UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 02-7057

COVAD COMMUNICATIONS COMPANY and DIECA COMMUNICATIONS, INC. d/b/a/ COVAD COMMUNICATIONS COMPANY,

Plaintiffs-Appellants,

v.

BELL ATLANTIC CORPORATION; BELL ATLANTIC NETWORK SERVICES, INC.; TELESECTOR RESOURCES GROUP, INC.; BELL ATLANTIC INTERNET SOLUTIONS, INC.; BELL ATLANTIC-WASHINGTON, D.C., INC.; BELL ATLANTIC-DELAWARE, INC.; BELL ATLANTIC-MARYLAND, INC.; BELL ATLANTIC-NEW JERSEY, INC.; BELL ATLANTIC-PENNSYLVANIA, INC.; BELL ATLANTIC-WEST VIRGINIA, INC.; NEW YORK TELEPHONE COMPANY; NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,

Defendants-Appellees.

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

BRIEF FOR AMICI CURIAE STATES OF NEW YORK, CONNECTICUT KANSAS, MAINE, MARYLAND, MINNESOTA, NEVADA AND UTAH IN SUPPORT OF REVERSAL OF THE ORDER APPEALED FROM

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to District of Columbia Cir. R. 28(a)(1), the undersigned counsel for the Amici states, New York, Connecticut, Kansas, Maine, Maryland, Minnesota, Nevada, Utah, hereby certifies the following:

(A) **Parties and *Amici*.** Except for the following, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Covad Communications Company, *et al*.

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(B) **Rulings Under Review.** References to the ruling at issue appear in the Brief for Covad Communications Company, *et al*.

(C) **Related Cases.** This case has not been on review previously before this Court or any other court. The Amici States have been informed of one case before another United States court of appeals that arguably raises similar issues:

Cavalier Telephone, L.L.C. v. Verizon Virginia, Inc., No. 02-1337 (4th Cir.)

Two other such cases, cited in the Amici States' brief, were recently decided by courts of appeals and are pending on petitions for further review. *See Covad Communications Co. v. BellSouth Telecommunications, Inc.*, 299 F.3d 1272 (11th Cir. 2002), *petition for rehearing pending*; *Law Offices of Curtis V. Trinko v. Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir. 2002), *petition for rehearing pending*, No. 02-682 (U.S. docketed Nov. 5, 2002).

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Jay L. Himes

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The States of New York, Connecticut, Kansas, Maine, Maryland, Minnesota, Nevada and Utah ("the *Amici* States"), through their Attorneys General, respectfully submit this brief as *amici curiae*, pursuant to FRAP 29(a), urging reversal of the decision in *Covad Communications Co. v. Bell Atl. Corp.*, 201 F.Supp.2d 123 (D.D.C. 2002).

THE INTEREST OF AMICI CURIAE

This action raises significant issues concerning the interplay between the antitrust laws and the Telecommunications Act of 1996, Pub. L. 104-104 (1996) (the "1996 Act"). The district court resolved them by insulating anticompetitive conduct by incumbent local exchange carriers from antitrust review.

The Attorneys General of the *Amici* States are charged with the enforcement of federal and

state antitrust and consumer protection laws and advocate on behalf of consumers who reside or do business within the States' respective borders. As advocates for consumers and businesses, the *Amici* States are particularly concerned with the delivery of telecommunications services. They frequently participate in federal and state regulatory proceedings to promote delivery of efficient, competitively priced telecommunications services to customers. As a result of their participation in these regulatory matters, as well as their antitrust enforcement and consumer protection activity generally, the *Amici* States are particularly mindful of the critical need to preserve antitrust remedies in the telecommunications industry.

The complaint in this action alleges conduct by a dominant firm in local telecommunications markets which, if proven, is anticompetitive. Where, as in this case, Congress intended to preserve antitrust scrutiny despite the passage of regulatory legislation, the antitrust laws should not be interpreted to permit cases to be dismissed on the pleadings, without any factual inquiry into whether a real, unjustified threat of harm to competition — and, hence, to consumers — exists. Summary judgment, and if necessary trial, are the proper stages of litigation at which to assess an argument that Bell Atlantic's conduct lacks any threat to competition in local telecommunications markets. Then, the parties may offer evidence to prove whether or not Bell Atlantic's conduct harmed competition, and whether or not procompetitive justifications outweigh proven anticompetitive effects.

