiss these appeals. On May 23,

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[3]Michael Sindram, pro se, appealed the district court's refusal to permit him to intervene in No. 89-5106 (No. 89-5127). On January 30, 1990, the Court granted appellee Bell Atlantic's motion for summary affirmance.

1990, Bell Atlantic, NYNEX and Southwestern Bell filed a motion to hold these appeals in abeyance pending a decision by the district court in the remand of the consolidated cases, No. 87-5388, et al. By order of this Court dated July 25, 1990, these appeals were held in abeyance and consideration of the pending motions to dismiss was also held in abeyance.

Bell Atlantic (No. 91-5064) and the United States (No. 91-5098) appealed from the district court's decision dated February 14, 1991 denying Bell Atlantic's request for a waiver to provide interLATA delivery of time-of-day information in conjunction with a wristwatch paging services. On December 4, 1991, this Court granted Bell Atlantic's motion for summary reversal, vacated the district court's order and remanded the case to the district court for further consideration.

Six of the BOCs appealed the district court's orders dated July 13, 1990 and September 6, 1990, denying their request for an order permitting delivery of network control signals (but not the underlying communications) on a multi-LATA basis. (No. 90-5333 and consolidated cases 90-5335, 90-5337, 90-5351, 90-5365, 90-5367, and 90-5373). On July 24, 1992 this Court affirmed the judgment of the district court. United States v. Western Elec. Co., 969 F.2d 1231 (D.C. Cir. 1992). On February 22, 1993, the Supreme Court denied the BOCs' petitions for a writ of certiorari. Ameritech Corporation v. American Telephone and Telegraph Company, No. 92-848; BellSouth Corporation v. American Telephone and Telegraph Company, No. 92-879.

Numerous intervenors have appealed the district court's July 25, 1991 order on remand from this Court's decision in No. 87-5388, granting the BOCs' and United States' motions to remove the decree's information services restriction.[4] These consolidated appeals (Nos. 91-5263 through 91-5273) were briefed, argued on December 1, 1992, and are pending in this Court.

Pacific Telesis and the United States appealed from the district court's January 29, 1992 order denying the United States' motion for a waiver of the decree's line-of-business restrictions to permit Pacific Telesis to provide multi-LATA cellular service in Northern Ohio (consolidated cases (Nos. 92-5065 and 92-5114). Upon consideration of Pacific's motion for summary reversal, this Court, on November 5, 1992, on its own motion, remanded the case to the district court for further consideration.

Pending District Court Motions

Several motions are pending before the district court in the on-going decree proceedings, No. 82-0192 (D.D.C.). None of these directly raises the issue that is the subject of this appeal. The meaning of the term "affiliated enterprise," however, is relevant to the legality under the decree of numerous business arrangements between the BOCs and entities engaged in lines of business prohibited to the BOCs by the decree.

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[4]In the same decision, the district court stayed its order pending appeal. The United States and the BOCs moved this Court to vacate that stay. By order dated October 7, 1991, this Court vacated the stay. The United States Supreme Court denied motions to reinstate the stay.

*  *  *

Counsel for the United States is not aware of any other related cases pending in any court.

Respectfully submitted,

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March 15, 1993

ORAL ARGUMENT SCHEDULED FOR APRIL 14, 1993

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

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UNITED STATES OF AMERICA,

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Defendants,

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Appellants.

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

---

# BRIEF FOR APPELLANT UNITED STATES OF AMERICA

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The AT&T antitrust consent decree prohibits the Bell Operating Companies ("BOCs") from engaging in certain lines of business "directly or through any affiliated enterprise" without first obtaining approval from the decree court. United States v. Western Elec. Co., 552 F. Supp. 131, 227-28, 231 (D.D.C. 1982), aff'd mem. sub nom. Maryland v. United States, 460 U.S. 1001

(1983). The decree does not define "affiliated enterprise," and the district court denied the United States' motion for an order construing that term to mean "any entity in which a BOC owns more than a de minimis equity interest (defined as five percent or more) or over which it exercises substantial management control." These appeals followed.[1]

## ISSUE PRESENTED FOR REVIEW

Whether the term "affiliated enterprise," as used in the decree's line-of-business prohibitions, should be construed to mean any entity in which a BOC owns more than a de minimis equity interest, i.e., five percent or more, or over which it exercises substantial management control.

## STATUTES AND REGULATIONS

There are no statutes or regulations directly pertinent to the issue presented for review in this case.

