
No. 06-56866

**United States Court of Appeals
For The Ninth Circuit**

LABOR/COMMUNITY STRATEGY CENTER, et al.,
Plaintiffs-Appellants,

v.

LOS ANGELES COUNTY METROPOLITAN TRANSIT AUTHORITY, et al.,
Defendants-Appellees

*Appeal From the United States District Court for the Central District of California
Case No. CV 94-5936 TJH (MCx)*

APPELLANTS' REPLY BRIEF

RICHARD A. MARCANTONIO
ANGELICA K. JONGCO
Public Advocates, Inc.
131 Steuart Street, Suite 300
San Francisco, CA 94105
Telephone: (415) 431-7430
Facsimile: (415) 431-1048

KAREN M. LOCKWOOD
HOWREY LLP
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004
Telephone: (202) 783-0800
Facsimile: (202) 383-6810

ETHAN B. ANDELMAN
HOWREY LLP
525 Market Street, Suite 3600
San Francisco, CA 94105
Telephone: (415) 848-4900
Facsimile: (415) 848-4999

KATHERINE M. BASILE
HOWREY LLP
1950 University Avenue, 4th Floor
East Palo Alto, CA 94303
Telephone: (650) 798-3500
Facsimile: (650) 798-3600

*Attorneys for Plaintiffs-Appellants
Labor/Communit Strategy Center, et al.*

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I. INTRODUCTION

In the Consent Decree, MTA made the ongoing commitment to bring intolerable overcrowding to within pre-established, tolerable, limits. MTA acknowledges that this obligation is “critical,” and does not dispute that it failed to meet the established load factor limits. The fundamental question here is whether the mere passage of time can erase the plaintiff class’s right to MTA’s promised performance. Below, the District Court rejected that argument. It correctly understood the Decree to require compliance before jurisdiction could end.

The District Court’s error lay in its determination that MTA had “substantially complied.” That determination must be reversed as a matter of law. The law uniformly holds that “substantial compliance,” the standard used by the District Court, requires that each “essential requirement” of the obligation be fulfilled. The Decree’s load factor provisions are indisputably essential requirements. This Court ruled in 2001 that MTA’s essential obligation to reduce overcrowding requires it “to meet the scheduled load factor targets.”

Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority, 263 F.3d 1041, 1049 (9th Cir. 2001). Yet, when MTA’s load factor compliance is measured according to the terms of the Decree — as the Special Master did for nearly a decade and as this Court upheld — MTA is in compliance on only 14% of the monitored lines.

MTA concedes the predicate facts, and does not disagree with (or even discuss) BRU's authority on the legal definition of substantial compliance. MTA proffers instead an unsupported, legally erroneous definition of substantial compliance which would evaporate the pre-established load factor ceilings. Because MTA still has not met the load factors on more than a small fraction of bus lines, the District Court's determination of substantial compliance constitutes legal error and must be reversed.

In crafting its mandate, this Court has ample power and precedent to direct the District Court to continue its enforcement jurisdiction and the Decree's enforcement procedures. Nowhere does the Decree *limit* the Court's jurisdiction to *only* ten years. The District Court so understood in its order on appeal — it retained jurisdiction over another provision of the Decree. The alternative bases to continue jurisdiction — the inherent enforcement power, and the modification power — supplement the Decree's express continuing jurisdiction provision, as the District Court implicitly recognized in its order on appeal.

The District Court's order denying contempt also should be reversed. Under the proper interpretation of the 2004 Remedial Order, which this Court reviews *de novo* based on undisputed record facts, MTA not only failed to fulfill all the Order's requirements, but flagrantly misinterpreted those obligations.

The District Court effectively eliminated MTA's critical load factor obligations by ceasing its jurisdictional oversight. A consent decree cannot be rewritten so easily. The District Court's order should be reversed and remanded.

II. THE DISTRICT COURT'S DECISION SHOULD BE REVERSED BECAUSE, AS A MATTER OF LAW, MTA WAS NOT IN COMPLIANCE WITH THE CONSENT DECREE.

The central and dispositive question on appeal is whether the District Court erred in concluding that MTA had substantially complied with the Consent Decree. MTA agrees that the District Court based its decision solely on a finding of substantial compliance, MTA's Answering Brief ("MAB") at 14; it did not interpret the Consent Decree to expire by its own terms, regardless of compliance. The meaning of substantial compliance, and the standards that govern compliance with this Decree's essential load factor provisions, establish that the District Court committed reversible error. *See* Section A, *infra*.

MTA cannot escape the Decree's load factor requirements by relying on a rebuttable presumption mentioned in the 2004 Remedial Order. Even if MTA had fulfilled all the requirements of the Remedial Order, which it has not, any presumption of compliance with the Decree has been amply rebutted. *See* Section B, *infra*.

A. The Conclusion That MTA Has Not Adequately Complied With The Consent Decree Follows Necessarily — As A Matter Of Law — From MTA’s Concessions About The Critical Load Factor Standards For Reducing Bus Overcrowding.

