Exhibit KK

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	84-78-2356
	)	
MOUNTAIN STATES TELEPHONE	)	
AND TELEGRAPH COMPANY,	)	
Defendant-Appellant.	)	
	)	

APPELLEE'S BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

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B. WHETHER THE UNITED STATES DISTRICT COURT'S ORDER OF MAY 26, 1978, DIRECTING MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY TO INSTALL AND OPERATE AN ELECTRONIC OR MECHANICAL DEVICE TO TRACE INCOMING TELEPHONE CALLS WAS AN ABUSE OF ITS DISCRETION UNDER THE CIRCUMSTANCES OF THE CASE?

C. WHETHER THE UNITED STATES DISTRICT COURT'S ORDER OF MAY 26, 1978, DEPRIVED MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY OF ITS PROPERTY WITHOUT DUE PROCESS AND/OR CONSTITUTED A TAKING WITHOUT JUST COMPENSATION, ALL IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

STATEMENT OF THE CASE

A. Jurisdictional Statement.

On May 26, 1978, in the United States District Court for the District of Arizona, the Honorable William P. Copple, United States District Court Judge, entered an Order directing Mountain States Telephone and Telegraph Company ("Mountain Bell") to install and operate an electronic or mechanical device designed to trace and record telephone numbers of a dialing party or parties when said party or parties called certain telephone numbers. Mountain States Telephone and Telegraph Company filed a motion to vacate this Order of the District Court, which was denied after hearing on June 5, 1978. This Court has jurisdiction to entertain this appeal under Title 28, United States Code, Section 1291.

The government adopts the notation "T.R." as being the transcript of record on appeal; "R.T." as the reporter's transcript of the District Court proceedings.

B. Statement of Facts.

On April 7, 1978, United States Magistrate Richard

C. Gormley signed an Order on application of the United States directing that Special Agents of the Internal Revenue Service, United States Department of Treasury, were authorized to install a mechanical device known as a "grabber" to record the number of a dialing party known at that time as "John Doe," a/k/a "Jack." This Order continued the operation of the "grabber" for a period of twenty days (T.R. 7). According to the information received by the United States, a "grabber" was a mechanical device which recorded the number of a dialing party when the party called a known number (T.R. 5). Mountain Bell resisted compliance with this Order, and submitted to the United States Attorney's Office a proposed Order that curtailed the trace of wire communications in the following respects: it limited hours; it required consent of the called party; it limited the trace to "ESS" facilities only; it required the Agents to call for information only during the business hours; and it required no manual tracing or standby of Mountain Bell personnel to monitor the trace (T.R. 26-27). This Order was vacated on motion of the United States on April 22, 1978 (T.R. 10).

United States District Court Judge William P. Copple, on April 21, 1978, signed a modified version of Mountain Bell's proposed Order based on probable cause,

authorizing and directing Mountain Bell to perform an in-progress trace of wire communications over telephone facilities. This Order was limited in its effect to certain hours, ESS facilities only, and required the consent of the called party. Mountain Bell complied with this request (R.T. 26).

On May 26, 1978, a second Order, based on additional probable cause, was signed by Judge Copple, directing and authorizing Mountain Bell to conduct an in-progress trace of wire communications. This Order provided that the tracing operation be limited to ESS facilities only; not involve or require any manual trace by telephone company personnel, or otherwise necessitate company personnel actively monitoring or maintaining the tracing operation; that it be accomplished unobtrusively and with a minimum of interference to telephone service, and not unduly interfere with telephone company operations, facilities, or personnel; not be unduly burdensome, and be limited to the hours of 8:00 a.m. to 6:00 p.m., for a period of twenty days. This Order, as well as the prior Order, provided that Mountain States Telephone and Telegraph Company be compensated and/or reimbursed for all charges and/or expenses at the prevailing rate for services or equipment furnished and/or expenses incurred in complying

