No. 02-682

In the Supreme Court of the United States

VERIZON COMMUNICATIONS, INC.,

Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN ANTITRUST INSTITUTE IN SUPPORT OF RESPONDENT

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Question Presented for Review

Did the Court of Appeals err in reversing the District Court's dismissal of respondent's antitrust claims?

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BRIEF OF *AMICUS CURIAE* AMERICAN ANTITRUST INSTITUTE IN SUPPORT OF RESPONDENT

July 22, 2003

Statement of Interest[1]

The American Antitrust Institute ("AAI") is an independent, not-for-profit organization dedicated to economic research, the study of the antitrust laws, and public education. The directors of the AAI, Jonathan Cuneo, Esq., Albert H. Foer, Esq., and Professor Robert Lande of the University of Baltimore Law School, authorized this filing. The Advisory Board of the AAI consists of 62 prominent lawyers, law professors, economists and business leaders (the members of the Advisory Board are listed on the AAI web site: www.antitrustinstitute.org). The members of the Advisory Board serve in a consultative capacity and their individual views may differ from the positions taken by the AAI. The AAI's mission is to increase the role of competition and sustain the vitality of the antitrust laws.

The AAI has several concerns. First, this case reaches to the heart of how antitrust law should function in newly deregulated industries undergoing a transition from state-sanctioned monopolistic markets to competitive ones. Such transitions are likely to be resisted by incumbent monopolists and other entrenched interests, and antitrust law is well-suited to redress and deter conduct which may

[1]The parties to this action have lodged blanket consents to the filing of *amicus* briefs with the Clerk of Court. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and that no persons other than the AAI or its counsel have made a monetary contribution to the preparation or submission of this brief.

frustrate or delay the emergence of competitive markets. In the context of such a transition, it is both unnecessary and unhelpful to insist that the antitrust laws must be suspended until the transition is by some measure "complete." The scope of antitrust law should not be artificially limited in a manner that inhibits it from accommodating the new factual circumstances created by deregulation. When particularly egregious conduct threatens to derail progress toward competition, or to deny consumers of the benefits of newly competitive markets, the federal courts should be empowered to intervene. *See* A.A. Foer & D.L. Moss, *Electricity in Transition*: *Implications for Regulation and Antitrust*, 24 Energy L.J. 89 (2003).

Second, the AAI is concerned with the preservation of well-settled principles of antitrust law as they apply to transitional as well as in more traditional contexts. In particular, the AAI urges this Court to refrain from eviscerating the essential facilities or monopoly leveraging doctrines by interposing unreasonably burdensome requirements of pleading or proof.

Finally, the AAI believes that any decision of this Court should take full cognisance of the procedural posture of the instant case, *i.e.*, that a motion to dismiss is under review without the benefit of the development of a factual record.

Summary of the Argument

The AAI as *amicus curiae* argues herein that the amended complaint in this case both asserts a legally cognizable claim and alleges sufficient facts to support that claim. AAI therefore urges affirmance of the court of appeals' decision reversing the Order and Opinion of the district court granting petitioner's motion to dismiss respondent's civil antitrust claim.

The Telecommunications Act of 1996, Pub.L. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 151 *et seq*. ("1996 Act" or the "Act"), requires that monopoly incumbent local exchange carriers ("ILECs") provide certain services to competitive local exchange carriers ("CLECs"), particularly "interconnection" with their local networks on terms that are "just, reasonable and non-discriminatory" so that CLECs can compete with ILECs in existing and emerging telecommunications markets. 47 U.S.C. § 251. The 1996 Act establishes a set of procedures for making and enforcing "interconnection agreements" between ILECs and CLECs for access to local networks. 47 U.S.C. § 252.

Respondent brought suit under Section 2 of the Sherman Act, 15 U.S.C. § 2, and Section 4 of the Clayton Act, 15 U.S.C. § 15(a), alleging that petitioner caused antitrust injury by failing to fulfill its duties under its interconnection agreement with the CLEC of which respondent was a customer.

1. Respondent's antitrust claim is cognizable notwithstanding the regulatory scheme established in the 1996 Act. Although precedent exists for insulating exclusionary conduct from antitrust liability because of the market effects of economic regulation, this principle does not apply to the case at bar. No regulatory "necessity" or "approval" can be raised to justify or excuse petitioner's alleged anticompetitive conduct. In fact, the market effect of the 1996 Act is to expand the scope of competition. As a result, the duties of an ILEC to refrain from anticompetitive conduct are correspondingly enlarged. By introducing new areas of competition, the 1996 Act widens the scope for conduct that offends the requirements of the antitrust laws. The introduction of competition thus creates an additional area in which one must refrain from anticompetitive conduct. This factual circumstance is entirely consistent with the express antitrust savings clause in the Act, 47 U.S.C. §152, note, 110 Stat. 56, 143 (1996), which forecloses

any finding of antitrust immunity.

As it pertains to the local exchange market, the primary purpose of the 1996 Act is to effect a transition from a monopolistic market to a competitive one. Concurrent application of the antitrust laws and the 1996 Act will promote this transition. Moreover, well-settled principles of statutory construction require that where two statutes cover the same subject area, both should be given effect to the maximum extent possible. Because there is no "positive repugnancy" between the antitrust laws and the 1996 Act, the two statutes should be applied in a complimentary manner.