BRU’s Opening Brief (“AOB”) demonstrated the District Court’s error by discussing the role compliance with the load factors plays in analysis of the District Court’s inquiry into “substantial compliance.”¹ BRU explained that the District Court had applied the wrong legal test by ignoring both the law of the case on the load factor provisions of the Decree and the well-settled meaning of the term “substantial compliance.” AOB §VIII.A.1-2. Further, BRU argued that, even were MTA not held to real compliance with the load factor ceilings, its record in achieving them is so non-compliant that the District Court committed reversible error in finding otherwise. AOB §VIII.A.3.

In its Answering Brief, MTA concedes the two key points establishing error — that the Decree’s bus overcrowding and load factor provisions *are* “critical” requirements of the Decree, and that MTA did *not* comply with the load factor provisions as required by the Special Master and this Court. The only disputed issue is a question of law: the *legal* standard for substantial compliance with this Decree. That legal issue is resolved by caselaw and by this Court’s prior ruling.

¹ BRU makes no concession in this appeal that substantial compliance is the appropriate standard by which to measure compliance with this Decree. But even according to that standard, MTA does not comply.

MTA neither addresses nor disputes these, and its concessions lead necessarily to the conclusion — as a matter of law — that MTA did not substantially comply with the Decree, and that the District Court determination should be reversed.

1. “Substantial Compliance” With the Consent Decree Requires Full Compliance With Each of Its Essential Requirements.

“Substantial compliance” with an obligation, whether that obligation arises by contract, statute or consent decree, requires full compliance with each essential substantive requirement. AOB at 43, citing *In re Eagle Pitcher Indus., Inc.*, 285 F.3d 522, 525 n.3 (6th Cir. 2002); *Joseph A. v. New Mexico Dep’t of Human Servs.*, 69 F.3d 1081, 1086 (10th Cir. 1995) (consent decree). This Court has adopted this principle. *E.g., Shotgun Delivery v. United States*, 269 F.3d 969, 973-74 (9th Cir. 2001) (Substantial compliance with tax regulations may suffice when requirements are procedural and the *essential* statutory purposes have been fulfilled, but “[f]ull compliance is necessary when the requirement relates to the substance of the statute or *where the essential purposes have not been fulfilled.*”) (citations omitted and emphasis added).

Rather than contesting this well-established legal standard, MTA’s Answering Brief rests on the unsupported premise that compliance with “substantially all” of the terms of a consent decree — a mere numerical percentage — might constitute compliance that is on an overall basis “substantial,” even

though an essential requirement has gone unfulfilled. MAB at 8-11. This theory, which would excuse non-performance of essential provisions, has been expressly rejected:

Substantial compliance means *actual compliance* in respect to the substance essential to every reasonable objective of the statute. **“Substantial” obviously does not permit compliance with most or a majority of the objectives to suffice.**

Alioto v. Hoiles, 488 F. Supp. 2d 1148, 1152 (D. Colo. 2007) (emphasis added) (internal citations omitted). MTA’s proposed standard would frustrate the purposes of consent decrees. If compliance were measured this way, a defendant bound by a decree could focus its efforts on select obligations to the exclusion of critical ones. Indeed, MTA does just that. Of the thirteen “components” that MTA recites for the Court to consider (MAB at 5-6), *seven* (items 4-8, 10-11) appear in Attachment B, ER 321 at 47-52, which supports only one Decree provision on security, *id.* at §II.D, and which comprises only “minor bus-service improvements suggested initially by MTA as the entirety of its settlement proposal.” ER 416 at 604, ¶ 5. Item 9, in the words of the Decree, “shall not constitute a part of the monitoring process for insuring compliance.” ER 321 at 39. And items 12 and 13 in MTA’s list do not even appear in the Decree.

The supposed successes of MTA’s other activities cannot constitute “substantial” compliance if MTA failed to comply with any essential requirement. *See R.C. ex rel. Ala. Disabilities Advocacy Program v. Walley*, 390 F. Supp. 2d

1030, 1059 (M.D. Ala. 2005) (court “must remain true to the wording and the intent of [the decree] until their goals are met”). The applicable legal standard by which to determine whether MTA is in compliance with the Consent Decree is clear and uncontested: *actual, real compliance with the Decree’s essential requirements.*

2. The Load Factor Provision Is An Essential Requirement Of The Consent Decree.

There is no dispute that the bus overcrowding provisions and their load factor ceilings are an essential requirement of the Decree. MTA concedes that overcrowding reduction is not just an “important part,” MAB at 8 & 29, but actually “one of the critical objectives of the Decree.” MAB 8.² MTA’s concession is mandated by the words of the Decree and the fit of its various provisions.

Under the heading, “Reducing Overcrowding By Adding New Service,” ER 321 at 36-38, the Decree provides first and foremost that “MTA’s performance in meeting *this critical objective* of responding to consumer demand for bus services efficiently³ *shall be measured by the reduction in levels of crowding on board*

² MTA’s effort to characterize other purposes of the Decree does not diminish its concession. See MAB at 9-10.

³ This reference to consumer demand for bus services tracks back to MTA’s core commitments in the Decree to provide “equal and equitable access” that “meets the

buses.” ER 321 at §II.A.1 (emphasis added). No other provision in the Consent Decree is termed “critical.”

Further, the Decree specifies the measure of the reduction in overcrowding — it will be accomplished by MTA’s achieving the “Improved Performance Goal” of “Reduced Load Factor Targets.” *Id.* On MTA’s prior appeal, this Court rejected its argument that the word “goal” watered the importance of the “maximum load factor ceiling.” *Labor/Comm. Strategy I*, 263 F.3d at 1048-49.