STATEMENT OF THE CASE

A. Bell Atlantic's Market Position And Covad's Allegations Of Anticompetitive Conduct

Defendant Bell Atlantic Corporation, together with its affiliates ("Bell Atlantic"), is an incumbent local exchange carrier in thirteen states along the north-eastern seaboard, including the States of New York, Maryland and Maine, and in the District of Columbia. As the beneficiary of

longstanding state franchises, Bell Atlantic enjoys virtually exclusive control of local exchange network facilities used to provide local exchange services. These include switches (equipment directing calls to their destinations), local loops (wires connecting telephones to switches), and transport trunks (wires carrying calls between switches). Because Bell Atlantic controls local exchange network facilities, it is also the dominant local exchange service provider in the region.

Covad, a new entrant into markets for local exchange services, seeks to compete with Bell Atlantic as a provider of high-speed internet services and other network and data services. Allegedly the sole surviving national competitor of Bell Atlantic providing digital subscriber line ("DSL") service, Covad asserts that Bell Atlantic engaged in anticompetitive conduct to keep Covad from succeeding as a DSL service provider. Cmplt. ¶¶ 51-52. Covad further contends that it cannot compete as a provider of such services without access to Bell Atlantic's local exchange network facilities. According to Covad, Bell Atlantic has strategically obstructed Covad's access to the network in ways calculated to undermine competition. *See generally* Cmplt. ¶¶ 98-130, 136-45, 150-57, 175-85. For example, Covad alleges that Bell Atlantic: (1) fraudulently claimed that there was no room to collocate Covad's equipment in Bell Atlantic's central offices, Cmplt. ¶¶ 98-104; (2) required Covad to pay exorbitant prices for power, Cmplt. ¶¶ 119-23; (3) required Covad to build unnecessary special rooms before collocating in order to increase Covad's costs, Cmplt. ¶¶ 105-117; (4) delayed providing loops to Covad, Cmplt. ¶¶ 136-45; and (5) abused the regulatory and negotiation process to impede Covad's entry, Cmplt. ¶¶196-201.

In sum, Bell Atlantic's anticompetitive conduct allegedly prevented Covad from competing in internet access markets and landline local voice and long distance access services, thereby maintaining and extending Bell Atlantic's monopoly in these markets. Cmplt. ¶¶ 48-49, 61-62.

Based on these facts, which are assumed true for purposes of this appeal, Covad contends that Bell Atlantic monopolized and attempted to monopolize telecommunications markets in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

B. The District Court's Decision On Bell Atlantic's Motion To Dismiss.

Bell Atlantic moved to dismiss for failure to state an antitrust claim. Granting the motion, the district court relied heavily on the Seventh Circuit's decision in *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000). Like this case, *Goldwasser* involved allegations that an incumbent local exchange carrier ("ILEC") unlawfully excluded a competing local exchange carrier ("CLEC") from various telecommunications services. In rejecting the antitrust complaint, the *Goldwasser* court correctly recognized that the 1996 Act does not impliedly immunize anticompetitive conduct from scrutiny under the antitrust laws. *See id*. at 401. Nevertheless, the Seventh Circuit characterized the plaintiffs' claims as "inextricably linked" to claims that could have been asserted under the 1996 Act. *Id*. at 401. Noting that "[t]he 1996 Act is . . . more specific legislation," the *Goldwasser* court ruled that the 1996 Act "must take precedence over the general antitrust laws." *Id*. at 401; *see also id*. ("[t]he antitrust laws would add nothing to the oversight already available under the 1996 law").

In dismissing Covad's complaint, the court below, like the Seventh Circuit, considered "virtually all" of Covad's allegations to "relate to" conduct "governed by" the 1996 Act. *Covad Communications Co. v. Bell Atl. Corp.*, 201 F.Supp.2d 123, 129 (D.D.C. 2002). This perceived overlap led the district court to several conclusions, each of which harkens back to *Goldwasser*. First, the court below stated that the 1996 Act establishes "'affirmative duties to help one's competitors' that 'do not exist under the unadorned antitrust laws.'" *Id*. at 130 (*quoting Goldwasser*, 222 F.3d at 400). In the district court's view, because the 1996 Act creates duties to deal that did