Permitting respondent to prosecute its claim will not affect the scope of affirmative duties required of a monopolist to deal with its rivals under existing antitrust principles. Petitioner's duty to grant access to requesting CLECs arises under the 1996 Act and not under the antitrust laws. Nonetheless, petitioner continues to be subject to a negative duty to refrain from conduct that frustrates the pro-competitive provisions of the Act. Affirmance in the instant case would not create precedent for the expansion of antitrust duties of a monopolist to deal with its rivals; it would, however, support the proposition that interference with a statutorily mandated introduction of competition can provide the factual basis for an antitrust claim.

Reformulation of the essential facilities or monopoly leveraging doctrines, as urged in particular by the government in its brief as *amicus curiae*, is unwarranted. Requiring a Section 2 claimant to establish that a defendant's conduct rises to the level of economic irrationality in order to plead a claim under these theories would serve no useful purpose. These well-established doctrines already subsume the kind of exclusionary and anticompetitive conduct prohibited by Section 2. No claimant should be saddled with pleading and proving a

negative fact in order to establish exclusionary conduct. If some claim of a consumer benefit can be made, or there is some reason why a defendant's exclusionary conduct is not overly restrictive, it is for the defendant and not the plaintiff to bear the burden of going forward with evidence to that effect.

2. The amended complaint alleges a violation of Section 2 of the Sherman Act because it sufficiently articulates the elements of such a claim. Respondent alleges that petitioner breached its duties under its interconnection agreement with respondent's CLEC by filling its own orders ahead of those of the CLEC's customers, delaying orders, and "making it difficult for its competitors to provide service in the Local Phone Service market on the level that [it] is able to provide to its customers in that market." Am. Compl. ¶¶ 21, 52. Respondent asserts that this breach was without any valid business purpose. These statements are sufficient to place petitioner on notice of the nature of the claim. Dismissal of the claim because of the absence of specific language or phraseology is contrary to the essential requirements of law.

In particular, petitioner urges that the amended complaint is deficient because it fails to allege that petitioner's conduct would make no economic sense but for its tendency to perpetuate petitioner's monopoly. But, it could not be otherwise: There can be no legitimate economic rationale for breaching a statutorily mandated interconnection agreement. No consumer will purchase telephone service from a provider who cannot connect them to all other users on the network. The breach of an interconnection agreement, therefore, makes competition impossible. By the very nature of the industry, a breach of an interconnection agreement forestalls the transition to competition contemplated by the Act and perpetuates petitioner's monopoly.

Argument

The district court below granted petitioner's motion under Fed.R.Civ.P. 12(b)(6) to dismiss respondent's private antitrust claim. *Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp.*, 123 F.Supp.2d 738, 742 (S.D.N.Y., 2000). The Second Circuit Court of Appeals reversed. 305 F.3d 89 (2nd Cir., 2002) ("*Trinko*"). This Court granted *certiorari* solely for review of the Question Presented. *Sub nom., Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, ___ U.S. ___, 123 S.Ct. 1480, 155 L.Ed.2d 224 (2003).

Fed.R.Civ.P. 12(b)(6) codifies the common law plea of demurrer, *i.e.,* that the complaint fails "to state a claim upon which relief can be granted." It tests the legal sufficiency of the claim, to screen out lawsuits "that are fatally flawed in their legal premises and destined to fail * * *." *Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems, Inc.*, 988 F.2d 1157, 1160 (Fed.Cir., 1993). Dismissal under the Rule is warranted when a claim either *i*) asserts a legal theory that is not cognizable as a matter of law, or *ii*) fails to allege sufficient facts to support a cognizable legal claim.

It is axiomatic that the standard of review requires accepting the allegations in the complaint as true, and affirming dismissal of the claim

> only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Hinshon v. King & Spalding*, 467 U.S. 69, 73, (1984), *accord, Trinko,* supra, 309 F.3d 71 (Sack, J., concurring in part and dissenting in part) and *Covad Communications Co. v. Bell Atlantic Corp*., 201 F.Supp.2d 123, 128 (D.D.C., 2002)("*Covad-Bell Atlantic*").

Summary disposition of an antitrust case before the plaintiff has had the opportunity for discovery, as this Court has noted, "should be granted very sparingly." *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976). Only if "'it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief,'" is the claim not cognizable as a matter of law. *McClain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980) (*quoting Conley v. Gibson*, 355 U.S. 41, 45-46 (1957))[emphasis added]. This rule applies with no less force to a Sherman Act claim. *Ibid*, 444 U.S. at 246.

I.
RESPONDENT'S ANTITRUST CLAIM IS COGNIZABLE NOTWITHSTANDING THE REGULATORY SCHEME ESTABLISHED IN THE TELECOMMUNICATIONS ACT OF 1996

Typically, the issue of whether an antitrust claim against a defendant subject to market-regulating legislation is cognizable depends on whether the offending conduct is expressly or impliedly immune from antitrust scrutiny on account of the regulatory scheme.[2] In the present case,