with this Order (T.R. 11). Until the time the Order of May 26, 1978, was served by federal agents on Mountain Bell, Mountain Bell personnel or their counsel had not raised the objection of an undue burden on Mountain Bell's maintenance effort. The objections up to that time by their counsel had been only that it would tie up Mountain Bell personnel in manual traces, and that Mountain Bell objected to being actively involved in assisting law enforcement agents. Mountain Bell security personnel prior to that time had informed federal agents that the trace would be no problem so long as the subscriber and the caller were on the ESS system. Security personnel related to the agents that it would be picked up by the computer instantly, and that it was a matter of programing the computer. On May 26, 1978, one of the security officers for Mountain Bell informed a federal agent that it might hinder the maintenance effort, but that he wasn't sure. That was a possibility that he would have to check with company personnel (T.R. 27; R.T. 5-10).

Contrary to Mountain Bell's statement in its brief, there is no evidence that Mountain Bell promptly complied with the Order of the District Court on May 26, 1978. Mountain Bell did, however, comply with the Order at that time. Company policy, according to Mr. Gordon Hitt,

Area Security Supervisor for Mountain Bell, is that Mountain Bell would not comply with a Court Order, unless it is approved by their Legal Department (R.T. 8-9).

On May 30, 1978, Mountain Bell filed a Motion to Vacate the Order authorizing the in-progress trace of wire communications. Its motion was based on the lack of the District Court's authority to order Mountain Bell to assist law enforcement agencies; the burdensome nature of the Order; the disruption that it would cause in telephone service to the Phoenix area; the potential civil liabilities the phone company would be subject to because of the Order; and public policy considerations (T.R. 11). Mountain Bell did not take issue in the District Court with the fact that the Order was ex parte, thereby allegedly depriving it of its property without due process, or claim that it constituted a taking without just compensation.

On June 5, 1978, a hearing was held before the Honorable William P. Copple on Mountain Bell's motion. Mountain Bell called as witnesses in support of its motion Mr. Gordon Hitt, Area Security Supervisor for Mountain Bell, and Robert S. Hubler, a Supervising Engineer for ESS Maintenance. The United States called Edward F. Kellerman, Special Agent, Internal Revenue Service.

Mr. Hitt testified that he told the agents the company had done traces before in similar cases, and cited annoyance calls as an example (R.T. 7). As Mr. Hitt later testified, the phone company would leave the tracing operation in progress for twenty-four hours if it was necessary (R.T. 14). In response to the Court's question, Mr. Hitt related that if no suspect was available before the phone company's tracing operation, then they would develop one through tracing. Mr. Hitt related to the agents that the company would comply in all cases where the Court ordered, so long as it was approved by their Legal Department. He indicated that the company would refuse if it was told not to comply with the Order by its Legal Department (R.T. 8, 9). Mr. Hitt related that the same procedure used in back-tracing for the District Court's Order involved here is employed in the back-tracing in an obscene or annoyance call which the phone company conducts when they have no suspect. The phone company, according to Mr. Hitt, has back-traced calls without the consent of a party where they had threats, such as bomb threats to their buildings (R.T. 11, 12). Mr. Hitt defined annoyance calls as those which were obscene, harassing, involving extortion, kidnapping, or threatening. He stated that the phone company's policy was that they would do everything in their

power legally to trace these phone calls (R.T. 12, 13). The phone company will apparently trace a call for company reasons, such as a threat to one of their executives (R.T. 14). Mountain Bell Telephone and Telegraph will continue a tracing operation so long as it considers it necessary (R.T. 14, 15).

Mr. Hubler testified that a trace in an ESS office would have an impact on the maintenance teletype, in that there would be a time penalty (R.T. 19, 20). If an ESS office was close to capacity, there would be a minimum number of traces that could be handled. If the office was near to capacity, it could possibly bog down the operation of the office. The engineer related that the company did experience a failure in a "257" office, but that the call trap or trace had no impact on the failure of that office (R.T. 22). Even though the trace has an impact on maintenance, all lines were available for maintenance. Only at the specific instance of the teletype machine being used for tracing was the teletype not available for maintenance (R.T. 20-23). Mr. Hubert testified that the impact of a three line rotary trace would be that they would have a large volume of printouts on the maintenance machines (R.T. 24). He testified that the calls would still go through, and there was no threat of a shutdown of communications

because of these specific traces ordered by the District Court. If other things were combined there could be a danger of an outage of telecommunications in that switching station because of tracing operations (R.T. 26). The witness could not identify anything involved with the trace ordered by this Court that pushed the processor behind its real time limit (R.T. 26, 27).