not previously exist, Covad's allegations "fall squarely outside the parameters of antitrust laws." *Id*. Second, the district court held that the 1996 Act's two savings clauses do not "alter the application or scope of existing laws" and, in particular, do not expand existing antitrust law to encompass duties imposed solely by the 1996 Act. *Id.* Third, the court concluded that Covad could not prevail on an "essential facilities" theory because, as a matter of law, the regulatory scheme of obligations and remedies created by the 1996 Act precludes any possibility of anti-competitive effect or harm to competition. *Id*. at 132 (citing *Goldwasser*, 222 F.3d at 401). Finally, the district court expressed the view that there is a "fundamental incompatibility" between the antitrust laws and the 1996 Act because "[p]ermitting judicial consideration of these same issues may interfere with the ability of state regulatory agencies and the FCC to carry out their regulatory missions, and could subject ILECs to inconsistent standards of conduct." *Id*. at 133-34.

The district court thus dismissed Covad's complaint as legally insufficient. Significantly, however, since then, the Second and Eleventh Circuits have upheld comparable antitrust complaints on motions to dismiss. *Law Offices of Curtis V. Trinko, L.L.P v. Bell Atlantic Corp.*, 305 F.3d 89 (2nd Cir. 2002), *petition for certiorari pending*, No. 02-682 (U.S. docketed Nov. 5, 2002); *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002).

STANDARD OF APPELLATE REVIEW

This Court's review of the grant of a motion to dismiss is *de novo*. *Wilson v. Pena*, 79 F.3d 154, 160 n.1 (D.C. Cir. 1996).

SUMMARY OF ARGUMENT

When Congress does not address the proper accommodation between the antitrust laws and a later-enacted regulatory regime, the courts, by necessity, must reconcile the public policy

considerations animating both statutory schemes. The doctrine of implied antitrust immunity permits a court to construe a later-enacted regulatory statute to modify, impair, or supersede antitrust enforcement. But where Congress has expressly preserved antitrust scrutiny, that doctrine does not apply. That is precisely the situation here.

The 1996 Act explicitly provides that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair or supersede the applicability of any of the antitrust laws." Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, § 601, reproduced in note to 47 U.S.C. § 152. Accordingly, courts must give effect to Congress' intent, as expressed in the words of the statute itself, by accommodating the 1996 Act and antitrust laws. The district court here did not achieve that required balance. By dismissing Covad's complaint as legally insufficient, the court below accomplished indirectly a result that Congress rejected: it elevated the 1996 Act to a position of superiority over the antitrust laws when Congress instead directed that the two statutory schemes complement each other to promote and protect competition in the nation's telecommunications markets.

The conduct that Bell Atlantic is alleged to have engaged in, fully considered both individually and as a whole, does not amount simply to breaches of affirmative obligations arising solely from the 1996 Act. In consequence, Covad's complaint states a legally sufficient antitrust claim under established precedent — as did the complaints in both *Trinko* and *BellSouth*. Accepting the factual allegations of the complaint as true — as this Court must on a motion to dismiss — the complaint is not susceptible of dismissal at the pleading stage. Determining whether Bell Atlantic in fact undertook the campaign of exclusionary conduct detailed in Covad's complaint — and whether there are pro-competitive benefits from such conduct, which outweigh their

anticompetitive effects — requires fact-intensive inquiries. Furthermore, the impact of the regulatory overlay of the 1996 Act on the antitrust analysis that otherwise would apply absent this legislation needs to be determined on a factual record – not on a motion directed to the complaint. In pre-judging these matters on Bell Atlantic's motion to dismiss, the court below erred.

ARGUMENT

POINT I

CONGRESS INTENDED THE 1996 TELECOMMUNICATIONS ACT AND THE ANTITRUST LAWS TO PLAY COMPLEMENTARY ROLES IN PROMOTING AND PROTECTING COMPETITION IN LOCAL EXCHANGE SERVICE MARKETS

The over-arching purpose of the 1996 Act is to "open[] all telecommunications markets to competition." H.R. Conf. Rep. 104-458, 104th Cong., 2d Sess., at 1 (1996). In enacting this new telecommunications regime, Congress did not intend, however, to insulate anticompetitive conduct by incumbent local telecommunications companies from antitrust scrutiny. To the contrary, the 1996 Act explicitly provides as follows:

> Savings Clause. . . . [N]othing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of the antitrust laws. . . .

Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, § 601, reproduced in note to 47 U.S.C. § 152. In addition, the 1996 Act provides:

> No implied effect . . . . This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local laws unless expressly so provided in such Act or amendments.

Id.

Congress' intent to preserve — not to displace — the antitrust laws is manifest. Bell Atlantic itself should not be heard to argue otherwise: the company obtained FCC approval of its applications

to serve the long distance market in New York by showcasing the continuing applicability of the antitrust laws to local interconnection disputes. In a 1999 application, Bell Atlantic acknowledged that, if it "were nevertheless to engage in anticompetitive conduct, carriers would of course be able to resort to private remedies under generally applicable statutes, *including the treble-damages remedy of the federal antitrust laws*."[1] The FCC specifically noted Bell Atlantic's admission in its Memorandum Opinion and Order.[2]

In considering the interplay between the 1996 Act and the antitrust laws, no court has invoked the implied immunity doctrine to hold that Congress intended the later-enacted regulatory scheme to displace the antitrust laws.[3] Nevertheless, in the court below, Bell Atlantic argued that the implied immunity doctrine is itself part of the antitrust enforcement scheme "saved" by the antitrust savings clause of the 1996 Act that Congress did adopt. Def. Mem. at 25-26. That argument is plainly unsound.

The antitrust implied immunity doctrine, as applied to federal regulatory legislation, reflects

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[1] FCC Docket No.99-295, *Application By Bell Atlantic-New York For Authorization To Provide In-Region, InterLATA Services In New York,* filed September 29, 1999, at 71 (emphasis added).

[2] CC Docket 99-295, *In the Matter of Application by Bell Atlantic-New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York,* December 21, 1999 *Memorandum Opinion and Order,* fn. 1320.

[3] *See BellSouth,* 299 F.3d at 1280-82; *Trinko,* 305 F.3d at 109-110; *Verizon New Jersey, Inc. v. Ntegrity Telecontent Services, Inc.*, 219 F. Supp. 2d 616, 630 (D.N.J. 2002) (noting that "[i]t is abundantly clear that implied immunity is not created simply because a plaintiff's claims might also arise under the Telecommunications Act"); *Ohio Bell Telephone Co. v. Corecomm. Newco, Inc.*, 214 F. Supp. 2d 810, 817 (N.D. Ohio 2002) (finding that "it is possible to give effect to both" the Sherman Act and the 1996 Act); *Stein v. Pacific Bell Tel. Co.*, 173 F. Supp. 2d 975 (N.D. Cal. 2001). *See generally* Megan Delany, Comment, "The Dominos of *Goldwasser*: Only Congress Can Stop the Toppling Effect Before the Game is Over," 10 *Commlaw Conspectus* 279, 285-86, 294-95 (2002) (discussing statutory precedents adopted by Congress to preserve the operation of the antitrust laws, and the legislative history underlying the savings provisions in the 1996 Act).

separation of powers principles. *See* 2A Norman J. Singer, *Statutes and Statutory Construction* § 45.05 at 25 (6th ed. 2000) (noting that the construct of "legislative intent" assumes an obligation to construe statutes so that they carry out the will, real or attributed, of the lawmaking branch of the government mandated by principles of separation of powers"); *see also id.* § 46.04 at 135. Thus, when a court is called on to determine whether a subsequently enacted, but textually equivocal, law supercedes or otherwise modifies pre-existing law, the court may imply displacement of the earlier law from those expressions of the legislature's intent that do exist. On the other hand, where, as here, Congress *has* expressed its intent in the language of the subsequently enacted law itself, the court's responsibility is to give effect to that statutory language. *See, e.g., United States v. Turkette*, 452 U.S. 576, 580 (1981) (where "statutory language is unambiguous" the courts ordinarily should regard that language as "conclusive"). To engage nonetheless in an implied immunity inquiry would disserve the very separation of powers considerations that the implied immunity doctrine is designed to recognize.[4]

These principles apply with particular force in the antitrust context. The Supreme Court has held that "[r]epeals of the antitrust laws by implication of a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963) (footnotes omitted). As this Court noted in *Hecht v. Pro-Football, Inc.*, 444 F.2d 931, 943-44 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), "Congress knows how to spell out an exemption from the antitrust law when it wants to do so." In the 1996 Act, Congress did exactly the opposite. *See*