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[2] *See*, *e.g.*, *Nat'l Railroad Passenger Corp v. Nat'l Ass'n of Railroad Passengers*, 414 U.S. 453 (1974)(interstate railroads); *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972)(trucking); *Maryland & Virginia Milk Producers Ass'n v. U.S.*, 362 U.S. 458 (1960)(milk production); *U.S. Navigation Co., Inc. v. Cunard S.S. Co., Ltd.,* 284 U.S. 474 (1932)(maritime shipping); *U.S. v. Philadelphia National Bank*, 374 U.S. 321 (1963)(banking); *U.S. v. Radio Corp. of America,* 358 U.S. 334 (1959)(broadcasting); *Otter Tail Power Co. v. U.S.*, 410 U.S. 366 (1973)(electricity wholesaling); *California v. FPC*, 369 U.S. 482 (1962)(natural gas); *Nat'l Gerimedical Hosp. & Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378 (1981)(health care); *Hartford Fire Insurance Co. v. California,* 509 U.S. 764 (1993)(insurance); *Pan*
(continued...)

however, the express antitrust savings clause in the 1996 Act forecloses antitrust immunity.[3] 47 U.S.C. §152, note, 110 Stat. 56, 143 (1996), *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir., 2000). As the *Goldwasser* court stated, "Our principal holding is * * * not that the 1996 Act confers implied immunity * * *. Such a conclusion would be troublesome at best given the antitrust savings clause in the statute." 222 F.3d, at 401. Despite this, the *Goldwasser* court nonetheless found that the antitrust claim before it was not cognizable, *accord, Cavalier Tel. Co. v. Verizon Va., Inc.*, No. 02-1337, 2003 WL 21153305 (4th Cir., May 20, 2003). One interpretation of the *Goldwasser* decision limits its applicability to the particular complaint before that court, the dismissal of which is attributable to the plaintiff's failure to allege sufficient facts. However, numerous lower courts, including the district court in the present case, have relied on *Goldwasser* as authority for the proposition that antitrust claims against incumbent local telephone carriers must be dismissed as a matter of law.[4]

At least three legal avenues other than implied immunity

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[2](...continued)
American World Airways, Inc., v. United States, 371 U.S. 296 (1963), *Hughes Tool Company v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973)(air transport); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975)(securities).

[3]The Senate Report analyzing the bill specifically provided: "[T]he provisions of this bill shall not be construed to grant immunity from any future antitrust action against any entity referred to in the bill." S. Rep. No. 104-23, at 17 (1995) (R2-7-A18).

[4]*See Covad-Bell Atlantic, supra* (collecting cases). However, the Second Circuit in the instant case, the Eleventh Circuit in *Covad Communications Co., et al. v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir.), *reh'g den.*, 314 F.3d 1272 (2002)("*Covad-BellSouth*"), and the Ninth Circuit in *MetroNet Services Corporation v. USWest Communications*, 325 F.3d 1086 (9th Cir., 2003) have taken the opposite view.

may bar an antitrust claim in the context of a regulated industry. First, the so-called "filed rate doctrine," adopted by this Court in *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922) and reaffirmed in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), bars antitrust claims which seek remedies that are incompatible with the rate approval process of a regulatory agency.

Second, the doctrine of "primary jurisdiction" requires a district court to defer an antitrust claim where the case "requires resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *Ricci v. Chicago Merc. Exch.*, 409 U.S. 289 (1973). "[I]n such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States v. Western Pacific R. Co.* 352 U.S. 59, 64 (1956), citing *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940).

Finally, limitations on the cognizability of antitrust claims against regulated entities may arise from the alteration of the market environment induced by regulation. Thus, in *Town of Concord, Ma. v. Boston Edison Co.*, 915 F.2d 17 (1st Cir., 1990), *cert. denied*, 499 U.S. 931 (1991), the court of appeals did not say either that the antitrust laws did not apply to the electrical wholesale market or that they applied less stringently, but rather that the regulatory scheme itself made "a critical difference in terms of antitrust harms, benefits, and administrative considerations." 915 F.2d, at 23. Similarly, as then-judge Kennedy wrote in *Phonetele, Inc., v. American Telephone and Telegraph Company*, 664 F.2d 716, 737 (1981), "While a given regulatory scheme may not amount to the degree of necessity required to confer implied immunity on all activities of a regulated entity, some degree of necessity may be established as a matter of fact in individual cases." *See also Otter Tail, supra*, note 2.

Goldwasser, by contrast, does not rely on the "fact-based" inquiry into the relationship between regulation and antitrust suggested by *Town of Concord* and *Phonetele*. The regulatory scheme in the Act does not alter the market in a way that supports a bar to respondent's claim. In fact, just the opposite: The pro-competitive changes in the market induced by the 1996 Act have altered the market in such a way as to *support* respondent's antitrust claim. Moreover, the antitrust remedies sought by respondent do not conflict in a manner analogous to the conflict with administrative rate-setting that underlies the filed rate doctrine. That doctrine is inapposite here, and to the extent *Goldwasser* relied on the filed rate doctrine to affirm the dismissal of the complaint in that case, it erred.

A. The 1996 Act Does Not Insulate Petitioner's Conduct from Antitrust Scrutiny.

The fact-based rationale underlying both *Town of Concord*, *supra*, and the filed rate doctrine of *Keogh* and *Square D*, *supra*, is straightforward: Antitrust analysis depends on specific market conditions which, in turn, depend on applicable economic regulation. Under both doctrines, a Section 2 Sherman Act claim cannot survive when regulatory oversight sufficiently reduces the likelihood that alleged anticompetitive conduct will result in the requisite exclusionary effect. But, such "transactional immunity" for conduct that might otherwise violate the antitrust laws requires specific and intimate supervision of the challenged conduct by the regulatory agency. In the present case, no comparable regulatory oversight exists to attenuate the exclusionary effect of petitioner's alleged breach of its interconnection duties.