The fit between these overcrowding provisions and MTA’s other Decree obligations underscores the overarching importance of the load factor ceilings. The Decree requires elsewhere, for example, that MTA buy a number of buses for another purpose, ER 321 at §II.B, and institute new service for the transit-dependent to jobs, schools, and hospitals. ER 321 at §II.C.2. The load factor ceilings apply even *after* MTA takes those and other steps mandated by the Decree. Thus, regardless of how other Decree requirements might affect consumer demand, MTA remains responsible to reduce overcrowding on each bus line to the

needs of all riders” “regardless of race, color, or national origin,” (ER 321 §I.A-H), and to give its “highest priority” to “improvement of the quality of *bus* service,” including especially for transit-dependent populations (as opposed to new expensive modes such as rail). ER 321 at §I.B (emphasis added). MTA ignores this unifying purpose, omitting these key words from its listing of purposes. MAB at 9-10.

level of the critical load factor ceilings, before it can be in “substantial” compliance with the Decree.⁴

3. This Court’s Previous Decision Established The Standard For Compliance With The Load Factors – That MTA Must Meet The Maximum Load Factor Ceilings.

Given that the load factors form a part of the Decree’s essential substance, MTA must fully comply with them. This Court has already ruled on what constitutes “compliance” with the load factors:

The decree set out a mathematically precise method of measuring bus overcrowding and a detailed schedule of load factor targets that were to be met by specific dates.... To say that MTA’s ”best efforts” are enough for compliance would be to ignore the precise load factor schedule set out in the decree.... It is clear that *MTA’s obligation was to meet the scheduled load factor targets*, not simply to use its ‘best efforts.

Labor/Comm. Strategy Center I, 263 F.3d at 1048-49 (emphasis added). The Court *expressly rejected* MTA’s argument, raised again in this appeal, that the Decree only required its “best efforts” or “substantial compliance” with the load factors. *Id.* The Decree’s requirement that MTA “perform” within a “maximum ceiling” means that the 1.2 load factor does not simply denote a range to achieve; it is instead the outside limit for each bus line.

⁴ Thus, it matters not whether MTA characterizes its traffic as “mercurial” and “ever-changing.” *See* MAB at 27.

MTA repeatedly falls back on a fallacious distinction between the Decree and load factor ceilings. Positing that the District Court was to decide whether MTA had substantially complied with the Decree “as a whole,” MTA argues that load factor compliance under this Court’s prior ruling addressed a “different” question. MAB at 25-29, 34. Such thinking is baseless. MTA’s illogical argument would have it that compliance with the entire Decree requires less than compliance with the sum of its essential elements, contrary to uniform caselaw. This Court’s ruling that MTA must actually “meet the load factor requirements” is an integral part — necessary but not sufficient — of even substantial compliance with the entire Decree. *Labor/Comm. Strategy I*, 263 F.3d at 1049.

Within the load factor *ceiling* lies the only tolerance in the parties’ agreement for occasional overcrowding. As this Court noted, “if the average of these test results exceeded the relevant target load factor, MTA would have failed to comply with the decree for that bus line.” *Id.* at 1045-46 n.2. Whatever else it must do under the Decree, MTA must meet the load factors.

4. MTA Did Not Meet The Load Factor Ceilings.

Rather than dispute whether it has “met the scheduled load factor targets,” MTA proffers alternative numbers, but essentially concedes they are inapplicable.

MTA does not challenge the calculations summarized by BRU. Indeed, it *cannot* assert that it has met the load factor targets. Not only did it consistently fail

to meet each reduced load factor on schedule;⁵ it failed to *ever* meet them. BRU made the overwhelming evidentiary showing below that MTA was in compliance with load factor ceilings on *only 14%* of the bus lines at the ten-year anniversary of the Decree. ER 459 at 783; *see also* AOB at 32. This showing is based on MTA's own data collected and reported during the Special Master proceedings. ER 413.

Rather than a factual argument, either here or below, MTA's only counter – beyond belaboring, for immaterial purposes, lists of other things it has done within or outside the Decree -- is to argue a “percentage compliance” estimate for load factors. *E.g.*, MAB at 29-32, 34-35. *See* AOB at 22, 28, 41. It describes its figure as a ratio that reflects the portion of *all* the 20-minute time periods measured in a year that had “exceedences.” MAB at 35. But MTA readily concedes that this figure covers up the line-by-line measure of load factor “exceedences” on each bus line. *Id.* at 35.⁶ It concedes further that this figure will not prove it has met the load factors; instead MTA proffers it merely “to provide an overall assessment of

⁵ *See, e.g.*, AOB at 25, 27, 30 (13% of lines in compliance at the 1.25 deadline; 19% at the 1.2 deadline; 29% at the close of 2003; and worse consistently thereafter ending with 14% compliance in June 2006).