Special Agent Kellerman testified based on his experience that the information gained by this tracing operation was important information to the government's investigation, and that the United States had no other way of ascertaining the identity of the people calling the listed numbers (R.T. 29).

The District Court found that it could not see any difference other than the lack of consent in some cases between the tracing operation ordered by the District Court and the ordinary backtracing which the phone company apparently does for annoyance and obscene calls, or on behalf of the phone company itself when they order a backtrace of a call that may create a threat to the company. The Court found that there was no serious dispute in the evidence, and denied the motion of Mountain Bell Telephone and Telegraph in all respects.

V

ARGUMENT

A. THE UNITED STATES DISTRICT COURT HAS THE AUTHORITY, PURSUANT TO TITLE 28, UNITED STATES CODE, SECTION 1651, AND RULE 41, FEDERAL RULES OF CRIMINAL PROCEDURE, TO COMPEL MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY TO INSTALL AND OPERATE AN IN-PROGRESS TRACE OF INCOMING TELEPHONE CALLS TO ASSIST FEDERAL LAW ENFORCEMENT OFFICIALS IN INVESTIGATING OFFENSES ALLEGEDLY BEING COMMITTED BY THE USE OF THE TELEPHONE.

Mountain Bell would have this Court view the District Court's authority to issue this type of Order as a problem involving a search warrant, and whether the Court could issue a search warrant of this type. Put in proper perspective, however, the Order issued by the District Court on May 26, 1978, was not a search warrant, but an Order similar to a search warrant. A search warrant issued under Rule 41, Fed.R.Crim.P., is an Order based on probable cause to federal agents to conduct a search. The Order of the District Court in this case was also based on probable cause, and was directed to Mountain States Telephone and Telegraph Company as well as federal law enforcement agencies. As the Seventh Circuit noted in United States v. Illinois Bell Telephone Company, 531 F.2d 809 (7th Cir.

1976), this type of Order is in the nature of a search warrant, and is a common sense approach, and is a procedure that has been approved by the U. S. Supreme Court. That case involved an ex parte Order for a pen register to be used by the Bureau of Alcohol, Tobacco & Firearms. The telephone company in that case also argued that there was no authority for the District Court to compel assistance by a private party. The Court of Appeals found that the District Court had inherent authority which was not directly derived from Rule 41.

In Illinois Bell, supra, at 811, the Court at footnote 2 stated:

> The inherent authority of the District Court, made necessary by the special nature of electronic communications, is not directly derived from Federal Rule of Criminal Procedure 41, which governs the search and seizure of "tangible" objects, nor from Title III of the Omnibus Crime Control and Safe Streets Act, 18 United States Code §§2510-2520, which governs wiretapping and electronic surveillance, although, by analogy,

these statutes are supportive in this regard.

The Seventh Circuit in this case, at 812-13, noted:

> Such an accommodation for issuing an Order for the use of a pen register was cited with apparent approval by Mr. Justice Powell, in a concurring and dissenting opinion, joined by Chief Justice Berger, Mr. Justice Blackmun, and Mr. Justice Rehnquist, in United States v. Giordano, 416 U.S. 505, 553-54. . . (citations deleted):
>
> "Because a pen register device is not subject to the provisions of Title III, the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment. In this case, the government secured a Court Order, the equivalent for this purpose of a search warrant, for each of the two extentions of its authorization to use a pen register."