Admittedly, the 1996 Act establishes elaborate procedures for negotiating and implementing interconnection agreements between ILECs and CLECs. The procedural

role for regulators under the Act, however, plainly does not extend to overseeing or supervising an ILEC's performance of its contractual interconnection duties. Nor does the Act provide an on-going oversight mechanism intended to prevent the challenged conduct. Requiring ILECs to enter into interconnection agreements presupposes that such agreements will be honored by the subscribing parties. The failure to abide by such an agreement can in no way be justified by any of the procedures in the Act. There can be no inference that the alleged misconduct arises out of any regulatory "necessity" or "approval." The "factual justification" which excused arguably anticompetitive conduct by the defendants in *Town of Concord* and *Square D*, therefore, is entirely absent in the present case.

The present case is thus analogous to *U.S. v. Radio Corp. of America, supra*, note 2, where this Court held that the antitrust laws apply to television broadcasters despite the "pervasive regulation" of the industry by the FCC. Indeed, that case represents an even more extreme example of a regulatory scheme co-existing with antitrust enforcement. Even in the face of express FCC approval, broadcasters were still not shielded from antitrust liability for mergers with anticompetitive effects. The Second Circuit Court of Appeals in the case at bar, together with the Eleventh Circuit in *Covad-BellSouth, supra*, note 4, and the Ninth Circuit in *MetroNet*, *supra*, note 4, firmly rejected the proposition that an antitrust claim is barred as a matter of law "on the basis of an allegation of anti-competitive conduct that happens to be 'intertwined' with obligations established by the 1996 Act," *Covad-BellSouth, supra*, note 4, 314 F.3d, at 1282, or because the antitrust claim was "inextricably linked" to allegations that section 251 of the Telecommunications Act has been violated, *Trinko*, *supra*, 305 F.3d, at 109.

B. The 1996 Act Expands the Scope of Competition and also an Incumbent's Duty to Refrain from Anticompetitive Conduct.

The analytical framework of *Town of Concord*, however, does more than defeat any claimed justification for petitioner's alleged anticompetitive conduct. If a statute that serves to replace competition with governmental control is a "fact of market life" which can alter the "antitrust harms, benefits, and administrative considerations" pertaining to the conduct of a regulated entity, so too should a statute which replaces governmental control with competition. The clear purpose of the 1996 Act is to "provide for a pro-competitive, de-regulatory national policy framework * * * by opening all telecommunications markets to competition * * *." H.R.Conf.Rep. No. 104-458, at 1 (1996). The Act thus turns the typical regulatory scheme on its head by replacing monopolistic markets with competitive ones. Such deregulatory legislation also inverts the analysis in *Town of Concord*. Newly competitive markets give rise to new factual circumstances, which, in turn, give rise to new opportunities for the violation of the antitrust laws.

This result does not depend on any "modification" of the antitrust laws, which would be expressly prohibited by the savings clause. The introduction of a competitive environment, however, does create an additional area in which one must refrain from antitcompetitive conduct. Even allowing that "conduct that did *not* violate antitrust law prior to the 1996 Act does not now violate antitrust law after the Act" (*Covad-Bell Atlantic, supra*, 201 F.Supp.2d, at 131), a competitive environment in the local exchange market was created by the Act which simply did not exist before. Once the Congressionally mandated interconnection agreements are in place, parties to those agreements should be held to account for the natural consequences of their breach, including any anticompetitive effects. The

successful emergence of competition critically depends on the faithful performance of these agreements, in the absence of which the intent of the statute and competition-in-fact is frustrated.

The analysis in *Goldwasser* and *Covad-Bell Atlantic* cannot be reconciled with the alteration in market conditions engendered by the 1996 Act. By requiring that the plaintiff's allegations in that case "be divorced from its 1996 Act context such that it states a freestanding antitrust claim for Rule 12(b)(6) purposes," (*Goldwasser*, *supra*, 222 F.3d, at 401) the *Goldwasser* court created an insurmountable pre-condition. No antitrust claim can be divorced from the conditions in the relevant market. The fact that those conditions are a creature of the 1996 Act does not transform preexisting duties to refrain from exclusionary or anticompetitive conduct rooted in the antitrust laws into statutory duties that arise solely from the unique provisions of the 1996 Act. The obvious fact that without the interconnection agreement required by the Act petitioner would face no antitrust liability for its breach in no way vitiates the gravamen of respondent's claim.

C. Concurrent Application of the 1996 Act and the Antitrust Laws Will Promote the Transition to Competition.

Preclusion of respondent's claim is inconsistent with the transition of the local exchange market from monopoly to competition in yet another respect. The intended end result is a competitive local exchange market to which antitrust law fully applies. Any bar to antitrust relief for anticompetitive conduct by an ILEC in connection with its statutory duties to assist rivals, therefore, must, at some point, come to an end. When should such a moratorium be lifted?

In *Goldwasser,* the court takes the view that a private antitrust claim will not lie until local telephony becomes sufficiently competitive, as evidenced by some future administrative or legislative act that "dismantles" the local exchange provisions of the 1996 Act. According to *Goldwasser*, the Act's antitrust savings clause does not authorize applying the antitrust law to the local telephone market because the local market is unlike

> many markets within the telecommunications industry that are already open to competition and that are not subject to the detailed regulatory regime we have been discussing; as to those, the antitrust savings clause makes it clear that antitrust suits may be brought today. At some appropriate point down the road, the FCC will undoubtedly find that local markets have also become sufficiently competitive that the transitional regulatory regime can be dismantled and the background antitrust laws can move to the fore. * * * [T]his is not what Congress has mandated at this time for the ILEC duties that are the subject of the Goldwasser complaint. *Goldwasser,* 222 F.3d, at 401-02.

