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May 16, 2000

EX PARTE

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-B-204
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: In re GTE Corp., Transferor, and Bell Atlantic Corp., Transferee,
CC Docket No. 98-184

Dear Ms. Salas:

This letter briefly addresses two questions relating to the treatment of not-yet-exercised options to acquire stock, including fixed-price options, under the MFJ.

As an initial matter, we previously demonstrated that the definition of "affiliate" in the 1996 Act was taken from the MFJ, and was intended by Congress to have the same meaning as under the MFJ. That definition, of course, defines ownership in terms of an "equity interest (or the equivalent thereof)." As a result, whether or not an option or other "conditional interest" qualified as equity under the MFJ is directly relevant to the question of whether options qualify as equity under the 1996 Act.

It could not be clearer that such options were consistently and categorically treated – by the Court, by the Justice Department, and by AT&T itself – as *not* equity interests or their equivalent. That treatment, moreover, was wholly independent of the "size" of the option, and was wholly independent of whether the option price was fixed or pre-paid. Regardless, options did not qualify as equity interests unless and until exercised. This consistent interpretive history is dispositive here.

The MFJ also contained a different term – "affiliated enterprise" – that expressly was *not* included in the 1996 Act. In fact, while the predecessor of the bill that ultimately was enacted did include this separate term, it was dropped from the version of the bill enacted into law in

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favor of “affiliate.” As a result, precedent interpreting or applying this separate term – which was defined more broadly than the term affiliate – is not relevant.

1. There is no question that, under the MFJ, the term “affiliated enterprise” had a different and broader meaning than the term “affiliate.” *United States v. Western Elec. Co.*, 12 F.3d 225, 227 (D.C. Cir. 1993) (quoting § II(D)). As the D.C. Circuit made clear, “‘affiliated enterprise’ has a *broader* meaning” than the term “affiliate” defined under Section IV(A) of the MFJ. *Id.* at 230 (emphasis added). And the Court explained that this “broader” term “was intended to cover certain contractual relationships *not involving ownership or control.*” *Id.* (emphasis added). Indeed, the briefing before the D.C. Circuit and Judge Greene in the *Tel-Optik* proceeding makes unmistakably clear the agreement of all participants that, at a minimum, an “affiliate” under Section IV(A) was an “affiliated enterprise.” The only dispute was the extent to which, if at all, the “affiliated enterprise” standard encompassed *more*. And the unequivocal answer was that it did.

Congress likewise understood that “affiliated enterprise” was defined by court decisions under the MFJ to be broader than “affiliate.” As noted above, the 1994 House predecessor of the 1996 Act included both terms and gave side-by-side definitions of both. *See* H.R. Rep. 103-559(II), 103d Cong., 2d Sess. 18 (1994) (Sections 106(1) and (2)). The “affiliated enterprise” definition in the predecessor bill expressly assigned the phrase the meaning that it had under “the Modification of Final Judgment.” *Id.* And the House report for that predecessor bill expressly noted that “affiliated enterprise,” as defined “in court opinions rendered under the MFJ” (*id.* at 216, citing *Western Elec. Co.*, 12 F.3d 225), “includes *not only ownership and corporate control relationships*, but also other economic relationships under which the BOC has a stake in the revenues of another company” (*id.* at 216-17) (emphasis added). *See also id.* at 228 (“affiliated enterprise” is “interpreted in *United States v. Western Elec. Co.*, Civil Action No. 82-0192 (D.D.C. Jan. 21, 1992), *aff’d*, 12 F.3d 225 (D.C. Cir. 1993). . . . As the court opinions make clear, the term ‘affiliated enterprise’ includes not only ownership and corporate control relationships, but also other economic relationships under which the BOC has a stake in the revenues of another company”). Having recognized the difference, however, in the bill ultimately enacted as the 1996 Act, Congress rejected the broader term “affiliated enterprise” in favor of the narrower “affiliate.”

It is therefore decisive that even the broader “affiliated enterprise” standard did not apply simply because a BOC obtained an option to acquire stock in another company, including a transferrable fixed-price option for 100 percent of the company (and indeed one that would be exercised at a nominal price). If such an option were an “equity interest” or its “equivalent,” it would have squarely fallen under Section IV(A)’s “affiliate” definition and, for that reason, would automatically have come under the more encompassing “affiliated enterprise” standard. Because such options were repeatedly held to fall outside the MFJ’s broader prohibition, they were *a fortiori* outside the narrower “affiliate” definition and, hence, not equity interests or their equivalent.