* * *

> Apparently, Fed.R.Cr.P. 41, which deals with the traditional concept of search and seizure and which lodges jurisdiction and authority in the District Courts to issue search warrants to search and seize "tangible" objects was not thought by the Supreme Court to be a limitation upon the power of the District Court to authorize, outside Title III, reasonable use of investigative techniques made possible by modern technology as to "nontangibles." The commonsense approach used by the District Court in issuing an Order based on probable cause and following the procedure designed to comply with Fourth Amendment considerations in authorizing the use by the government of a pen register was a valid exercise of authority.

See also, United States v. Southwestern Bell Telephone Co., 546 F.2d 243 (8th Cir. 1976); Michigan Bell Telephone Co. v.

United States, 565 F.2d 385 (6th Cir. 1977); and United States v. New York Telephone Company, 434 U.S. 159, (1977).

Mountain Bell, in their brief, analogizes the Order signed by the Arizona District Court to a writ of assistance. In a case cited by Mountain Bell, Berry v. United States, 361 U.S. 98, 100 (1959), writs of assistance were discussed generally.

> The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of probable cause before a magistrate was required.

Writs of assistance of the type discussed by Mountain Bell were writs issued by the executive without any judicial supervision or control. This is definitely not the case here. The United States was following an approved procedure when it sought this Court Order and disclosed its probable cause to believe that evidence of a crime would be

obtained by the use of this Order. The United States demonstrated that there was no other means by which evidence of this type could be obtained by the government. The type of Order issued by the District Court here is a long way from the writ of assistance discussed by Mountain Bell in their brief.

Mountain Bell argues that the District Court did not have any jurisdiction by which it could utilize the All Writs Act, 28 U.S.C. §1651, to issue its Order. Mountain Bell is correct in its argument that the All Writs Act does not confer additional jurisdiction on the Court, but allows the District Court to defend the proper exercise of its jurisdiction. Mountain Bell goes on to argue that the District Court did not have any jurisdiction or basis for its Order other than the All Writs Act. Mountain Bell is confusing the fact that the Federal District Courts are Courts of limited jurisdiction, with the notion that Federal District Courts have no authority. The jurisdiction here is the Court's supervision over the enforcement of the criminal laws of the United States. The United States was conducting an investigation of possible violations of Title 26, United States Code. Mountain Bell apparently assumes that before the District Court can use the All Writs Act in a criminal matter, that there has to be an indictment, complaint, or a

formal charge of some type. If this were the case, Federal District Courts could never issue search warrants, or order persons to supply handwriting, blood samples, or fingerprints in investigations by the United States. The U. S. Supreme Court, in FTC v. Dean Foods, 384 U.S. 597 (1966), upheld an Order of the Court of Appeals under the All Writs Act when it found that the Court of Appeals might have potential jurisdiction even if no appeal was later perfected. In that case, the Court noted that it was permissible for the Court of Appeals to exercise its power under the All Writs Act, even though the Federal Trade Commission had no authority to go into federal court under the All Writs Act. It is obvious that if the United States, uncovers a significant amount of criminal activity involving violations of Title 26, it is likely that it may seek an indictment from the federal grand jury which would result in a formal action being filed in the District Court for the District of Arizona. The District Court here was acting under the All Writs Act in aid of its potential jurisdiction as the District Court which would try these cases.

Mountain Bell argues that this type of Order is contrary to the usages and principles of law, which are required under the All Writs Act. In Harris v. Nelson, 394 U.S. 286 (1969), a state prisoner brought a habeas corpus petition

and a hearing was set on the matter. The petitioner served interrogatories on the opposing party, which the District Court found permissible. The Ninth Circuit Court of Appeals reversed the District Court because there was no authority for these interrogatories to be used for discovery. The U. S. Supreme Court found that since Congress had not specified procedures for securing the facts, the District Court could fashion appropriate procedures for development of relevant facts by analogy to existing rules of judicial usage. The Court explained that authority was conferred on the District Court by the All Writs Act. It found that the All Writs Act was a legislatively approved source of procedural instruments designed to achieve the rational ends of law. It noted, as examples, subpoenas dueces tecum, and orders for production of documents. This is essentially what the District Court did in issuing the Order involved here.