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[4] *See generally* 1A Norman J. Singer, *Statutes and Statutory Construction*, § 23.9 at 467-70 (6th ed. 2002) (legislative intent "may establish or deny a repeal by implication"); *United States v. Borden Co.*, 308 U.S. 188 (1939) (express provisions established the extent of antitrust immunity).

also Hearing of the House Judiciary Committee on Congressional Oversight of the Department of Justice (June 6, 2001) (testimony of Attorney General John Ashcroft, regarding the decision by the Department of Justice and the Federal Communications Commission to file an appellate brief in the Eleventh Circuit, supporting reversal in *Covad Communications Co. v. BellSouth, Corp.*, No. 1:00-CV- 3414 (N.D. Ga. July 2001). "Congress expressed its will and intent with very substantial clarity" that the antitrust laws "would remain in place," and "we felt it was very important that the department again reiterate what the Congress had explicitly, in our judgment, made clear in the 1996 act"). [5]

In *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260 (3rd Cir. 1994), the Third Circuit held that the antitrust savings clause in the Public Utility Regulatory Policies Act applied to preserve operation of the state action doctrine. In the court below, Bell Atlantic relied on *Yeager*, by analogy, to argue that the 1996 Act savings provision includes the implied immunity doctrine. But the analogy is wrong. The purpose of the state action doctrine is to reconcile the federal antitrust laws to principles of federalism, which recognize that a state may exercise its sovereign authority in ways that replace a regime of competition with one of state regulation. An antitrust savings clause necessarily includes this limitation on the federal antitrust laws' substantive scope. By contrast, the purpose of the implied immunity doctrine — a principle of statutory

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[5] *See generally Nat'l Geremedical Hosp. & Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1981); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-75 (1973) (holding that, although the FPC had the power to compel an electric utility company to permit competitors in retail markets for electricity to use its distribution facilities, utility company's refusal to permit such use was also subject to antitrust scrutiny); IA Areeda and Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 243, at 57 (1997) ("Areeda & Hovenkamp, *Antitrust Law*") ("Clearly no repugnancy exists between a regulatory regime and antitrust policy when enforcing the latter would support the former").

construction not unique to antitrust — is to fill a gap left by Congress in enacting subsequent legislation. Where Congress leaves no gap, there is no reason to invoke the doctrine. Indeed, separation of powers considerations preclude doing so. *See, e.g., Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress;" footnote omitted).

POINT II

THE ALLEGATIONS OF COVAD'S COMPLAINT CANNOT BE RESOLVED ON A MOTION TO DISMISS, BUT MUST INSTEAD BE ASSESSED ON A DEVELOPED FACTUAL RECORD

Covad's antitrust claims invoke Section 2 of the Sherman Act, which prohibits monopolization and attempted monopolization. "A firm violates Section 2 only when it acquires or maintains, or attempts to acquire or maintain, a monopoly by engaging in exclusionary conduct, 'as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C.Cir. 2001) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966)). In holding that Covad's complaint failed to state a claim under Section 2, the district court conducted no sustained antitrust analysis, relying instead on *Goldwasser*. This was error.

A. The Complaint Pleads A Section 2 Violation

Covad alleges that Bell Atlantic possesses monopoly power "in all relevant local telecommunications services markets." Cmplt. ¶ 215. Covad further pleads that Bell Atlantic controls local exchange network facilities which alone can practicably provide necessary inputs for competitors in various "downstream" markets — specifically, internet access, landline local voice

and long distance access markets — and that new competitors cannot reasonably duplicate such facilities. According to Covad, despite the 1996 Act, Bell Atlantic has foreclosed meaningful competition in these downstream markets through a campaign calculated to obstruct competitors' access to local exchange network facilities and to raise their costs to use those facilities.[6] Covad also alleges that Bell Atlantic engaged in conduct that would have *no* business justification other than its anticompetitive effect. For example, Bell Atlantic allegedly: (1) engaged in inexplicable delays when its cooperation was necessary to permit Covad access to local exchange network facilities; (2) falsely reported that there was no available space for collocation in its facilities; and (3) required Covad to construct unnecessary facilities as a condition for collocation of Covad's equipment.

