No. 01-16064-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COVAD COMMUNICATIONS CO. and DIECA COMMUNICATIONS, INC.
d/b/a COVAD COMMUNICATIONS, CO.,
Plaintiffs-Appellants,

v.

BELLSOUTH CORP. and BELLSOUTH TELECOMMUNICATIONS, INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION AS AMICI CURIAE

CHARLES A. JAMES
Assistant Attorney General

R. HEWITT PATE
Deputy Assistant Attorney General

JOHN ROGOVIN
Deputy General Counsel

LINDA KINNEY
Associate General Counsel

JOHN E. INGLE
Deputy Associate General Counsel
Federal Communications Commission
Washington, D.C. 20554

CATHERINE G. O'SULLIVAN
NANCY C. GARRISON
Attorneys
U.S. Department of Justice
Antitrust Division
601 D Street, N.W.
Washington, D.C. 20530
(202) 514-1531

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COVAD COMMUNICATIONS CO. and DIECA COMMUNICATIONS, INC. d/b/a COVAD COMMUNICATIONS CO., *Plaintiffs/Appellants,*	)	NO. 01-16064
v.	)	**CERTIFICATE OF INTERESTED PERSONS**
BELLSOUTH CORP. and BELLSOUTH TELECOMMUNICATIONS, INC., *Defendants/Appellants.*	)	

The undersigned, counsel for the United States, certifies pursuant to Fed. R. App. P. 26.1 and Rule 26.1-1 of this Court that, to the best of her knowledge and based on appellants' certificate of interested persons, the following is a complete list of persons and entities who have an interest in the outcome of this case:

Alexis, Geraldine M.

BellSouth Corporation

BellSouth Telecommunications, Inc.

BlueStar Communications, Inc.

BlueStar Communications Group, Inc.

BlueStar Networks, Inc.

Boone, Catherine F.

Clay, A. Stephens

Covad Canada Communications, Inc.

Covad Communications Company

Covad Communications GmbH

Covad Communications Group, Inc.

Covad Communications International B.V. (The Netherlands)

Covad Communications Investment Corp.

Covad Europe Sarl (Luxembourg)

Covad France

DIECA Communications, Inc.

Garrison, Nancy C.; Counsel for Amicus United States

Hansen, Mark C.

Hinman, Frank M.

Ingle, John E.; Counsel for Amicus Federal Communications Commission

James, Charles A.; Counsel for Amicus United States

Kellogg, Huber, Hansen, Todd & Evans

Kellogg, Michael K.

Kilpatrick Stockton LLP

Kinney, Linda; Counsel for Amicus Federal Communications Commission

Lightsaber Acquisition Co., d/b/a/ Covad Integrated Services

Loop Holdings Europe ApS (Denmark)

Martin, The Honorable Beverly B.

McCutchen, Doyle, Brown & Enersen, LLP

Myers, Kimberly L.

O'Sullivan, Catherine G.; Counsel for Amicus United States

Panner, Aaron M.

Pate, R. Hewitt; Counsel for Amicus United States

Patton, Matthew H.

Pfeiffer, Alfred C., Jr.

Powers, Tony G.

Robbins, Margaret

Rogers & Hardin LLP

Rogovin, John; Counsel for Amicus Federal Communications Commission

Sonnenberg, Brad

Walker, J. Henry

Yurasek, Jason A.

NANCY C. GARRISON

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS

TABLE OF AUTHORITIES

INTEREST OF THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION 1

STATEMENT OF THE ISSUE 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 9

ARGUMENT 12

I. THE TELECOMMUNICATIONS ACT OF 1996 DOES NOT PRECLUDE APPLICATION OF THE ANTITRUST LAWS TO EXCLUSIONARY CONDUCT BY AN INCUMBENT PROVIDER OF LOCAL TELECOMMUNICATIONS SERVICES 12

A. The 1996 Act Expressly Provides That It Creates No Antitrust Immunity 12

B. The Regulatory Framework of the 1996 Act Creates No Basis for Implied Antitrust Immunity 15

1. Implied Antitrust Immunities Are Disfavored and Strictly Limited 17

2. There is No Clear Repugnancy Between the Sherman Act and the Telecommunications Act of 1996 18

II. THE DISTRICT COURT FAILED TO DETERMINE WHETHER COVAD'S COMPLAINT STATES A CLAIM UNDER THE APPLICABLE SHERMAN ACT STANDARDS . . . 24

CONCLUSION 28

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

*Authorities upon which amici primarily rely are marked with an *.