Unfortunately, no legal authority was cited to support this distinction between those markets to which the savings clause should apply and those to which it should not. Nor is there any evidence that Congress intended a consecutive application of the Act followed at some later time by the antitrust laws. Indeed, the legislative history reveals that Congress intended that the antitrust laws and the local telephony deregulatory provisions of the Act apply concurrently and in a complimentary manner. The conference committee stated that the savings clause "prevents affected parties from asserting that the bill

impliedly preempts other laws." Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 104-458, S. Rep. No. 104-230, at 201 (1996). Similarly, the continued vitality of the antitrust laws in the telecommunications industry was commended in statements made by Representative Conyers and Senators Thurmond and Leahy.[5]

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[5] Antitrust law is synonymous with low prices and consumer protection–and that is exactly what we need in our telecommunications industry * * *. [T]he bill contains an all-important antitrust savings clause which ensures that any and all telecommunications merger and anticompetitive activities are fully subject to the antitrust laws * * *. And by maintaining the role of the antitrust laws, the bill helps to ensure that the Bells cannot use their market power to impede competition and harm consumers. *Covad-BellSouth, supra,* note 4, 314 F.3d, at 1281, *quoting*, 142 Cong. Rec. H1145-06 (daily ed. February 1, 1996)(statement of Rep. Conyers).

The second important antitrust issue in this legislation is the unequivocal antitrust savings clause that explicitly maintains the full force of the antitrust laws in this vital industry. Today we take for granted that the antitrust laws apply to the communications sector * * *. Application of the antitrust laws is the most reliable, time-tested means of ensuring that competition, and the innovation that it fosters, can flourish to benefit consumers and the economy. *Id., quoting*, 142 Cong. Rec. S687-01 (daily ed. February 1, 1996) (statement of Sen. Thurmond).

I firmly believe that we must rely on the bipartisan principles of antitrust law in order to move as quickly as possible toward competition in all segments of the telecommunications industry, and away from regulation. Relying on antitrust principles is vital to ensure that the free market will work to spur competition and reduce government involvement in the industry. *Id.*, *quoting*, 141 Cong. Rec. S18586-01 (daily ed. December 14, 1995) (statement of Sen. Leahy).

The *Goldwasser* decision and the cases that follow it rule out *ex ante* any complementarity between the two legal regimes. This "either-or" approach to the monopoly-to-competition transition of the local exchange market violates a "cardinal principle" of statutory construction, explicated by this Court in *U.S. v. Borden, Co.*, 308 U.S. 188 (1939):

> When there are two acts upon the same subject, the rule is to give effect to both if possible. * * * The intention of the legislature to repeal 'must be clear and manifest'. It is not sufficient as was said by Mr. Justice Story in *Wood v. United States*, 16 Pet. 342, 362, 363, 10 L.Ed. 987, 'to establish that subsequent laws cover some or even all of the cases provided for by (the prior act); for they may be merely affirmative, or cumulative, or auxiliary'. There must be 'a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only, pro tanto, to the extent of the repugnancy'. 308 U.S., at 198–199 [citations omitted].

Accord, Silver v. New York Stock Exchange, *supra*, note 2 (applying the *Borden* test in the antitrust context).

By contrast, the apparent construction given by the *Goldwasser* court to the antitrust laws and the 1996 Act *in pari materia* is that "[t]he 1996 Act is, in short, more specific legislation that must take precedence over the general antitrust laws, where the two are covering precisely the same field." 222 F.3d, at 401. In the absence of the requisite "positive repugnancy," such a construction violates the plainly stated rule in *Borden*.

To establish such repugnancy, petitioner, following *Goldwasser*, argues that a private antitrust claim in the

circumstances at bar is irreconcilable with the 1996 Act because the latter places exclusive control of the monopoly-to-competition transition in the hands of the FCC and the state utility commissions. A party would be able, by the simple act of filing an antitrust suit, to transfer that task to the federal courts.[6] But, permitting respondent's claim to proceed will have no such effect, and petitioner fails to go beyond the mere assertion that it will. The regulatory scheme established by Congress will not be "wiped away" by the filing of a private antitrust claim in the present circumstances.

Certainly, not all conceivable antitrust claims can be reconciled with the procedures established under the 1996 Act as can the case at bar. For example, a competitive carrier dissatisfied with the outcome of interconnection negotiations regulated by the Act should not be permitted to sidestep those regulatory procedures by filing an antitrust action. Should such a claim reach adjudication by a district court, petitioner's dire prognostications may very well come true. But, this is not such a case. In this case, the regulation has come to an end-point, in the sense that the procedures of the Act related to introducing competition have been successfully implemented. In the absence of petitioner's alleged recalcitrance in fulfilling its interconnection duties, the quantum of competition intended by the statute would exist unimpeded. Respondent's claim seeks no reform of the negotiated interconnection duties, or any alteration of their scope or terms. The claim simply seeks a remedy for interference

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[6] There would, in short, be no escaping the imposition of novel and inappropriate regulatory tasks on antitrust judges and juries if Section 2 were now expanded to embrace respondent's claim. Antitrust judges and juries would become the shadow, omnipresent regulators of the telecommunications industry—even more than the district court that supervised the Bell breakup decree. Pet. Br., at 34.

with competitive arrangements which the Act has already established. In these circumstances, no opportunity exists for the district court to act as regulator, or for juries to substitute their judgment about the nature or scope of the competitive arrangements mandated by the Act.