The District Court, on application of the United States, fashioned an appropriate Order based on analogous case law dealing with pen registers and a Sixth Circuit case dealing with telephone traces. This Order was designed after a demonstration by the United States that there was probable cause to suspect criminal activity and no other way of obtaining this evidence. The U. S. Supreme Court, in United States v. Haymen, 342 U.S. 205 (1952), discussed how

Courts could look to the common law where Congress does not define an action. The Court there was discussing the history of the habeas corpus action.

Therefore, to find whether the District Court's Order involved here was agreeable to the usages and principles of law since there is no statute specifically authorizing the Court to issue this type of Order, we must look then to the common law, to find whether this type of Order has ever been issued. By analogy, a similar type of Order was involved in United States v. New York Telephone Co., supra, as well as in United States v. Illinois Bell Telephone Co., supra, and United States v. Southwestern Bell Telephone Co., supra. It should be noted that the Court Orders involved in some of these cases involved more than just identifying and furnishing leased lines. The District Court Orders compelled the respective phone companies to provide information, facilities and technical assistance to law enforcement agencies. In New York Telephone, the Supreme Court reversed the Second Circuit, which had said that without a specific and properly limited Congressional action, this was an abuse of discretion by the District Court. This is an approval by the Supreme Court of District Courts using this type of Order in the absence of specific authorization by Congress. The Sixth Circuit case of

Michigan Bell Telephone Co. v. United States, supra, is directly on point and supportive of the District Court Order involved here.

The District Court in that case ordered mechanical or electrical, as well as manual, tracing operations. The case also involved a gambling investigation. Michigan Bell challenged the District Court's authority in that case also. Michigan Bell contended that the District Court did not have the power to compel the telephone company against its will to participate in a government investigation, and if there was such a power it should not have been exercised in the present case. The U. S. Supreme Court, in United States v. New York Telephone Co., supra, used this Sixth Circuit case as a footnote to its statement that the Order involved there against the respondent phone company was clearly authorized by the All Writs Act and was consistent with the intent of Congress. In its footnote, it cited this case as one of two cases that have held that the Act did authorize the issuance of Orders compelling a phone company to assist in the use of surveillance devices not covered by Title III, such as pen registers. The Sixth Circuit found that the District Court had the authority to issue such an Order and that it was properly exercised.

Therefore, the real question before this Court should be not whether the District Court had authority to issue this type of Order, but whether in this particular case it was an abuse of discretion for the District Court to order this electronic trace under the circumstances of this case.

B. UNDER THE CIRCUMSTANCES OF THIS PARTICULAR CASE, THE UNITED STATES DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ITS ORDER OF MAY 26, 1978, DIRECTING MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY TO INSTALL AND OPERATE AN ELECTRONIC OR MECHANICAL DEVICE TO TRACE INCOMING TELEPHONE CALLS.

In New York Telephone, supra, at 174, the Supreme Court, looking at the facts of that case, found that the company, although a third party, was not so far removed from the underlying controversy that its assistance could not be permissibly compelled. There had been a finding that there was probable cause to believe that the company's facilities were being employed to facilitate a criminal enterprise on a continuing basis. The Court noted:

> For the Company, with this knowledge, to refuse to supply the meager assistance required by the FBI in its efforts to put an end to this venture threatened obstruction of an investigation which would determine whether the Company's facilities were being lawfully used. Moreover, it can hardly be contended that the Company, a highly regulated public utility with a duty to serve the public, had a substantial interest in

> not providing assistance. . . . The Company concedes that it regularly employs such devices without Court Order for the purpose of checking billing operations, detecting fraud, and preventing violations of law. . . . Nor was the District Court's Order in any way burdensome. The Order provided that the company be reimbursed at prevailing rates, and compliance with it required minimal effort on the part of the company and no disruption to its operations.

The situation in this case is very similar to the one involved in New York Telephone. Mountain Bell had knowledge that its communications facilities were being used and would probably continue to be used to commit violations of federal law. Mountain Bell is also a regulated public utility with a duty to serve the public. See, Ariz. Const. art. 4, §2; A.R.S. §§40-202, 203, 204. Mountain Bell employees stated at the hearing in this matter that it also regularly employs mechanical and electronic tracing devices without Court Order for its own purposes.