Whether conceptualized under a "refusal to deal" or "essential facitilities" theory of liability, Covad has plead exclusionary conduct that violates Section 2 of the Sherman Act. Indeed, this and other courts have applied the "essential facilities" doctrine to allegations substantially the same as those plead by Covad — specifically, an alleged refusal by a monopolist to permit competitors to interconnect to the monopolist's local distribution network facilities. *See, e.g., Southern Pacific Communications Co., Inc. v. AT&T Co.,* 740 F.2d 980 (D.C. Cir. 1984); *MCI Communications Corp. v. AT&T Co.,* 708 F.2d 1081 (7th Cir. 1983).

Thus, in *Southern Pacific*, after reviewing plaintiffs' charges that certain refusals to permit interconnection violated Section 2, this Court ruled:

Each of the above charges is based on the theory that the Bell operating

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[6] *See Verizon Communs., Inc. v. FCC*, 535 U.S. 467, 122 S.Ct. 1646, 1662 (2002) (explaining why "[i]t is easy to see why a company that owns a local exchange . . ., would have an almost insurmountable competitive advantage not only in routing calls within the exchange, but, through its control of this local market, in the markets for terminal equipment and long-distance calling as well").

> companies local distribution facilities are "essential facilities." By using its control over access to these essential facilities, AT&T had the ability to extend its natural monopoly power in the market for local public switched telephone service to the competitive market for intercity private line service. The antitrust laws therefore prohibit AT&T from unreasonably and discriminatorily prohibiting access to these essential facilities.

740 F.2d at 1008 (internal citations omitted). Similarly, in *MCI*, the Seventh Circuit held that because "AT&T had complete control over the local distribution facilities that MCI required, . . . [T]he interconnections were essential for MCI to offer [competitive private line services]. The facilities in question met the criteria of 'essential facilities' in that MCI could not duplicate Bell's local facilities." 708 F.2d at 1133.

In this action, absent either discovery or judicial scrutiny of the evidence, there is no basis for concluding that Covad could not prove unlawful "exclusionary" conduct in violation of Section 2. *See generally Eastman Kodak Co. v. Image Technical Serv's, Inc.*, 504 U.S. 451, 467 (1992)(instructing that courts should "resolve antitrust claims on a case-by-case basis, focusing on the particular facts disclosed by the record"); *Microsoft*, 253 F.3d at 58-59 (in identifying unlawful "exclusionary conduct," the emphasis should be on the conduct's probable competitive consequences, which requires a balancing of anti-competitive effects against pro-competitive justifications); O*lympic Equipment Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986) (Posner, J.) (construing *Aspen Skiing* as standing for the proposition that "a monopolist may be guilty of monopolization if it refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition"), *cert. denied*, 480 U.S. 934 (1987).

This analysis does not require an "expansion of antitrust law" to encompass duties which arise solely under the 1996 Act, as the court below concluded. *Covad*, 201 F. Supp. 2d at 131. The Amici States agree with the court below that the 1996 Act savings clauses neither contract nor

expand the antitrust laws. At the same time, the fact that conduct occurs in the context of activity associated with 1996 Act obligations does not itself preclude such conduct from also constituting unlawful monopolization under Section 2. If it did, the savings clauses themselves would be meaningless.

B. The District Court Misapplied This Court's Test for Exclusionary Conduct and Gave Improper Preclusive Effect to the Fact of Regulation

The district court recognized, but misapplied, this Court's test for determining exclusionary conduct for Section 2 purposes, set forth in *Microsoft*, 253 F.3d at 58-59. The court below erred not by recognizing that the fact of regulation under the 1996 Act *may* affect whether particular conduct is ultimately found to be exclusionary, but rather by investing the statute with a preclusive effect that it simply cannot have on a motion to dismiss.

The district court concluded that, because of regulatory arrangements established by the 1996 Act — including state regulatory and FCC oversight of interconnection agreements entered into pursuant to the Act — Bell Atlantic's alleged conduct could not be unlawfully exclusionary. In the court's words: "[i]n this setting, there can be no significant harm to competition or anticompetitive effect *as a matter of antitrust law . . . .*" *Covad*, 201 F. Supp. at 132 (emphasis added).