## JURISDICTION

The district court had jurisdiction of the United States' motion for an order construing the decree under 15 U.S.C. § 4; 28 U.S.C. §§ 1331, 1337 and 1345, and section VII of the decree.[2]

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[1]The United States' appeal is limited to the decree interpretation issue. The BOCs also appeal from the district court's denial of a waiver that would allow certain types of manufacturing royalty arrangements.

[2]Section VII of the decree provides:

> Jurisdiction is retained by [the district c]ourt for the purpose of enabling any of the parties to this Modification of Final Judgment, or, after the [divestiture of the BOCs from AT&T], a BOC to apply to [the

(continued...)

The order denying the motion is a final order, and this Court has jurisdiction of the United States' appeal pursuant to 28 U.S.C. § 1291.

## STATEMENT OF THE CASE

1. The AT&T antitrust decree, entered in 1982, required that AT&T divest its local exchange subsidiaries, the BOCs. AT&T retained its long distance service and manufacturing operations and was allowed to enter other businesses. The decree also imposed "line-of-business" restrictions on the BOCs, prohibiting them from providing interexchange (long distance) services and 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." United States v. Western Elec. Co., 552 F. Supp. at 227-28. The decree subsequently was modified to eliminate the nontelecommunications business prohibition, United States v. Western Elec. Co., 673 F. Supp. 525 (D.D.C. 1987), and the information services prohibition, United States v. Western Elec.

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[2](...continued)
district c]ourt at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Modification of Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

552 F. Supp. at 231.

Co., 767 F. Supp. 308 (D.D.C. 1991), appeal pending, No. 91-5263 (D.C. Cir.).

Section VIII(C) of the decree provides that the 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. BOC requests for such "waivers" or modifications of the decree are referred first to the Department of Justice, which receives and reviews comments from interested persons, conducts any necessary investigation of the probable competitive effects of the proposed modification, and presents its conclusions to the court by motion or in response to a BOC motion. See United States v. Western Elec. Co., No. 82-0192 (D.D.C. July 30, 1991).[3]

2. In 1986, NYNEX informed the Department of Justice that it intended to acquire, for $10 million, an option to purchase all of the stock of Tel-Optik, a cable system providing transAtlantic telecommunications services, which are interexchange services as defined in the decree. The Department reviewed the matter and concluded that the decree would prohibit NYNEX's exercise, but not its acquisition, of the option. The Department concluded that the option would not result in "direct" NYNEX provision of interexchange services because neither NYNEX

[3]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.), cert. denied, 111 S. Ct. 283 (1990).

nor its employees would have participated in Tel-Optik's operations. Interpreting "affiliated enterprise" to refer to a relationship involving more than a de minimis equity interest, or management control, the Department also concluded that the option would not make Tel-Optik an "affiliated enterprise" of NYNEX since it would not itself have given NYNEX an equity interest in Tel-Optik or any control over its operations. Because its conclusions concerning the Tel-Optik option and the definition of "affiliated enterprise" were important in assessing the legality of various BOC commercial relationships and potentially controversial, the Department reported those conclusions to the district court, and responded to objections and comments filed by MCI and others. See Report of the United States to the Court Concerning Proposed Purchase by NYNEX Corp. of Conditional Interest in Tel-Optik, Ltd., June 20, 1986; Response of the United States Concerning the Proposed Purchase by NYNEX Corp. of a Conditional Interest in Tel-Optik, Ltd., July 11, 1986.

The district court entered an order holding that some "conditional interests" are, or at least might be, prohibited by section II(D) of the decree and ordering the BOCs not to acquire any conditional interests without first obtaining approval from the Department of Justice. United States v. Western Elec. Co., 1986-2 Trade Cas. (CCH) ¶67,213 (D.D.C. 1986). Without expressly deciding whether or under what conditions options and similar arrangements would create prohibited "affiliated enterprise" relationships, the court ordered the Department to approve or

disapprove proposed conditional interests by considering "the goals and purposes of the decree." 1986-2 Trade Cas. at 61,052. Thus, the court held:

> The Department shall approve the acquisition of [a conditional] interest . . . upon a showing tending to establish (1) that the investment is relatively minor; (2) that occurrence of the contingency is genuinely in question; and (3) that the Regional Holding Company [BOC] clearly lacks the ability, the incentive, or both, to disadvantage the target company's competitors.

Id. Based on these criteria, the court held that the Tel-Optik conditional interest "presents a close case" but "does not require a waiver." Id. at 61,053.