Compliance with the District Court Order involved here, according to the testimony of Mountain Bell's own employees, was not unduely burdensome or disruptive of its services or operations. Mountain Bell apparently utilizes these devices for its own purposes when it considers it necessary. When there are no suspects, Mountain Bell, for its own purposes and when it considers it necessary, develops a suspect. Mountain Bell apparently uses pen registers and other devices for its own purposes and when it considers it necessary to protect its own company operations. This information, if the phone company deems it appropriate, is turned over to law enforcement authorities. See, United States v. Bowler, 561 F.2d 1323 (9th Cir. 1977); United States v. Clegg, 509 F.2d 605 (5th Cir. 1975); and Hodge v. Mountain States Telephone and Telegraph Co., 555 F.2d 254 (9th Cir. 1977).

Mountain Bell's Supervising Engineer for ESS Maintenance testified that there was no threat or failure of communications due to this particular Court Order. This engineer testified that the maintenance effort was still available, that there was no communications outage, and that the calls still went through. It can be inferred from this engineer's testimony that the only burden that was imposed on Mountain Bell was a large number of print-outs on the

teletype machine.

The Order itself was limited in its application. The Order specifies that the tracing operation was to be limited to telephone company facilities employing ESS switching facilities bearing a reasonable relationship to the probable originating point of telephone calls being made. The Order also required that the tracing operation not involve or require any manual trace by telephone company personnel, nor require telephone company personnel to standby to actively monitor or maintain the trace. It required the trace to be accomplished unobtrusively and with a minimum of interference to telephone service, and not cause undue interference with company operations. It further required that the tracing operations not be unduely burdensome and be limited to the hours of 8:00 a.m. to 6:00 p.m., for a twenty day period. The United States was ordered to compensate Mountain States Telephone and Telegraph Company for all charges, expenses for services and equipment furnished, as well as expenses incurred in complying with the Order.

The United States had no alternative other than requesting this type of an Order, since there was no other way it could obtain this information. The communications

lines involved in this criminal activity were controlled totally by Mountain States Telephone and Telegraph Company.

If the District Court could not issue this type of an Order, would not Mountain States Telephone and Telegraph Company be in the position of unwittingly aiding a criminal enterprise? This puts a public utility in the position of knowing that its communications network is being used to commit crimes against the United States and of continuing to furnish communications to this criminal enterprise, which could not operate without telephones.

Mountain Bell, in the conclusion to its brief, runs through a "parade of horrors," alleging that this type of Order and action by the government in District Court is "fraught with the potential for abuse." It states because the communications network in the United States goes into every home and office, and that telephone personnel are admitted into the privacy of residences to install and prepare phone facilities, phone companies would become federal law enforcement agencies who would be conducting unobtrusive searches. It asks the question where will the line be drawn. The very procedure that the United States used in obtaining this type of Order is designed to prevent this type of abuse. The United States stated its reasons

why it felt that there was probable cause that crimes were being committed over the telephone or communications network. An impartial judge made the finding that there was probable cause that such a crime was being committed, and authorized a limited gathering of certain data by law enforcement officers. At no time in this case has the United States asked any telephone company personnel to enter a private residence or office to conduct a search as defined under the Fourth Amendment. The cases cited by the United States earlier, such as United States v. New York Telephone Co., supra, have noted that pen registers do not intercept the aural contents of any wire or oral communications by any electronic, mechanical, or other device. The same is applicable to an in-progress trace of wire communications. The United States is not intruding into an area where there would be a reasonable expectation of privacy. There has been no overhearing of communications, merely a trace of phone numbers. Apparently this procedure is used routinely by Mountain States Telephone and Telegraph when it deems it necessary and appropriate to protect its own property and interest. It is a process whereby telephone numbers are identified. There should be no reasonable expectation on the part of the persons using these telephone or communications lines that this type of data would be

private.