The application of the antitrust laws in an environment in which the competitive relationships among the parties have been fully settled serves the useful purpose of identifying conduct which, if permitted, would be so egregious as to threaten the transition to and the viability of statutorily-mandated competition. Moreover, respondent's claim provides a remedy for those consumers injured when the pro-competitive purposes of the Act have been undermined. *See Long Lake Energy Corporation v. Niagara Mohawk Power Corporation*, 700 F.Supp. 186, 188-9 (S.D.N.Y., 1988) ("Although * * * there are a host of agency proceedings now underway * * * these agencies do not have the power to grant the relief sought in this action, treble damages for alleged violations of the antitrust laws and a broad injunction against further anticompetitive acts.") Antitrust law can and should prevent the transition to a competitive environment from backsliding in the face of conduct of the type alleged by respondent.

D. Respondent's Claim Will Have No Effect on the Scope of Affirmative Duties Required of a Monopolist Under Existing Antitrust Principles.

Respondent's claim involves no novel extension of the affirmative duties required of a monopolist as they presently exist under Section 2 of the Sherman Act. Such an expansion of the scope of Section 2 does not follow from the cognizability of respondent's claim. The scope and terms of access which petitioner is required to grant under any given interconnection agreement are not issues that require adjudication in any antitrust litigation. The fact that the

1996 Act imposes duties that "go well beyond anything the antitrust laws would mandate on their own," *Goldwasser, supra,* 222 F.3d, at 400, does not nullify the *negative* duties in the antitrust law to *refrain* from actionable anticompetitive conduct. Certainly, the *Goldwasser* court is correct to decline "to equate a failure to comply with the 1996 Act with a failure to comply with the antitrust laws." 222 F.3d, at 401. But, just as certainly, an antitrust violation that happens also to involve a failure to comply with an interconnection agreement required by the Act does not imbue the antitrust laws with additional duties that stem from the statute.

Indeed, if respondent's duties to grant access to its CLEC counterparties arise under its interconnection agreements and not under the antitrust laws, as petitioner asserts, there would be little or no precedential effect on the scope of the essential facilities or monopoly leveraging doctrines from a decision by this Court that petitioner's alleged interference with the pro-competitive arrangements of the Act are actionable under the antitrust laws. Such a holding would not support a claim that antitrust principles have been expanded by this Court so as to encompass the more exacting duties imposed by the statute.

Affirmance in this case would lend support, however, to the proposition that the failure to perform statutory duties designed to promote a transition to competition in the marketplace—when accompanied by the other requisite elements of a Section 2 offense—may form the factual basis of a viable antitrust claim.

It is puzzling, therefore, that both petitioner and the United States and the Federal Trade Commission as *amici curiae* devote so much argumentation to the issue of the extent to which a monopolist ought to be compelled to share resources or grant access to rivals. Petitioner urges that "respondent's proposed Section 2 duty to provide rivals

adequate affirmative assistance * * * reduces the incentives that antitrust law centrally encourages" and "creates significant costs of implementation." Pet. Br., at 27-8. Similarly, the government argues that

> courts should be hesitant to impose a duty to assist rivals. The decisions of a seller, even a monopolist, regarding to whom it will sell, on what terms, and under what sort of quality and purchaser-satisfaction measures, generally reflect its own assessment of how to compete and provide goods most effectively in the marketplace. U.S. Br., at 20.

In the same vein, the government argues that affirmance in this case "would fundamentally transform the Sherman Act" so that monopolists would have to "pull their competitive punches, assist their competitors, convert themselves from retailers into wholesalers, and share monopoly profits on demand." U.S. Br., at 30.

But these issues—the scope and terms of access to the local exchange network—have all been settled in the context of the Act, and are beyond the reach of respondent's claim. The appropriate forum before which to voice objections to the interconnection obligations established by the Act is the Congress, not before this Court in the context of an antitrust claim seeking redress for the anticompetitive effects of petitioner's alleged failure to abide by established legal requirements.

E. Reformulating the Pleading or Proof Requirements of a Section 2 Claim Based on the Essential Facilities or Monopoly Leveraging Doctrines is Unwarranted.

The petitioner's conditional duties to provide access to certain of its local exchange facilities arises out of the 1996

Act and not out of Section 2 of the Sherman Act. Because of this, the scope or continued validity of either the essential facilities or monopoly leveraging doctrines of Section 2 are inapposite in the present case. Despite the irrelevance of such issues, however, a radical reformulation of these doctrines is urged by petitioner and the government in their respective briefs. Such a reformulation of these doctrines is entirely unwarranted.