⁶ Line-by-line measurements are required by the Decree's terms, an issue long ago litigated and resolved by the Special Master and acknowledged in this Court's prior opinion. *Labor/Comm.Strategy I* at 1048-49 & n.2 (The Special Master, when establishing the methodology for calculating MTA's load factor performance, “based this interpretation on the language of the decree itself”). Because of that

MTA's compliance with the load factor targets." MAB at 33. It also concedes that this figure is not "the *applicable* mathematical formula for determining whether a load factor target has been met on individual lines during certain periods of time." MAB at 34 (emphasis added).

MTA's concessions are fatal, as demonstrated above. What is more, MTA's "percentage compliance" figures led the District Court into legal error by interjecting immaterial, and previously stricken, calculations.⁷ MAB at 33 ("Such information . . . compelled the denial of BTU's Motion To Extend."). The District Court's decision should be reversed.

B. Even If MTA Had Complied With The 2004 Remedial Order, Any Presumption Of Compliance With The Decree Was Amply Rebutted.

MTA asserts in its factual statement (but does not support with argument) that if it fulfilled the 2004 Remedial Order, it would be in substantial compliance with the load factor requirements. MAB at 11, 23. Relying on quoted language in that order stating that the Special Master was seeking "good faith, substantial

flaw, the same ratios were stricken from the record by the Special Master when MTA proffered them after this Court's prior opinion. *See* AOB at 27-28.

⁷ Another proffered alternative is a purported decrease from 54 to 50 in the system-wide number of passengers per hour. MAB at 30. This figure is not a load factor and cannot be substituted for it. Moreover, as a gross aggregate of all buses over all hours, it fails to distinguish between individual bus lines, or peak and non-peak hours.

compliance with the load factor targets,” MAB at 38, MTA implies that the Remedial Order somehow effectuated a modification of the Decree. Plainly it did not. The Decree continued to bind MTA; the Remedial Order could not, and was not intended to, supplant the Decree’s legal standards for compliance with the essential load factors.⁸

First, MTA did not comply with the Remedial Order.⁹ *See* Section IV, *infra*. Second, even if it had, that Order merely introduced a *rebuttable presumption* of substantial compliance with the load factors. *See* ER 392-671.1 at 463 (“[T]here will be a *presumption* that the MTA has taken *substantial and reasonable good faith steps* to meet the expansion bus procurement requirements of Section II.A of the Consent Decree”); *id.* at 473 (“Full implementation ... [shall] create a

⁸ MTA’s term “Final Order” is misleading. The 2004 Remedial Order was called “final” only in contrast to the proposed draft order that the Special Master circulated to the parties. ER 392 at 204 (entry 655). The Remedial Order (which includes both the Memorandum Decision II and the attached Order) is not the “final” or “last” order in the case, but only the first remedial order to address MTA’s past and continuing non-compliance with the 1.25 and 1.2 load factors.

⁹ MTA bootstraps its argument about compliance from the denial of BRU’s motion for contempt. MAB at 38. But the standards for determining contempt and compliance are different. Although “substantial compliance...is a defense to an action for civil contempt,” *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir. 1986), the presumption under the Remedial Order attaches only upon “full implementation.” ER 392-671.1 at 473.

presumption that the expansion bus procurement requirements of Section II.A of the Consent Decree have been met.”) (emphasis added). Tellingly, MTA itself understood the 2004 Remedial Order to create nothing more than a rebuttable presumption when it briefed the issue to the District Court:

Having complied with all of the orders of the Special Master and the Court, MTA is in substantial compliance with Section II.A of the Consent Decree and the BRU has failed to *rebut the presumption* that MTA has complied with its bus procurement obligations.

SER 421 at 102 (emphasis added).

The evidentiary presumption raised by full compliance with the terms of the 2004 Remedial Order is governed by Federal Rule of Evidence 301:

a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Fed. R. Evid. 301. If BRU rebuts the presumption, that presumption “drops from the case.” *Texas Dep’t of Comm’ty Affairs v. Burdine*, 450 U.S. 248, 256 (1981); *see also In re Bryan*, 261 B.R. 240, 245 (B.A.P. 9th Cir. 2001) (“If the presumption is rebuttable and if the foundational fact is controverted, then — the bubble having been burst — the presumption is rebutted and drops from the case.”).

BRU’s undisputed evidence of load factor data, *see* Section II.A.4, *supra*, bursts the bubble of any presumption that MTA may claim, leaving MTA without

having satisfied its burden of persuasion regarding compliance with the Decree. Even if MTA had done everything in the 2004 Remedial Order (which it did not), the evidence is undisputed that load factor “exceedences” remained on 86% of the lines just prior to the District Court’s decision.¹⁰ This abysmal rate of non-compliance abundantly demonstrates as a matter of law that, whether or not MTA fully complied with the requirements of the 2004 Remedial Order, it is not (and never has been) in compliance with the essential requirements of reduction in bus overcrowding.¹¹

Third, neither the Special Master nor the District Court could have rewritten the substantive compliance standards of the Decree absent a formal modification of the Decree in MTA’s favor. *E.g., Rufo v. Inmates of Suffolk County Jail*, 502 U.S.

¹⁰ See also ER 417 at 643 (Special Master finding, upon review of one of MTA’s best quarters, that “there continues ... to be much need for improvement”).