The propositions that Mountain Bell Telephone and Telegraph puts forth amount to almost irresponsible conduct by a public utility. Mountain Bell wants to be in the position of determining when it is appropriate for them to assist law enforcement officers in investigations. Mountain Bell wants to substitute itself for the Courts of the United States in determining whether sufficient probable cause or reason exist to conduct these types of traces. As the Supreme Court stated in United States v. New York Telephone Co., supra, at 174, a refusal to provide meager assistance in that case threatened obstruction of an investigation. The United States is requesting technical assistance again from a telephone company, here, Mountain Bell. For Mountain Bell to refuse to assist the United States in its investigation perhaps does not threaten obstruction of justice as in the New York Telephone case, but it does raise a question of irresponsible conduct by a public utility and demonstrates an indifference to the legitimate needs of law enforcement authorities.

It is interesting to note that Mountain Bell, in attempting to distinguish Michigan Bell Telephone Co. v. United States, supra, distinguishes it on the ground that an

in-progress trace or manual trace is significantly different in its burden than a pen register. Therefore, according to Mountain Bell, the Sixth Circuit did not properly consider the issues before it. Mountain Bell distinguishes this case more in the nature of an argument on abuse of discretion, rather than one of no authority in the District Courts. Their argument essentially amounts to a claim that it was an abuse of discretion for the Court to put a substantial burden upon the telephone company, rather than one of no authority. The issue properly, then, that this Court should consider is whether the Order of the United States District Court for the District of Arizona amounted to an abuse of discretion under the circumstances of this case. As the hearing in this matter demonstrated, there was no evidence that Mountain Bell's operation had been unduly interrupted or burdened by compliance with this Order for an in-progress trace of wire communications.

C. MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY WAS NOT DEPRIVED OF ITS PROPERTY WITHOUT DUE PROCESS OR WITHOUT JUST COMPENSATION BECAUSE OF THE DISTRICT COURT'S ORDER OF MAY 26, 1976.

Mountain Bell now raises on appeal, for the first time, additional grounds objecting to the Order of the United States District Court for the District of Arizona. These allegations are that the District Court's Order denied Mountain Bell due process of law and that it constituted a taking of its property without just compensation. The United States respectfully submits that the Court should not consider these two grounds since they were not properly raised, briefed, and argued before the District Court. The United States is aware that the appellate courts will relax their rule of practice in certain exceptional or unusual circumstances when an issue has not been raised in a lower court. Usually, the Court of Appeals will consider an issue not raised in the lower courts if it raises significant questions of general impact or where an injustice would result. Krause v. Sacramento Inn, 479 F.2d 988 (9th Cir. 1973); Frommhagen v. Klein, 456 F.2d 1391 (9th Cir. 1972); and Securities and Exchange Commission v. Milner, 474 F.2d 162 (1st Cir. 1973). If these questions had been properly raised by Mountain Bell in the lower court, the District Court could have considered these two additional grounds,

and, if appropriate, modified its Order accordingly.

The position that Mountain Bell now takes that it will not or cannot receive just compensation for its property is almost ludicrous. As of this time the United States is not aware of any demand for payment being made upon it by Mountain Bell for the services rendered in performing this in-progress trace of wire communications. Therefore, there is nothing that the Court can consider as to whether the United States has not fairly compensated Mountain Bell for the alleged taking of its property. Mountain Bell cited numerous cases dealing with condemnation suits. It is interesting to note that in Berman v. Parker, 348 U.S. 26 (1954), cited by Mountain Bell, the Supreme Court related that policy questions (concerning the taking of property) are for the executive branch of the government, not the Courts. It noted that the Courts do not sit to determine the purpose of the taking. Since Mountain Bell has not made a demand for payment and there is no evidence indicating that the United States has refused to pay a fair price for the property allegedly taken, this Court cannot properly consider this issue at this time. Nor is it a major obstacle that the alleged property that was taken has no market value or is property or services not normally furnished to Mountain Bell customers. As the Supreme Court

stated in United States v. Miller, 317 U.S. 369 (1942), at 374, "Where, for any reason, property has no market value, a resort must be had to other data to ascertain its value; . . ."