Cases: **Page**

AT&T Wireless PCS, Inc. v. City of Atlanta, 210 F.3d 1322 (11th Cir. 2000), *vacated on other grounds*, 223 F.3d 1324 (11th Cir. 2000), *reinstated* 250 F.3d 1307 (11th Cir. 2001), *vacated on reh'g en banc*, 260 F.3d 1320 (11th Cir. 2001), *appeal dismissed*, 264 F.2d 1314 (11th Cir. 2001) 12-14

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) 25, 26

Brunswick Corp. v. Pueblo Bowl-O-Mat Inc., 429 U.S. 477 (1977) 25

Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966) 18, 23

Essential Communications Systems, Inc. v. AT&T, 610 F.2d 1114 (1979) 23

Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000) . . . . . *passim*

Gordon v. New York Stock Exch., 422 U.S. 659 (1975) 18

Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) 26-27

J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred International, Inc., 2001 WL 1560870 (U.S. Dec. 10, 2001) 17

MCI Communications v. AT&T, 708 F.2d 1081 (7th Cir. 1983) 14, 23, 25

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) 24

Morton v. Mancari, 417 U.S. 535 (1974) 17

Nat'l Gerimedical Hosp. & Gerontology Center v. Blue Cross, 452 U.S. 378 (1981) 17, 18

Olympia Equip. Leasing Co. v . *W. Union Tel. Co.*, 797 F.2d 370 (7th Cir. 1986) 24

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

Phonetele, Inc. v. AT&T, 664 F.2d 716 (9th Cir. 1981) 14, 21, 22

Square D Co. v. Niagara Frontier Tariff Bureau Inc., 476 U.S. 409 (1986) 17

United States v. AT&T, 524 F. Supp. 1336 (D.D.C. 1981) 25

United States v. AT&T, 461 F. Supp. 1314 (D.D.C. 1978) 14

United States v. Griffith, 334 U.S. 100 (1948) 24

United States v. Nat'l Ass'n of Sec. Dealers, 422 U.S. 694 (1975) 21

Statutes:

Sherman Act, § 2, 15 U.S.C. 2 . . . . . passim

Communications Act of 1934

47 U.S.C. 251. 12-13

47 U.S.C. 252 13

47 U.S.C. 253 13

47 U.S.C. 271 15

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 . . . . . passim

Preamble, 110 Stat. 56 12

* Title VI, § 601(b)(1), 110 Stat. 143 . . . . . passim

Title VI, § 601(c)(1), 110 Stat. 143 13

Other Authorities:

3 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW (1996) 25-26

H.R. CONF. REP. NO. 104-458 (1996) 14

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 61 Fed. Reg. 45476 (1996) 15

Brief in Support of Second Application by BellSouth for Provision of In-Region, InterLATA Services in Louisiana (July 9, 1998) 15

No. 01-16064-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COVAD COMMUNICATIONS CO. and DIECA COMMUNICATIONS, INC.
d/b/a COVAD COMMUNICATIONS, CO.,
Plaintiffs-Appellants,

v.

BELLSOUTH CORP. and BELLSOUTH TELECOMMUNICATIONS, INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION AS AMICI CURIAE

INTEREST OF THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

The United States has primary responsibility for enforcing the federal antitrust laws. The Federal Communications Commission has primary responsibility for enforcing the Communications Act of 1934, as amended by the Telecommunications Act of 1996.[1] The United States and the FCC thus have a mutual interest in

---

[1]Pub. L. 104-104, 110 Stat. 56 ("1996 Act").

ensuring that the Communications Act and the Sherman Act are properly interpreted so that regulated telecommunications carriers also remain subject to the antitrust laws, as Congress provided in the 1996 Act. The United States and the FCC believe it is essential that the developing case law reflect the Congressional intent that enforcement of the 1996 Act complement rather than displace the Sherman Act, affording the public the benefits of all the tools Congress has chosen to protect and foster competition in telecommunications markets.

STATEMENT OF THE ISSUE

The United States and the FCC will address the following issue:

Whether the Telecommunications Act of 1996 precludes application of Section 2 of the Sherman Act, 15 U.S.C. 2, to allegations that an incumbent local exchange carrier has monopolized or attempted to monopolize a market for local telecommunications services through anticompetitive conduct that may also be subject to the 1996 Act.

STATEMENT OF THE CASE

Covad's Complaint. Appellant Covad's complaint in this case alleges, *inter alia*, that BellSouth violated Section 2 of the Sherman Act, unlawfully maintaining monopoly power in "the Local Internet Access Markets in the BellSouth Region"

(Compl. ¶¶ 45, 111, 115[2]) by denying Covad reasonable access to network facilities over which BellSouth has a monopoly ((Compl. ¶¶ 12-13 ("the market for central offices, loops, transport and other equipment necessary to make local telephone connections")). Covad alleges that it seeks to provide internet access service in competition with BellSouth and that its internet access service package is superior in price and performance to BellSouth's competing services. (Compl. ¶14.) However, "[b]ecause Covad's market entry and service offerings pose a real threat to BellSouth's monopoly power in the Local Internet Access Markets in the BellSouth Region, . . . BellSouth has engaged in a wide variety of unlawful, exclusionary and anticompetitive acts with the intent and inevitable effect of injuring, thwarting or eliminating Covad as an actual or potential competitor." (Compl. ¶ 45.)