¹¹ MTA correctly ties the Remedial Order presumption to the Special Master’s various discussions of a future *de minimis* phase wherein isolated exceedences would possibly be excused due to circumstances beyond MTA’s control, see AOB at 41-42. But MTA draws the wrong conclusions. See MAB at 23. The Special Master, beginning in 1998, stated that no decision to excuse *de minimis* violations could occur until after “*there is substantial evidence of MTA’s good faith effort to meet the load factor targets by addressing the precise causes of overcrowding.*” ER 392-582.1 at 281 (emphasis added). The 2004 Remedial Order “presumption” language tracks his early ruling, suggesting that a *de minimis* phase would begin if and when the presumption arose. See also ER 417 at 642 (whether “Remedial Plan is effective in reducing excessive overcrowding will depend on how it is implemented”). Thus, even if a presumption had arisen, further proceedings were to follow.

367 (1992). MTA never moved for such modification, nor did the Special Master or the District Court ever make any findings in support of modification of the maximum load factor ceilings.

For the foregoing reasons, the determination of substantial compliance by the District Court should be reversed. In effect, MTA has secured an unsupportable modification of the Decree's substantive terms as a result of the District Court's legal error.¹² To allow MTA to escape this Decree in this manner is reversible error.

III. ON REMAND, THIS COURT SHOULD DIRECT THAT JURISDICTION CONTINUE UNTIL MTA ACHIEVES COMPLIANCE WITH THE DECREE.

The District Court's sole basis for denying BRU's motion — its finding of substantial compliance — was erroneous. The remaining question is the appropriate appellate remedy. In its Opening Brief, BRU discussed three alternative bases for this Court's power to mandate continued jurisdiction to monitor compliance. In response, MTA asserts that this Court is powerless to provide a remedy. MAB at 43. Its position is that time ran out.

¹² No modification is supported by this record, as MTA has not come close meeting the standards required for modification. *See Rufo*, 502 U.S. at 391. Further, absent detailed findings by the district court, a purported modification is reversible even if it is ostensibly supported by the record. *See Holland v. New Jersey Dept. of Corrections*, 246 F.3d 267 (3d Cir. 2001).

MTA is wrong: in this Decree, compliance plainly trumps duration.

A. The Consent Decree Provides For “Continuing Jurisdiction” Until MTA Can Terminate It By Showing Both Compliance and a Plan To Maintain Compliance.

Section VIII of the Decree — tellingly entitled “Continuing Jurisdiction” — sets forth in two sentences (a) the *minimum* period of the Court’s jurisdiction, and (b) the *earliest* time at which MTA may move for termination.

The first sentence assures that “the Court *shall retain* jurisdiction” for ten years to monitor compliance. ER 321 at 43(emphasis added). It binds the District Court not to end jurisdiction *before* ten years, while placing no outer limit on continuation of jurisdiction *beyond* ten years. Unlike the jurisdictional mandate in self-terminating consent decrees, this one is open-ended. *See, e.g., Thompson v. Enomoto*, 915 F.2d 1383, 1389 (9th Cir. 1990) (decree stated: “[i]f it appears at or before the expiration of said six months that there has been substantial compliance with the letter and the clear intendments of the Consent Decree, the Court intends that *there shall thereafter be no further extension of jurisdiction.*”) (emphasis added).

In its second sentence, Section VIII provides that MTA may move for termination of the Decree as early as the end of the seventh year, *if* it can demonstrate *both* substantial compliance and its adoption of a service plan that “will enable *continued adherence* to the principles and objectives of the Consent

Decree during the five years subsequent to termination of the Consent Decree.” ER 321 at 44(emphasis added). This sentence specifies the *earliest* time for termination — MTA “may” bring that motion at the end of seven years — while leaving the *latest* time open. Again, no language limits the court’s jurisdiction — or requires termination — after a fixed period of time. To the contrary, it implies merely an exception to the Court’s ten-year duty to retain jurisdiction for all of ten years.¹³

The only other mention of the Decree’s duration comes, without any stated limitation on jurisdiction or date for termination, in Section II.A.1, which requires MTA to “maintain the 1.2 load factor for the duration of this Consent Decree.” ER 321 at 36.

These Decree provisions sharply contrast with decrees that automatically terminate. *E.g.*, *David C. v. Leavitt*, 242 F.3d 1206, 1208 (10th Cir. 2001) (“The Agreement shall terminate in 48 months from the date it is given final approval by the Court.”);¹⁴ *United States v. Motor Vehicle Manuf. Assoc.*, 643 F.2d 644, 649 (9th Cir. 1981) (certain provisions “shall expire ten years after the date of entry

¹³ MTA never invoked that exception, mute but clear testimony to its own lack of “substantial compliance.”

¹⁴ Despite this express termination date, the *David C.* court found that the decree could be modified due to the state’s substantial non-compliance, which constituted changed circumstances. *Id.* at 1213.

hereof”). Language like that in Section VIII is not an automatic termination provision. For instance, the consent decree in *Officers for Justice v. Civil Service Commission*, 934 F.2d 1092 (9th Cir. 1991) included a nearly identical provision:

This Decree shall continue in full force and effect for a period of ten years from and after the date of final approval hereof by the Court. The Decree shall terminate upon filing of an order of dismissal with prejudice by defendants at any time after the expiration of this ten year period, unless plaintiffs show good cause upon motion why the Court’s jurisdiction should be continued.