Mountain Bell also attacks the Order of the District Court by saying that the compensation provisions of the District Court Order were not specific enough so as to include compensation for certain services and equipment use, as well as any potential liability. The Order specified Mountain Bell be compensated for all charges or expenses at prevailing rates for services or equipment furnished, and expenses incurred in complying with this Order. Mountain Bell also complains at length that the United States did not assume a liability which Mountain Bell might have incurred because of conducting an electronic search on behalf of the government. Basically Mountain Bell wants the United States to immunize it from any liability when it acts in compliance with the Order of the United States District Court for the District of Arizona. Mountain Bell speculates that there could be an outage or shortage of communications whereby it would be sued by someone or some party and incur some type of liability. They presented no facts at the hearing on this matter that there was even a danger of an outage of communications. The Order specified that it was not to be

unduly burdensome, nor was it to unduly interfere with communications. This argument of Mountain Bell's is totally in the realm of speculation and not supported by facts. Mountain Bell has an appropriate remedy if it does incur some liability in compliance with a Court Order on behalf of the United States. It can sue the United States for any damages it incurs, as well as bring the United States in as a third party defendant in a suit against the company. If this alternative does not work, it has a remedy in the nature of a private bill before Congress.

Mountain Bell argues that it was denied due process of law when the United States obtained an ex parte Order requiring it to conduct an in-progress trace of wire communications. Apparently Mountain Bell is arguing that it was not given reasonable notice and an opportunity to be heard in this matter before the Court issued its Order. Mountain Bell, however, was given notice and an opportunity to be heard after the Court issued its Order. At this hearing that Mountain Bell requested, they advanced no evidence in support of their proposition that the District Court had no authority or that the Order was unduly burdensome. This type of ex parte proceeding is not unusual. It is an accepted method of acting by the United States District Courts involving Orders of this type. As

the U. S. Supreme Court discussed in Link v. Wabash Railroad, 370 U.S. 626 (1962), not every Order by a District Court entered without notice and a preliminary adversary hearing offends due process. The Supreme Court related that circumstances may dispense with the necessity for notice and hearing. Mountain Bell here was afforded notice and was given a hearing after the United States District Court issued its Order. There had been prior acquiescence by Mountain Bell in complying with an Order of this type, which also was obtained on an ex parte basis and without a hearing before the Order was issued.

Additionally, what role would Mountain Bell play if it were present at the time the United States made its application for the District Court Order? They are not in any position to challenge the finding of probable cause by the District Court, that a crime was being committed involving the use of public telephone facilities. Presumably, they would argue once again as other phone companies throughout the United States have argued, that the District Court has no authority to Order a public utility such as a phone company to provide assistance to law enforcement officers. Mountain Bell has put forth no case or any type of authority that the District Court does not have authority to issue this type of Order.

The Court should therefore reject these two arguments of Mountain Bell, because they are not supported by facts or law, and were not raised in the Court below.

VI

CONCLUSION

The Order of the United States District Court, as well as its denial of the Motion to Vacate, should be upheld.

Respectfully submitted this 21st day of September, 1978.

MICHAEL D. HAWKINS
United States Attorney
District of Arizona

Kenneth L. Fields
Assistant U. S. Attorney

VII

CERTIFICATE OF MAILING

STATE OF ARIZONA)
; ss
County of Maricopa)

KENNETH L. FIELDS, being first duly sworn, upon his oath deposes and says:

That two copies of the foregoing Brief of Appellee have been mailed this 21st day of September, 1978, to: C. Webb Crockett, Esq., Fennemore, Craig, von Ammon & Udall, 100 West Washington, Suite 1700, Phoenix, Arizona 85003, attorneys for Appellant Mountain States Telephone and Telegraph Company.

DATED: September 21, 1978.

Kenneth L. Fields
Assistant U. S. Attorney
District of Arizona

SUBSCRIBED AND SWORN to before me this 21st day of September, 1978, at Phoenix, Arizona.

Notary Public

My Commission Expires Sept. 21, 1978