This Court reversed the district court's order insofar as it had required prior Department of Justice approval for all BOC conditional interests. United States v. Western Elec. Co., 894 F.2d 430 (D.C. Cir. 1990). This Court held that the decree does not require the BOCs to obtain such approval before acquiring interests that are not prohibited by the decree, and that the district court had not followed the appropriate standards and procedures for decree modification. Id. at 432. The Court expressly declined to rule on the question "whether BOCs must obtain section VIII(C) waivers for all equity-interest transactions" because that issue "was neither briefed by the parties nor addressed by the trial court." Id. at 435-36 n.8. It also did not decide "the question of which conditional-interest transactions in fact create a relationship subject to the Decree's line-of-business restrictions." Id. at 435-36 n.9.

3. In 1988, Ameritech requested a waiver that would allow it to receive royalties on third-party sales of telecommunications products in return for partial funding of manufacturers' development activities, subject to certain conditions. See Ameritech's Revised Request for a Waiver To Allow the Receipt of Royalties on Third-Party Sales of Telecommunications Products, June 16, 1988.[4] After reviewing Ameritech's request, the Department of Justice concluded that no waiver was required because Ameritech's receipt of royalties would neither constitute "direct" participation in manufacturing nor create an "affiliated enterprise" relationship, as the Department construed that term, between Ameritech and any manufacturer.

Because this construction of the decree was disputed and not legally binding, the United States moved for a declaratory ruling

> that the term "affiliated enterprise," for purposes of section II(D)(2) of the Modification of Final Judgment, means any entity in which a BOC owns more than a de minimis equity interest (defined as five per cent or more) or over which it exercises substantial management control.

Motion of the United States for a Declaratory Ruling Regarding the Receipt of Royalties on Third-Party Sales of Telecommunications Products, Jan. 4, 1989. In seeking this ruling, the United States recognized that the decree does not provide a definition of "affiliated enterprise" and that there

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[4]In December 1987, the district court had ruled that "manufacturing" prohibited by section II(D)(2) of the decree includes design and development as well as fabrication; this Court affirmed. United States v. Western Elec. Co., 675 F. Supp. 655 (D.D.C. 1987), aff'd, 894 F.2d 1387 (D.C. Cir. 1990).

was no discussion of the term in the decree history. Thus the United States advocated a construction based on the common meaning of "affiliated" and the context in which that and similar terms were used in the decree. Alternatively, the United States' motion asked the court to hold that the specific manufacturing royalty arrangements Ameritech had proposed would not constitute manufacturing "directly or through any affiliated enterprise" in violation of section II(D)(2). The United States also indicated that if a waiver were required, Ameritech's request should be granted under the section VIII(C) standard, and offered to address the waiver issue in greater detail if necessary. Id. at 3-4 n.4. Various manufacturers, including AT&T, and manufacturers' organizations opposed the United States' motion.

4. Nearly three years after briefing was completed, the district court denied the United States' motion. United States v. Western Elec. Co., No. 82-0192 (D.D.C., Jan. 31, 1992) (J.A. 10-15). Citing its decision on NYNEX's conditional interest in Tel-Optik (see pp. 4-6, supra), the court concluded that "a waiver under the decree [is] required in those situations in which a Regional Company would have `a substantial incentive and ability unfairly to impede competition by use of its monopoly position in the market it is . . . entering.'" Slip op. at 4 (J.A. 13) (quoting 1986-2 Trade Cas. at 61,052).[5] The district

[5]The district court also cited United States v. Western Elec. Co., 578 F. Supp. 653 (D.D.C. 1983). Shortly before divestiture, the Federal Communications Commission had suspended the BOCs' original access charge tariffs, filed pursuant to the (continued...)

court correctly noted that the ruling the United States requested would not be limited in its application to the manufacturing restrictions; it also would apply to other lines of business prohibited to the BOCs. Slip op. at 2 (J.A. 11). The district court characterized the Department's proffered definition of "affiliated enterprise" as "narrow and mechanical," and rejected it because it "would not alleviate the incentive and ability of the Regional Companies to engage in anticompetitive conduct." Id. at 4 (J.A. 13). The court perceived risks of BOC "influence" and "cross-subsidization" in any arrangement giving a BOC a financial stake in a manufacturer. Id. at 5 (J.A. 14). It added that "in some cases, a royalty arrangement would be more dangerous than ownership of a relatively small interest in a manufacturer," and "the Department's proposed definition of `affiliated enterprise' would undercut the purposes of the manufacturing restrictions." Id. at 6 (J.A. 15).