Id. at 1093. Although the first sentence refers to ten years, the court ruled that the decree did not terminate automatically then. *Id.* at 1094. In sum, this Decree does not limit the court’s jurisdiction, and it is not self-terminating. Rather, it can terminate only upon court action.

MTA’s counter to this interpretation is that jurisdiction would have to continue “indefinitely.” MAB at 43. But “indefinite” does not mean “infinite,” and it is no objection to a decree’s enforcement that it does not automatically terminate on a date certain. On remand, MTA may pursue compliance, such as by buying and operating more buses during peak hours in the places necessary to meet and maintain the required load factor ceilings. It can, thereafter and as appropriate,

bring a motion to terminate the Decree. And, as a last resort, MTA can seek to modify the substantive Decree terms. *See* Section III.D, *infra*.¹⁵

B. MTA’s Collateral Attacks On BRU’s Legal Interpretation Of The Consent Decree Are Invalid.

MTA raises three collateral points to attack this Court’s province to read the Decree according to its plain language. Each fails for two basic reasons. First, whether the Decree terminates automatically after ten years is a question of law, not fact. Second, despite casual references in the record — including mere *dicta* — about the Decree’s “expiration,” the only actual holding of the District Court that necessarily implicates the question of automatic termination demonstrates its implicit *rejection* of that interpretation.

MTA asserts that interpretation of the Decree’s continuing jurisdiction provision is a “new issue” on appeal. MAB at 38. But that legal question was squarely before the District Court. MTA itself briefed it. *E.g.*, SER 421 at 108-10 (“Consent Decrees Must Be Interpreted As Contract,” “scope must be determined within its four corners” and “construed as it is written”; making argument from Section VIII that the Decree limits jurisdiction). That BRU did not brief below the interpretation it makes before this Court does not render the issue of the legal

¹⁵ When it does move to terminate or modify, MTA will have the burdens of proof and persuasion.

interpretation new, nor call for any evidence on this purely legal question of interpretation.¹⁶

Moreover, the District Court implicitly ruled on (and rejected) MTA's interpretation by ordering continuing jurisdiction over another provision of the Decree without exercising its modification power. ER 445 at 778. Had the District Court found that the Decree terminated on a date certain, it would have been required to use its modification power, for which detailed factual findings and conclusions are required by caselaw which the parties cited to the court. *See supra* at 16 n.12. It did not do so, and its ruling necessarily implies the legal conclusion that the Decree did *not* terminate by its own operation.¹⁷

Even if the issue of the Decree's interpretation were deemed new, this Court may consider BRU's interpretation. The question whether that interpretation is justified is a purely legal issue and can be resolved on this record. *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1241 (9th Cir. 2001). MTA, which itself raised this legal issue below, cannot assert prejudice.

¹⁶ Moreover, the issue is inherent in the ground that BRU briefed regarding the District Court's use of its inherent enforcement power. MTA briefed the issue below, too. SER 421 at 116, 118.

¹⁷ Consistently, the District Court refrained from denying BRU's motion to extend on what would have been the simplest basis: that the Decree automatically terminated. Instead, the Court relied on substantial compliance, an unnecessary issue had it accepted MTA's view of automatic termination.

MTA's other two collateral attacks assert the doctrines of judicial admission and judicial estoppel. Neither doctrine applies here.

At the outset, it is important to place BRU's motion in context. BRU first brought its motion to extend in year eight. MTA had missed all three deadlines, *see* AOB at 27 (15% compliance in third quarter 2003), and at year eight MTA was only falling *farther* behind. *See id.* at 30 (10% compliance in second quarter 2005). The Special Master denied BRU's first motion without prejudice, apparently hoping to see MTA closer to compliance nearer to the ten-year mark. *See* AOB at 31.¹⁸ That hope proved unavailing. *Id.* at 30. BRU thus faced a Decree that left the possibility that the District Court's jurisdiction could end as *early* as year ten. It also faced MTA's inaction in seeking either termination or modification. By acting to avert the *risk*, due to there being no clear court direction, that activity under the Decree would lapse prior to MTA's compliance, BRU in no way endorsed the legitimacy of earlier dicta about "expiration." BRU's motion to extend was the only responsible step it could take in pursuit of certainty and compliance.

¹⁸ A statement by the Special Master on BRU's first motion to extend does not diminish this Court's power to decide the legal interpretation of the Decree; he ruled without prejudice and with instruction to re-file, ER 417 at 631-32, as BRU did.

The doctrine of judicial admissions does not foreclose this Court from interpreting the Consent Decree. The subject of a judicial admission is a *fact*, not a question of law. See MAB at 40 (citing *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 227 (9th Cir. 1988)). But the Decree’s interpretation is a legal question, and the BRU statements below on which MTA rests its argument are not admissions of fact. It is the province of the courts to interpret the law.