But as noted earlier, the clear congressional directive in the 1996 Act establishes that the existence of 1996 Act regulation, standing alone, does not trump otherwise actionable allegations of exclusionary conduct. *See Point I, supra.* Moreover, even putting aside the unambiguous saving clause, the mere fact of regulation here, without more, provides no warrant to oust antitrust laws. *Phonetele, Inc. v. AT&T Co.*, 664 F.2d 716, 729 (9th Cir. 1981) (Kennedy, J.) ("Antitrust immunity is not conferred by the bare fact that defendants' activities might be controlled by an agency having broad powers over their conduct. There is no general presumption that Congress intends the antitrust

laws to be displaced whenever it gives an agency regulatory authority over an industry"); *United States v. AT&T,* 461 F.Supp. 1314, 1128 (D.D.C. 1978) (Greene, J.) ("It would be a gross misconception. . . to equate the instant statutory scheme. . .with the kind of explicit regulation endorsing industry conduct which the Supreme Court has held in relatively few instances to be inconsistent with antitrust enforcement.")

In this case, the exclusionary effects analysis mandated by controlling precedent can only properly be performed on a fully developed factual record. In attempting to short-cut that analysis on a motion to dismiss, the court below erred.

C. The District Court May Properly Take Regulation Into Account On A Developed Record

Though Congress did not intend the 1996 Act to confer broad antitrust immunity for conduct by ILECs, it does not follow that the statute's regulatory regime lacks significance for antitrust law purposes. As the leading commentators have reminded, "even when conduct is not exempt from antitrust laws, regulation of a market can bear heavily on the application of antitrust principles...." IA Areeda & Hovenkamp, *Antitrust Law* ¶ 240(d) at 15, 17; *MCI Communication Corp. v . AT&T Co.*, 708 F.2d 1081, 1105-09 (7th Cir. 1983) (discussing significance of regulation in consideration of antitrust claims against regulated common carriers). Thus, as this litigation develops on remand, the court may appropriately take into account the regulatory scheme in assessing whether particular Bell Atlantic acts were unlawfully exclusionary. But the specific ways in which 1996 Act regulation might inform the analysis of Bell Atlantic's conduct can only be tentatively forecast at this stage, rather than definitively assessed.

For example, continued regulation of Bell Atlantic's wholesale and retail rates for local exchange services — which Bell Atlantic is alleged to have monopolized — may be relevant to

appraising Covad's claims that Bell Atlantic unlawfully obstructed Covad's entry into adjacent markets. "A monopolist who lawfully operates in a regulated market monopoly and in a related market that can be competitive should not be allowed to deny rivals in the competitive market access to the monopoly market. . . . The 'essential facility' doctrine may have some relevance in regulated monopolies when it serves to limit the monopolist's power to expand the monopoly into 'adjacent' unregulated (or less regulated) markets." IIIA Areeda & Hovenkamp, *Antitrust Law*, ¶ 787c1.

Or, to take another example, 1996 Act regulation may be relevant to determining whether Bell Atlantic can prove a legitimate business purpose for specific, allegedly exclusionary, acts. As the Ninth Circuit wrote in *Phonetele*, "[i]f a defendant can establish that, at the time the various anticompetitive acts alleged here were taken, it had a reasonable basis to conclude that its actions were necessitated by concrete factual imperatives recognized as legitimate by the regulatory authority, then its actions did not violate the antitrust laws." *Phonetele*, 664 F.2d at 737-38; *see also Mid-Texas Communications Systems, Inc. v. AT&T Co.*, 615 F.2d 1372, 1389-90 (5th Cir. 1980); IA Areeda & Hovenkamp, *Antitrust Law*, ¶ 246 at 98-102.

Applying principles such as these should enable the court on remand to achieve the accommodation between the antitrust laws and the 1996 Act that Congress envisioned when it directed both statutory schemes to be used to promote competition in telecommunications markets. The salient point for this appeal, however, is that a developed factual record is essential if the district court is to properly discharge its responsibility to define the interplay between 1996 Act regulation and the antitrust laws, within which the lawfulness of Bell Atlantic's alleged conduct must be determined. The Second and Eleventh Circuits recognized this in *Trinko* and *BellSouth*. By contrast, the district court here incorrectly prejudged these matters on the bare pleadings.

CONCLUSION

The district court erred in dismissing Covad's complaint. This Court should reverse the district court's order dismissing the complaint and remand this case for further proceedings.

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Pursuant to Fed. R. App. P. 32(a)(7)(C) and Cir. R. 32(a)(4), the undersigned attorney hereby certifies that this brief complies with the type-volume limitation in Cir. R. 32(a)(4). The word processing system used to prepare this brief reflects that, excluding the portions of the brief permitted to be excluded under Fed. R. App. P. 32(a)(7)(B)(iii) and Cir. R. 32(a)(2), the brief contains 5345 words.