Ameritech then filed a motion asking the court "to reconsider and clarify" its order and "to rule that a funding/royalty

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[5](...continued)
decree, and the BOCs sought court approval of "contracts to govern the compensation which the [BOCs] would receive from AT&T for their [local exchange access] services to [AT&T] during the three-month period of the suspension," immediately following divestiture. Id. at 654. The court held that these arrangements, without a waiver, would violate the specific decree requirement of tariffed access charges, App. B § B(1), and that they also would continue BOC "participation in interexchange telecommunications prohibited by section II(D)(1) of the decree." Id. at 655. The court, however, granted a waiver, the access tariffs subsequently took effect, and there was no appeal from the decision.

arrangement subject to [conditions as set out in Ameritech's motion] does not engage a Regional Company in prohibited manufacturing directly or through an affiliated enterprise." Ameritech's Motion for Reconsideration or for a Waiver To Receive Royalties at 1, Feb. 14, 1992. In the alternative, Ameritech requested a waiver permitting such arrangements. Id. at 2. AT&T and others opposed the reconsideration motion, and the district court summarily denied it. United States v. Western Elec. Co., No. 82-0192 (D.D.C. Mar. 3, 1992) (J.A. 16).[6]

## ARGUMENT

### I. STANDARD OF REVIEW

Construction of an antitrust consent decree is a question of law subject to de novo review by this Court. E.g., United States v. Western Elec. Co., 900 F.2d at 293-94; United States v. Western Elec. Co., 797 F.2d 1082, 1089 (D.C. Cir. 1986), cert. denied, 480 U.S. 922 (1987). The district court's interpretation of the decree is not entitled to deference. 900 F.2d at 294.

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[6]The district court subsequently made clear that it was denying Ameritech's waiver as well as the declaratory ruling. United States v. Western Elec. Co., No. 82-0192 (D.D.C. Mar. 24, 1992) (J.A. 17-19).

## II. THE TERM "AFFILIATED ENTERPRISE" SHOULD BE CONSTRUED TO MEAN AN ENTITY IN WHICH A BOC OWNS MORE THAN A DE MINIMIS EQUITY INTEREST, I.E., FIVE PERCENT OR MORE, OR OVER WHICH IT EXERCISES SUBSTANTIAL MANAGEMENT CONTROL

The construction of "affiliated enterprise" that the United States advocated in the district court was properly based on common usage and the context in which that term is used in the AT&T decree. The parties did not agree to prohibit other types of BOC financial interests in entities engaged in activities prohibited to the BOCs, and the district court erred in modifying the decree to expand its prohibitions in an effort to provide additional safeguards against anticompetitive BOC conduct.

The basic principles that govern construction of antitrust consent decrees are well-established. A consent decree "is to be construed for enforcement purposes basically as a contract." United States v. ITT Continental Baking Co., 420 U.S. 223, 238 (1975); accord, United States v. Western Elec. Co., 900 F.2d at 293; United States v. Western Elec. Co., 846 F.2d 1422, 1427 (D.C. Cir.), cert. denied, 488 U.S. 924 (1988); United States v. Western Elec. Co., 797 F.2d 1082, 1089 (D.C. Cir. 1986), cert. denied, 480 U.S. 922 (1987). In construing a decree, the Court "is guided by conventional `aids to construction' including `the circumstances surrounding the formation of the consent order [and] any technical meaning words used may have had to the parties.'" United States v. Western Elec. Co., 900 F.2d at 292 (quoting United States v. ITT Continental Baking Co., 420 U.S. at 238). General usage also is an accepted aid to construction;

common terms that are not expressly defined in the decree are to be construed in their "natural sense," United States v. Armour & Co., 402 U.S. 673, 678 (1971), and in accord with their "normal meaning," see United States v. Atlantic Refining Co., 360 U.S. 19, 23 (1959). A court may not read into a decree proscriptions that the parties did not agree upon, United States v. Western Elec. Co., 797 F.2d at 1089-91, even if doing so "`might satisfy the purposes of one of the parties'" to the decree, id. at 1089 (quoting United States v. Armour & Co., 402 U.S. 673, 682 (1971)); see also United States v. Western Elec. Co., 894 F.2d 430.