Judicial estoppel is equally misplaced. “Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, precludes a party from *gaining an advantage* by taking an *incompatible position*.” *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600-01 (9th Cir. 1996) (emphasis added). The supposed inconsistency below is in BRU’s alternative arguments – to extend if the Decree did not self-terminate, and to modify if it did. But a party is permitted alternative, inconsistent arguments. *Scott v. District of Columbia*, 101 F.3d 748 (D.C. Cir. 1996); *Brookhaven Landscape & Grading Co. v. J. F. Barton Contracting Co.*, 676 F.2d 516, 523 (11th Cir. 1982). BRU’s position about the interpretation of the Decree is simply an additional argument and, in this instance, a more direct one, consistent with one of its alternative arguments below. Further, BRU could not now gain any “advantage” in taking this position: the District Court already ruled that it could extend jurisdiction over part of the Decree, the very conclusion BRU seeks as to the rest of the Decree.

C. The Court’s Inherent Enforcement Power Further Supports Its Extension Of Continuing Jurisdiction.

For the reasons stated above, the District Court was free to — and did — use its inherent enforcement power to extend jurisdiction. It explicitly extended jurisdiction for an additional four years to monitor the new service plan. ER 445 at 778. In that much, it was right. Its error was in not extending jurisdiction over the entire Decree to enforce compliance.

The failure to continue court oversight over MTA would, in effect, terminate the Decree. Yet “a district court may not terminate its jurisdiction until it finds both that Defendants are in compliance with the decree’s terms and the decree’s objectives have been achieved.” *Gonzalez v. Galvin*, 151 F.3d 526, 531 (6th Cir. 1998). Assuming reversal on the merits of substantial compliance, the District Court will have no discretion to fail to extend its jurisdiction. *Id.* at 532 (“When the district court terminates its supervision and jurisdiction before making findings concerning compliance with all terms of a decree, the court abuses its discretion.”); *see* note 12, *supra*. This Court may order continued jurisdiction as a matter of law.

D. Even If The Decree Were Self-Terminating, Modification Of Such A Limitation Should Be Addressed On Remand.

Section VIII’s open-ended jurisdictional provisions are not a lever by which MTA can hoist itself past its non-compliance. Compliance trumps duration. Nevertheless, at risk due to prior dicta about “expiration,” BRU invoked *Rufo*, 502

U.S. 367, in its favor as an alternative argument in the event that the District Court held that the Decree was self-terminating, and that issue is a part of this appeal. BRU met the requirements of *Rufo* — for example, because BRU would never have agreed to the Decree if it thought MTA would not comply in time, MTA’s delay in compliance is a critical unforeseen change in circumstances. *E.g.*, *David C.*, 242 F.3d at 1213 (“[I]t would defy logic for Appellees to agree to include the four-year Termination Provision in the Agreement if they actually foresaw that Utah would not be in substantial compliance with the terms of the Agreement at the end of the four-year period.”). The District Court, however, did not rule on the *Rufo* argument. Thus, in the event that this Court were to find the Decree to be self-terminating, the District Court would have to take up the question of modification on remand.

IV. MTA IS IN CONTEMPT OF THE 2004 REMEDIAL ORDER BECAUSE IT HAS NOT COMPLIED WITH ITS OBLIGATIONS UNDER A REASONABLE, GOOD FAITH READING OF THE ORDER.

In the 2004 Remedial Order, the Special Master dictated remedies calculated to extract from MTA a good faith effort to comply with the load factor ceiling. *See* Section II.B, *supra*. Using his own calculations of the additional service needed at peak hours, he required MTA to purchase 145 buses for deployment to reduce peak hour load factors, and to place each bus in service for an average of 2,001 hours

annually — a total of 290,145 additional in-service hours. *Id.* at 471. He also required MTA to hire new mechanics to maintain this expanded fleet. *Id.* at 472.

It is undisputed that MTA put only 54 new buses into service on existing overcrowded lines (ER 406 at 520, ¶ 11); that it added only 54.4% of its roughly 290,000 new service hours to peak periods (ER 406 at 517-18, ¶ 5; SER 418 at 7-8, ¶ 7); and, that, despite this new service, the number of mechanics assigned to the bus system *decreased*. *Id.* at 524, ¶ 19; SER 418 at 87-89.

The sole dispute is whether MTA’s interpretation of the requirements of the order is a reasonable, good faith interpretation.¹⁹ MTA asserts that the Order gave it the discretion to put improvements where they were not needed, and to leave peak hour needs unmet. That assertion is not a good-faith reading of the Order.

In tailoring a Remedial Order to bring MTA into good faith efforts to comply with the 1.2 load factor ceiling, the Special Master expressly relied on his

¹⁹ BRU’s question presented regarding contempt and its argument are precisely the same, despite MTA’s characterization of a “counterfeit” question presented. MAB at 50 n.18. BRU challenges the District Court’s ultimate factual conclusion that MTA substantially complied with the 2004 Remedial Order, a decision that is reviewed for clear error. AOB at 52. The District Court erred in failing to interpret the order correctly, and its error is reviewed *de novo*. In other words, BRU does contend that the District Court “appl[ied] the wrong legal standard to the interpretation of the remedial enforcement order entered by the Special Master,” precisely as posed in the question presented. MTA itself expressly recognizes that BRU is arguing interpretation of the 2004 Remedial Order. (MAB at 18, 51.)

analysis of *peak* period “exceedences.” ER 392-671.1 at 433 n.32 (remedy proceedings “focused on overcrowding during weekday *peak* hours”) (emphasis added). He accepted the Joint Working Group’s determination that 784 additional expansion service units (“ESUs”) would have to be added during peak morning and evening hours. *Id.* at 394-95, 470. As adjusted to reflect credits for service modifications and scheduling software, these ESUs represented the equivalent of 145 buses at 2,001 in-service hours annually, or 290,145 total hours. *Id.* at 471.