All of this, of course, comports fully with what the MFJ Court, the Department of Justice and AT&T all concluded – that options and other conditional interests do not constitute “equity interests” or their equivalent until exercised. As Judge Greene explained when a Bell company purchased a fixed price option to acquire 100 % of a business engaged in the interLATA business, it is “undisputed that NYNEX is not proposing, at this juncture, acquisition of an equity interest in Tel-Optik.” Memorandum (re Tel-Optik), *United States v. Western Elec. Co.*, No. 82-0192, August 7, 1986, at 2.

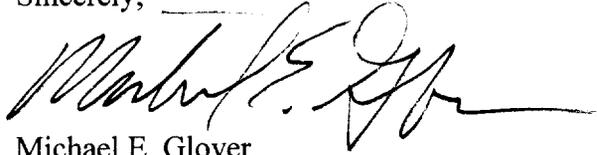
2. In other respects, precedent interpreting or applying the broader phrase “affiliated enterprise” is simply not relevant under the 1996 Act. In particular, AT&T has pointed to Judge Greene’s separate standard (articulated as a sufficient condition for approval by the Department of Justice without resort to the Court) for determining whether an option or other conditional interest gave rise to an “affiliated enterprise” relationship. Under that standard, BOC investments, including conditional interests such as an option, had to be “relatively minor” in relation to the BOCs’ main businesses. Memorandum (re Tel-Optik), *United States v. Western Elec. Co.*, No. 82-0192, August 7, 1986, at 5. That standard, however, has no counterpart in the 1996 Act, and quite simply neither had nor has anything to do with whether a particular option was or is an “equity interest” or its “equivalent.” Nothing in the logic or usage of those terms makes a connection between those terms and the ratio of an investment to the *BOC’s size*. If a 100% option bought for \$10 million does not create an “equity interest (or the equivalent thereof),” an option bought for a substantially higher price is no more an “equity interest (or the equivalent thereof).” The two concepts are unrelated.

Rather, Judge Greene set forth the “relatively minor” standard in the option context *because that was already a standard for BOCs being allowed to own an actual equity interest* in ventures other than their core local telephone businesses. Thus, Judge Greene, in enforcing the restriction against “affiliated enterprises,” had previously ruled that he would permit waivers to acquire otherwise-barred businesses only on the condition that such businesses “involve relatively minor expenditures.” *United States v. Western Elec. Co.*, 592 F. Supp. 846, 872 n.108 (D.D.C. 1984), *appeal dismissed*, 777 F.2d 23 (D.C. Cir. 1985). Specifically, Greene ruled that “the Court will require that the bulk of the investments of the Regional Holding Companies remain in decree-related activities [*i.e.*, providing intraLATA telephone service]. Accordingly, the Court will not, for the present, grant line of business waivers for activities the total estimated net revenues of which exceed ten percent of a Regional Holding Company’s total estimated net revenues.” *Id.* at 871-72 (footnotes omitted). The “relatively minor” standard Judge Greene announced for options was nothing more than a reflection of the already announced principle that an equity interest itself, *after* receipt of a waiver, should involve no more than “relatively minor expenditures.”

Judge Greene’s “relatively minor” standard for conditional interests thus did not even purport to relate to, and in no way affects, the recognition that an option was not itself an equity interest or its equivalent under the MFJ. The 1996 Act contains no counterpart to Judge Greene’s “relatively minor” standard. Once a BOC gets relief under Section 271, there is no

requirement that a BOC “stick to its knitting” by limiting its expenditures in the long distance business. That standard is, accordingly, irrelevant to the “affiliate” issue under Section 3(1) of the 1996 Act.

Sincerely, _____

A handwritten signature in black ink, appearing to read "Michael E. Glover", with a long horizontal flourish extending to the right.

Michael E. Glover

cc: Ms. D. Atwood
Ms. R. Beynon
Mr. K. Dixon
Mr. J. Goldstein
Ms. S. Whitesell
Ms. M. Carey
Ms. P. Silberthau
Ms. J. Mikes
Mr. J. Bird