"Affiliated enterprise" is not defined in the AT&T consent decree. Nor is that term expressly discussed in the parties' contemporaneous explanations of the decree restrictions. The primary aids to determining its meaning, therefore, must be the normal or usual meaning of "affiliated" and the context in which it is used in the decree, including the definition and use of similar terms. In general commercial usage and in a wide variety of federal statutes, the terms "affiliate" and "affiliated" refer to ownership or control relationships. For example, a widely-recognized dictionary defines "affiliate" as "a company effectively controlled by another or associated with others under common ownership or control." Webster's Third New International Dictionary of the English Language, Unabridged 35 (1981). See also Black's Law Dictionary 58 (6th ed. 1990) ("affiliate company" is "[c]ompany effectively controlled by another

company"; "[a] branch, division or subsidiary"; or "company in which there is ownership (direct or indirect) of 5 percent or more of the voting stock"). Similarly, many provisions of the United States Code define "affiliate" in terms of common "control"[7] or "ownership,"[8] or both.[9] The fact that the AT&T decree parties did not include a specialized definition of "affiliated" in this decree strongly suggests that they intended the term to have its normal meaning, i.e., to refer to an ownership or management relationship.

The context in which "affiliated enterprise" is used in the decree also supports the construction the United States advocates. The decree prohibits the BOCs from engaging in specified lines of business "directly or through any affiliated enterprise." 552 F. Supp. at 227. Thus, it appears that the parties used the term "affiliated enterprise" to extend the line-of-business prohibitions somewhat beyond "direct" BOC

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[7] E.g., 12 U.S.C. § 1841(k) (bank holding companies); 15 U.S.C. § 2801(15) (petroleum marketing); 15 U.S.C. § 3301 (27) (natural gas policy); 27 U.S.C. § 211(a)(4) (intoxicating liquors); 50 U.S.C. App. § 2404(a)(1) (national defense export regulation).

[8] E.g, 12 U.S.C. § 3201(3) (depository institutions); 26 U.S.C. § 1504(a) (income taxes).

[9] E.g., 11 U.S.C. § 101(2) (bankruptcy); 12 U.S.C. § 221a(b) (banks and banking); 15 U.S.C. § 3603 (condominium coversion); 15 U.S.C. § 80a-2(3) (investment companies); 28 U.S.C. § 3301(1) (federal debt collection); 33 U.S.C. § 1502(2) (navigable waters); 43 U.S.C. § 1653(11) (trans-Alaska pipeline liability); 47 U.S.C. § 522 (cable communications); 49 U.S.C. §10706(a)(1)(A) (rail carrier rate agreements).

participation.[10] It also is significant, however, that the parties could have -- but did not -- prohibit the BOCs from having "any financial interest" or "any interest, direct or indirect" in the specified lines of business or from "receiving any revenues derived from" them. Compare, e.g., United States v. Armour & Co., 402 U.S. at 678 (decree prohibited defendants "from owning `any interests whatsoever' in a firm trading in the enumerated commodities"); United States v. National Broadcasting Co., 1978-1 Trade Cas. (CCH) ¶ 61,855 at 73,581 (C.D. Cal. 1977) (network enjoined from acquiring "any financial or proprietary rights or interest," except the right to network exhibition, in independently produced television programs).

Other provisions of the MFJ support the inference that the parties understood and intended "affiliated enterprise" to refer to an entity in which a BOC has an equity interest or significant management role. Section IV(C) of the decree defines the term "BOC" to include "any entity directly or indirectly owned or controlled by a BOC or affiliated through substantial common

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[10]The United States construes the prohibition on "direct" BOC participation to include activities of the "BOC" as defined in section IV(C) of the decree, i.e., the "the corporations listed in Appendix A [to the decree] and any entity directly or indirectly owned or controlled by a BOC or affiliated through substantial common ownership." 552 F. Supp. at 228. Because corporations act only through their officers, employees and agents, "direct" activities of a BOC would include actions of such persons attributable to the BOCs under standard agency law, i.e., persons acting within the scope of an employment relationship with a BOC and for its benefit. See Restatement (Second) of Agency §§ 228, 229, 235 (1957); New York Central & Hudson River R.R. Co. v. United States, 212 U.S. 481, 493-96 (1909); United States v. Twentieth Century Fox Film Co., 882 F.2d 656, 660 (2d Cir. 1989), cert. denied, 493 U.S. 1021 (1990).

ownership." 552 F. Supp. at 228; see also United States v. Western Elec. Co., 797 F.2d at 1088-89. The prohibition on BOC activity "through any affiliated enterprise," therefore, should be construed to include a lesser degree of affiliation than actual "control" or "substantial common ownership," else it would be superfluous. But the parties' express linkage between control and ownership and affiliation is indicative of the kind of relationships the drafters had in mind. Similarly, the decree definition of the term "affiliate," as used with reference to AT&T -- "any organization or entity . . . that is under direct or indirect common ownership with or control by AT&T or is owned or controlled by another affiliate," section IV(A), 552 F. Supp. at 228 -- supports the conclusion that the parties understood "affiliated" to involve an equity interest or management participation.