Both theories are fully consistent with leading decisions of this Court upholding liability under Section 2 based on exclusionary or anticompetitive conduct. With respect to the essential facilities doctrine, in the exceptional circumstances in which access to a truly essential facility is necessary for the very existence of competition, the imposition of an affirmative duty to deal based on Section 2 is entirely consistent with such decisions as *Aspen Skiing Company v. Aspen Highlands Skiing Corporation*, 472 U.S. 585 (1985) and *Otter Tail Power Co. v. U.S.*, *supra*, note 2. *See* Pitofsky, R., *et al., The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70:2 Antitrust L.J., 443 (2002). The suggestion by the court of appeals below that respondent's claim could be couched in terms of the essential facilities doctrine does not somehow "dispense with" the exclusionary conduct requirement of Section 2. U.S. Br., at 20. As the Ninth Circuit described it,

> When a firm's power to exclude rivals from a facility gives the firm the power to *eliminate* competition in a market downstream from the facility, and the firm excludes at least some of its competitors, the danger that the firm will monopolize the downstream market is clear. In this circumstance, a finding of monopolization, or at least attempted monopolization, is appropriate and there is little need to engage in the usual lengthy analysis of factors such as intent. *Alaska*

> *Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d. 536, 546 (9th Cir., 1991) [emphasis in original].

Thus, the exclusion of competition lies at the very heart of the essential facilities doctrine. The government urges, however, that more than the mere exclusion of competition should be required. In particular, it is urged not only that the denial of access to an essential facility be exclusionary, but also, citing *Matsushita Electric Industries Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986), "economically irrational for the monopolist but for the conduct's adverse impact on competition." U.S. Br., at 16. Such a standard is wholly inappropriate in the context of a claimed exclusionary denial of an essential facility.

The reason can be traced directly to the circumstances of the *Matsushita* case itself, in which this Court adopted the skepticism of Chicago School economic scholars, who stressed the implausibility of predatory pricing as a profitable anticompetitive scheme. The combination of the short-term benefits of lower prices for consumers and the perceived implausibility that predatory pricing can be a successful anticompetitive strategy led to the exercise of extreme caution in predatory pricing cases in the form of a severely strict standard of exclusionary or predatory behavior.

However, the factors that led this Court to raise the bar in predatory pricing cases are entirely absent from a provable Section 2 claim based on an essential facilities theory, so such extreme caution is unwarranted. It is sufficient that a defendant be given an opportunity to establish that any harm to competition is not disproportionate to the benefits that may accrue to consumers from denying access to an essential facility, or that superior efficiencies or other pro-competitive justifications outweigh any anticompetitive effects. To require a claimant to establish the "economic

irrationality" of a defendant's conduct in an essential facilities case as part of its case-in-chief goes far beyond anything that may be necessary to prevent the unjust result that a competitor is held to task under the antitrust laws for what may be essentially pro-competitive conduct.

Similarly, the government makes the same demand for a *prima facie* showing of economic irrationality before a claimant may establish a Section 2 claim based on a theory of monopoly leveraging, U.S. Br., at 26. This doctrine is also consistent with longstanding decisions of this Court, such as *U.S. v. Griffith*, 334 U.S. 100 (1948) and *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993). There is no rationale for such a severe standard in a monopoly leveraging case. As this Court made abundantly clear in *Spectrum Sports, supra*, 506 U.S., at 456, as long as a "dangerous probability of monopolization" by a defendant can be established, the exclusionary conduct element has been satisfied.

Finally, aside from the fact that such issues are fundamentally unrelated to the ultimate nature of respondent's claim in the instant case, and irrespective of the merits of the government's desire to reformulate *all* Section 2 cases in the image of *Matsushita*, such judicial revisionism is not appropriate in the context of a motion to dismiss. Even if this Court is inclined to yield to the government's exhortations to dramatically alter the jurisprudence of Section 2, it should only do so based on a fully developed factual record, and not in the procedural posture of the present case, in which the only issue is whether respondent has pled sufficient facts to proceed to gather proof that petitioner has violated the law.[7]

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[7]The essential facilities cases cited above, for example, apply to vertically related markets, in which control of an upstream input acts as the "gateway" to a downstream market. Under the 1996 Act and FCC

(continued...)

II.
THE AMENDED COMPLAINT ALLEGES A VIOLATION OF SECTION 2 OF THE SHERMAN ACT.

The fundamental elements of a claim for violation of Section 2 of the Sherman Act have been elaborated upon by this Court on numerous occasions:

> 'The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.' *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481 (1992), *quoting United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966), *accord Goldwasser, supra*, 222 F.3d, at 396-7.

Thus, having a monopoly does not by itself violate Section 2; a defendant must have engaged in improper exclusionary acts to acquire or maintain its monopoly power, *see United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2nd Cir., 1945) ("The successful competitor, having been urged to compete, must not be turned upon when he wins."). "The [Sherman Act] directs itself not against conduct which is competitive, even severely so, but against conduct which

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[7](...continued)
regulations, wholesale interconnection to the local loop is a separate relevant market from retail telephone service. The instant case thus fits squarely into the doctrine as a matter of law. At the very least, market definition is a factual inquiry that is not amenable to summary adjudication on a motion to dismiss.

unfairly tends to destroy competition itself." *Spectrum Sports*, *supra*, 506 U.S., at 458. However, as this Court observed in *Spectrum Sports*, "It is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects." 506 U.S., at 458-9.

In the analysis of conduct

> it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way. If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory. It is, accordingly, appropriate to examine the effect of the challenged pattern of conduct on consumers, on [the defendant's] smaller rival, and on [the defendant] itself. *Aspen Skiing Company v. Aspen Highlands Skiing Corp.*, 472 U.S., at 605, *quoting* R. Bork, *The Antitrust Paradox* 138 (1978) [footnote omitted].