The remedial requirement to add 145 buses and 290,145 hours of service was the Special Master’s direct response to MTA’s failure to meet *peak* hour load factor ceilings. Indeed, the Special Master *adjusted* some of MTA’s figures because they were directed to total hours, not peak hours. *Id.* at 433 n.32. MTA, however, put about half of these hours and buses into off-peak service. Without putting the additional buses and hours on peak period bus lines, and thus not matching the Special Master’s derivation of that additional capacity, MTA pre-determined that the load factor ceilings would not be met.

MTA’s defense for not deploying the buses to peak hours is that it maintains “discretion” in spreading the buses and hours across the system. MAB at 52-54. This contention is not only overstated to the point of absurdity, it is made in bad faith. MTA had expressly requested the Special Master to provide it with “complete flexibility as to how to implement the required expansion service

units....” — i.e., not mandate a specific number of buses or hours to reduce overcrowding. ER 392-671.1 at 397. The Special Master *denied* this request, which it called “a little like rearranging the chairs on a shrinking deck”:

I have concluded that additional expansion buses are an important component of the remedies required to meet the 1.20 LFT. I therefore cannot accept at this time the MTA’s proposal that essentially would scuttle well-established precedent and the recently refined methodology, and accord it *carte blanche* to meet the ESU requirements without any mandate of additional buses through whatever means or devices it chooses....”

Id. at 397, 424. MTA acted in a manner precisely calculated *not* to redress peak hour overcrowding.

The 2004 Remedial Order also required MTA to “hire additional mechanics as needed to meet the expansion service requirements.” ER 392-671.1 at 472. MTA reads this language as granting MTA absolute discretion. MAB at 55. Here, again, MTA overstates its discretion to the point of irrationality. The number of mechanics MTA must hire can be objectively determined — the number “needed to meet the expansion service requirements.” Peak service hours from December 2002 to December 2004 increased from 2,165,301 to 2,349,235. SER 418 at 82. At least some additional mechanics would be “needed” to service this 8% increase in hours.

Indeed, even under MTA’s subjective test (“it determines”), MTA clearly violated the order, because *MTA determined* more mechanics were required

between 2004 and 2006 — but the number of mechanics decreased rather than growing during that time. Even though MTA believed it needed 10 *additional* mechanics, it had 9 *fewer* mechanics active, and 13 *fewer* assigned. *Compare* SER 418 at 89 (2004 budget of 692 mechanics, with 687 active and 715 assigned) *with* SER 418 at 87 (2006 budget of 702 mechanics, with 678 active and 701 assigned). Thus, MTA is in contempt of the 2004 Remedial Order.

V. CONCLUSION

For all of the foregoing reasons and those presented in Appellants' Opening Brief, this Court should reverse the District Court's determination of substantial compliance and remand with instructions that the District Court shall continue its jurisdiction under the procedures stipulated by the Decree until MTA has complied with the entirety of the Consent Decree. It should also reverse the District Court's denial of BRU's contempt motion.

September 4, 2007

Respectfully submitted,

KAREN M. LOCKWOOD
HOWREY LLP
1299 Pennsylvania Avenue, N.W
Washington, DC 20004

ETHAN B. ANDELMAN
HOWREY LLP
525 Market Street, Suite 3600
San Francisco, CA 94105

KATHERINE M. BASILE
HOWREY LLP
1950 University Avenue, 4th Floor
East Palo Alto, CA 94303

RICHARD A. MARCANTONIO
ANGELICA K. JONGCO
Public Advocates, Inc.
131 Steuart Street, Suite 300
San Francisco, CA 94105

Attorneys for Plaintiffs-Appellants
Labor/Community Strategy Center, et al.

**CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1
FOR CASE NUMBER 06-56866**

I certify that: (**check appropriate option(s)**)

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September 4, 2007

ETHAN B. ANDELMAN
HOWREY LLP
525 Market Street, Suite 3600
San Francisco, CA 94105

Attorneys for Plaintiffs-Appellants
Labor/Community Strategy Center, et al.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.:
COUNTY OF SAN)
)
FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 525 Market Street, Suite 3600, San Francisco, California 94105.

On September 4, 2007, I served on the interested parties in said action the within:

APPELLANT’S REPLY BRIEF

by placing a true copy thereof in a sealed envelope(s) addressed as stated below and causing such envelope(s) to be deposited in the U.S. Mail at San Francisco, California.

Patricia L. Glaser, Esq.
Caroline H. Mankey, Esq.
Christensen, Glaser, Fink, Jacobs, Weil &
Shapiro, LLP
10250 Constellation Boulevard -19th Floor
Los Angeles, CA 90067

Charles M. Safer, Esq.
Raymond G. Fortner, Esq.
Office of the Los Angeles County
Counsel
One Gateway Plaza
Los Angeles, CA 90012

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I declare under penalty of perjury that I am employed in the office of a member of the bar of this Court at whose direction the service was made and that the foregoing is true and correct.

Executed on September 4, 2007, at San Francisco, California.

Jessika Fabian

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