The district court did not address the United States' argument as to the common meaning of the term "affiliated." Rather, it rejected the United States' construction of "affiliated enterprise" on the ground that it "would not alleviate the incentive and ability of the Regional Companies to engage in anticompetitive conduct." Slip op. at 4 (J.A. 13). And, it concluded, therefore, that the decree's line-of-business prohibitions extend to "those situations in which a Regional Company would have a substantial incentive and ability unfairly to impede competition by use of its monopoly position in the market it is . . . entering." Id. (internal quotation and

citations omitted). This was error. While a BOC's right to royalty payments might give it the same incentive and ability to favor a manufacturer as would an equity interest, that is not the issue. As this Court and the Supreme Court have held, a court may not "interpret" a decree so as to, in effect, modify the parties' agreement without adjudication, in order to further its general purpose or competition policy goals. United States v. Western Elec. Co., 894 F.2d 430 (reversing district court order requiring BOCs to obtain Department of Justice approval before acquiring "conditional interests"); United States v. Western Elec. Co., 797 F.2d at 1089-91 (reversing district court holding that decree prohibits BOC provision of extraregional exchange services); United States v. Armour & Co., 402 U.S. at 680-83; United States v. Atlantic Refining Co., 360 U.S. at 22-23; Hughes v. United States, 342 U.S. 353, 356-57 (1952).

The district court's previous decisions on the NYNEX Tel-Optik option and the temporary access charge waiver, see slip op. at 4, 5 (J.A. 13, 14); pp. 4-6, 8 n. 5, supra, do not support a definition of "affiliated enterprise" extending beyond the common understanding of the term. These decisions were not contemporaneous with the entry of the decree, did not consider the common meaning of "affiliated," and are not binding on this Court. See United States v. Western Elec. Co., 907 F.2d 160, 164 (D.C. Cir. 1990), cert. denied, 111 S. Ct. 1018 (1991)(court of appeals was not obligated to accept district court's 1983 interpretation that "official services" are not "for hire").

Moreover, a definition of "affiliated enterprise" that required the case-by-case determination of the potential for anticompetitive conduct suggested by the district court would be inconsistent with the structure of the decree. It would confuse the question whether a waiver is required with the question whether a waiver should be granted under the standard of section VIII(C), which requires "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.

The language of the decree does not, of course, compel the precise five percent threshold the United States advocated. To the contrary, the decree simply does not specify the degree of ownership interest or management control necessary to create an "affiliated enterprise" relationship. We submit, however, that some de minimis exception is inherent in common usage, and exclusion of equity interests of less than five percent where there is no control or management participation is consistent with that usage.[11]

We recognize also that some questions may arise at the margins as to what constitutes substantial BOC management control of another firm. But distinctions between a control or management role and a passive investment or a customer-supplier

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[11] E.g., 12 U.S.C. § 3106; 15 U.S.C. §§ 79b, 80a-2; 49 U.S.C. § 10706. While some other statutes set higher equity ownership thresholds, we are not aware of any that defines "affiliate" to include noncontrolling equity interests of less than 5 percent.

relationship are consistent with common usage, and in most cases will not require detailed analysis or predictions. Cf. Checkrite Petroleum, Inc. v. Amoco Oil Co., 678 F.2d 5, 8 n.4 (2d Cir.), cert. denied, 459 U.S. 833 (1982) (finding "no basis in the record to support a finding" that plaintiff is an affiliate, i.e., that it "controls, is controlled by, or is under common control with" defendant); Woodward & Lothrop, Inc. v. Schnabel, 593 F. Supp. 1385, 1400-01 (D.D.C. 1984) (applying SEC Rule 13-e definition of "affiliate": "a person that directly or indirectly . . . controls, or is controlled by, or is under common control with the issuer").

## CONCLUSION

The Court should vacate the district court's decision and should hold that "affiliated enterprise" as used in the decree's section II(D) line-of-business restrictions means an entity in which a BOC owns more than a de minimis equity interest, i.e.,

five percent or more, or over which it exercises substantial management control.[12]

Respectfully submitted,

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[12]An order construing "affiliated enterprise" as requested by the United States would eliminate the need for any rulings limited to the specific royalty arrangements proposed by Ameritech.

CERTIFICATE OF SERVICE

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