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Covad Communications Co. v. Bell Atl. Corp.,
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**Covad Communications Co. v. BellSouth Corp.*,
299 F.3d 1272 (11th Cir. 2002) 5, 6, 8 n.1

Eastman Kodak Co. v. Image Technical Serv's, Inc.,
504 U.S. 451 (1992) 12

Goldwasser v. Ameritech Corp.,
222 F.3d 390 (7th Cir. 2000) 4, 5, 10

Hecht v. Pro-Football, Inc.,
444 F.2d 931 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972) 10

**Law Offices of Curtis V. Trinko, L.L.P v. Bell Atlantic Corp.*,
305 F.3d 89 (2nd Cir. 2002), *petition for certiorari pending,*
No. 02-682 (U.S. docketed Nov. 5, 2002) 5, 6, 8 n.1

MCI Communications Corp. v. AT&T Co.,
708 F.2d 1081 (7th Cir. 1983) 11, 14

Mid-Texas Communications Systems, Inc. v. AT&T Co.,
615 F.2d 1372 (5th Cir. 1980) 15

Nat'l Geeremedical Hosp. & Gerontology Center v. Blue Cross,
452 U.S. 378 (1981) 10

Ohio Bell Telephone Co. v. Corecomm. Newco, Inc.,
214 F. Supp. 2d 810 (N.D. Ohio 2002) 8

Olympic Equipment Leasing Co. v. Western Union Tel. Co.,
797 F.2d 370 (7th Cir. 1986) 12

Otter Tail Power Co. v. United States,
410 U.S. 366 (1973) 10

---

* Authorities chiefly relied upon are marked with an asterisk.

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Phonetele, Inc. v. AT&T Co.,
664 F.2d 716 (9th Cir. 1981) 13, 15

Southern Pacific Communications Co., Inc. v. AT&T Co.,
740 F.2d 980 (D.C. Cir. 1984) 11

Stein v. Pacific Bell Tel. Co.,
123 F. Supp. 2d 975 (N.D. Cal. 2001) 8

United States v. AT&T Co.,
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United States v. Borden Co.,
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United States v. Grinnell Corp.,
384 U.S. 563 (1966) 10

**United States v. Microsoft Corp.*,
253 F.3d 34 (D.C.Cir. 2001) 10, 12

United States v. Philadelphia Nat'l Bank,
374 U.S. 321 (1963) 9

United States v. Turkette,
452 U.S. 576 (1981) 9

Verizon Communs., Inc. v. FCC,
535 U.S. 467, 122 S.Ct. 1646 (2002) 12

Verizon New Jersey, Inc. v. Ntegrity Telecontent Services, Inc.,
219 F. Supp. 2d 616 (D.N.J. 2002) 8

Wilson v. Pena,
79 F.3d 154 (D.C. Cir. 1996) 5

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FEDERAL STATUTES

Sherman Act § 2,
15 U.S.C. § 2 . . . . . 4, 11
Telecommunications Act of 1966 Pub. L. 104-104,
110 Stat. 56 § 601, 47 U.S.C. § 152 . . . . . 6, 7

LEGISLATIVE MATERIALS

H.R. Conf. Rep. 104-458, 104th Cong.,
2d Sess. (1996) 7

ADMINISTRATIVE MATERIALS

Application By Bell Atlantic-New York For Authorization
To Provide In-Region, InterLATA Services In New York,
filed September 29, 1999, at 71 8

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Authorization Under Section 271 of the Communications
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State of New York, December 21, 1999 Memorandum Opinion
and Order, fn. 1320 8

MISCELLANEOUS

Phillip Areeda and Herbert Hovenkamp, *Antitrust Law:*
Antitrust Principles and Their Application (1997)
Vol. IA, ¶ 240(d) 14
Vol. IA, ¶ 243 10
Vol. IA, ¶ 246 15
Vol. IA, ¶ 787c1. 14

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Megan Delany, Comment, "The Dominos of *Goldwasser*:
Only Congress Can Stop the Toppling Effect Before
the Game is Over," 10 *Commlaw Conspectus* 279, 285-86, 294-95 (2002) 8

Norman J. Singer, *Statutes and Statutory Construction*
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