A. The Amended Complaint Articulates the Elements of a Claim Under Section 2 of the Sherman Act.

The amended complaint states sufficient facts to allege a cause of action under Section 2 of the Sherman Act under the foregoing standards. The amended complaint alleges that at the time material to the claim, petitioner had monopoly power with respect to local telephone service in the relevant geographic market, defined to be "those areas in which [petitioner] is the ILEC, *viz.*, most of or all of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, the District of Columbia, and those portions of Connecticut and other states in which

[petitioner] is the ILEC." Am. Compl., ¶¶10, 48. Furthermore, the amended complaint alleges that petitioner

> has engaged in exclusionary and anticompetitive behavior by, *inter alia*, attempting to exclude or reduce the market share of rivals in the Local Phone Service [market] on a basis other than efficiency, i.e., by making it difficult for its competitors to provide service in the Local Phone Service market on the level that [petitioner] is able to provide to its customers in that market. This conduct has had an impact on consumers and has impaired competition in the Local Phone Service [market] in an unnecessarily restrictive way. Am. Compl., ¶52.

Moreover, it is alleged that petitioner has

> increased the barriers to entry into the Local Phone Service market in the Geographic Market, has retarded the development of competition within the Local Phone Service market in the Geographic Market, and has weakened the ability of competitors to compete in the Local Phone Service market within the Geographic Market. Am. Compl., ¶53.

The amended complaint also alleges that petitioner's "anticompetitive conduct" "had and has a dangerous probability of preventing CLECs from establishing significant positions in the Local Phone Service [market]." Am. Compl., ¶56. Moreover, respondent alleges that "[t]here is no valid business reason for [petitioner's] behavior" which was undertaken with a "specific intent to acquire a, or

maintain its, monopoly in the Local Phone Service market." Am. Compl., ¶¶57, 58. Finally, it is alleged that the class of which respondent is a representative has been injured in its business and property interests. Am. Compl., ¶59.

These allegations constitute "a short and plain statement of the claim showing that the pleader is entitled to relief," as required by the Fed.R.Civ.Proc. 8(a)(2). A statement which "gives the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests" is sufficient. *Conley v. Gibson*, 355 U.S. 41, 47 (1957). "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512, (2002).

B. There Can Be No Legitimate Economic Rationale for the Breach of a Statutorily Mandated Interconnection Agreement.

Despite the express allegation that petitioner had no valid business reason for its conduct, it is urged that because an actionable Section 2 claim in this context requires exclusionary conduct that must "make no business sense *except for* its enabling monopoly returns," "respondent's claim fails that test." Pet. Br., at 21. This argument is remarkable in two respects.

First, dismissal of respondent's claim on account of a claimed lack of *specific language* in the amended complaint contravenes "[t]he Federal Rules [which] reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Swierkiewicz*, *supra*, 534 U.S., at 514 (quoting *Conley*, *supra*, 355 U.S., at 48).

Second, petitioner urges that "*unprofitability* of the conduct without monopoly returns" is an "essential requirement for unlawful unilateral conduct," Pet. Br., at 23, while the government argues that "a refusal to sell an input to a rival when it requires the incumbent to forfeit profits would make obvious business sense." U.S. Br., at 20. This argument is fallacious in this case for several reasons.

One reason is that so-called "network effects" make it all but impossible for any benefit to accrue from petitioner's violation of an interconnection agreement that is *not* related to monopoly profits. Since no consumer will purchase telephone service from a local carrier that cannot interconnect with all other telephone users, competition is not possible without interconnection. If petitioner's conduct is profitable, it is because—and only because—of its anticompetitive effect. Petitioner's alleged conduct cannot be seen as a business strategy designed to accomplish anything *other* than the perpetuation of its market power.

Even if, *arguendo*, the interconnection agreement requires petitioner to sell access to its facilities below cost, the conduct still lacks any valid business justification. This Court has already established the legality of the TELRIC pricing formula. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). Unfavorable terms in the wholesale market cannot justify exclusionary practices in that market to monopolize the retail market, where price-cost margins may be higher.

Moreover, sound public policy militates against using the profitable frustration of the 1996 Act as a legitimate justification for exclusionary conduct. The transition from a monopolistic market to a competitive one is bound to create a modicum of economic hardship for an incumbent. But this is what Congress has mandated. From the incumbent's perspective, it may be eminently sensible to attempt to forestall such a transition, but doing so is not a

legitimate form of competition. Having been encouraged to enter markets that were previously closed to them, a CLEC should not be impeded by an incumbent reluctant to abide by the law, nor should respondent be deprived of an antitrust remedy on the grounds that retarding the transition to competition bestows economic benefits on the incumbent. Conduct that frustrates the expressed will of Congress should not shield petitioners from the legal consequences of having inflicted injury of the type meant to be addressed by the antitrust laws. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)("The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.").

Finally, as argued above (in Section I.E., *supra*), the burden of showing a justification for allegedly exclusionary conduct lies with petitioner. A claimant should not be required to allege or prove the unprofitability of alleged anticompetitive conduct in order to state a claim for which relief can be granted. Creating such a burden serves no useful purpose. It frustrates the intent of Section 2 and imposes an unreasonable requirement on Section 2 claimants by requiring the allegation or proof of facts which, in most circumstances, cannot be known *ab initio*.

Conclusion

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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