Covad claims that "BellSouth controls the facilities necessary for any CLEC [competitive local exchange carrier] to provide [internet access] services" (Compl. ¶ 110), "feasibly could have granted Covad access to these facilities and, indeed, promised to do so" (Compl. ¶ 111). Covad and BellSouth entered into an interconnection agreement, as required by Sections 251 and 252 of the 1996 Act, 47 U.S.C. 251, 252. (Compl. ¶ 30.) But, Covad alleges, "BellSouth . . . with the intent . . . to maintain and extend its monopoly power and position in the Local Internet

[2]The Complaint, R1-1, is reproduced in Appellant Covad Communica-tions Co.'s Record Excerpts (RE) at RE-7-67.

Access Markets, . . . continues to deny Covad access to . . . parts of BellSouth's network that Covad requires to provide its services." (Compl. ¶¶ 111, 115.) Covad specifies numerous ways BellSouth has engaged in alleged anticompetitive conduct; several of the allegations are detailed discussions of duties imposed by the 1996 Act and BellSouth's alleged failures to meet them. (*See* Compl. ¶¶ 45-95.) As a result of BellSouth's actions, Covad alleges, "competition in the relevant markets has been injured [,] Covad has been damaged [, and] BellSouth continues to dominate these markets . . . to the detriment of consumers and competition." (Compl. ¶¶ 112, 115, 116.) Covad contends that this course of conduct violates Section 2 of the Sherman Act. (Compl. ¶¶ 108-120.)[3] Covad seeks damages, but not injunctive relief. (Compl. Prayer for Relief.)

BellSouth's Motion to Dismiss. BellSouth moved to dismiss the complaint, arguing that Covad's antitrust claims were "squarely barred by the 1996 Act as construed and applied in the Seventh Circuit's recent decision in *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000)." Defendants BellSouth Corporation's and BellSouth Telecommunications, Inc.'s Memorandum of Law in Support of Their Motion to Dismiss at 1 (Feb. 5, 2001). BellSouth argued that

[3]Covad also alleges that BellSouth's anticompetitive conduct constitutes attempted monopolization (Compl. ¶¶ 117-120) and that it violates the Communications Act (Comp1. ¶¶ 121-123) and state law (Compl. ¶¶ 124-242).

because "each of Covad's allegations concerning access to BellSouth's network implicates a duty that is specifically addressed by the 1996 Act and the FCC's implementing regulations," those allegations "do not amount to a claim of 'exclusionary conduct' for purposes of Section 2." *Id*. at 15-16; s*ee also*, *id*. at 21. BellSouth further argued that Covad's Sherman Act claims are foreclosed by the pervasive regulatory scheme established by the 1996 Act, which would be "undermined" by antitrust litigation. *Id*. at 12-14.

In response, Covad emphasized that it was *not* arguing that violations of the 1996 Act necessarily violate the antitrust laws. Rather, it contended that "the exclusionary conduct Covad alleges in its complaint is exactly the sort antitrust law condemns as anticompetitive," "irrespective of the Telecom Act." Opposition to Motion To Dismiss Complaint at 16-17 (Feb. 26, 2001) ("Opp."). BellSouth acknowledged that "Covad 'seeks the opportunity to prove' that these 1996 Act violations also 'violate[] existing antitrust law.'" Defendants BellSouth Corporation's and BellSouth Telecommunications, Inc.'s Reply in Support of Motion To Dismiss Covad's Complaint at 5 (Mar. 19, 2001) ("Reply") (quoting Covad Opp. at 26). BellSouth argued, however, that "this is precisely what *Goldwasser* forbids." *Id*. The "'principal holding'" of *Goldwasser* is that "'the 1996 Act imposes duties on the ILECs that are not found in the antitrust laws,'" and "the 1996 Act's 'affirmative duties to help one's competitors . . . do not exist under

the unadorned antitrust laws.'" *Id*. at 4 (quoting 222 F.3d at 400-01). Thus, BellSouth argued, Covad "ha[d] not *alleged* an antitrust claim at all, because, *as a matter of law*, failure to adhere to the 1996 Act's sharing requirements does not constitute exclusionary conduct." *Id*. at 5.

The District Court's Order. The district court granted BellSouth's motion to dismiss as to most of Covad's antitrust claims. Order (July 6, 2001).[4] The court "agree[d] with the *Goldwasser* court" that "antitrust claims which allege[d] exclusionary conduct arising from the failure to perform duties under the 1996 Act" should be dismissed. *Id*. at 24. The district court noted that the 1996 Act imposes on incumbent local exchange carriers certain affirmative duties to provide interconnection and access to network elements. *Id*. The court acknowledged that the 1996 Act also "contains specific language about its relation to the federal antitrust laws," expressly providing that "nothing in the [1996 Act] shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.'" *Id*. at 13 (quoting 1996 Act, §601(b)(1)).

Nonetheless, the district court quoted and apparently applied the *Goldwasser* court's statement that, despite this express savings clause, "'the elaborate enforcement structure' of the 1996 Act precludes suits under the Sherman Act for

[4]The Order, R3-25, is reproduced at RE 68-110.

ILEC [incumbent local exchange carrier] duties because 'antitrust laws would add nothing to the oversight already available under the 1996 law.'" Order at 15 (quoting 222 F.3d at 400-01). The court did not identify any conflict between the 1996 Act and the antitrust laws. To the contrary, it quoted the Seventh Circuit's observation in *Goldwasser* that while "the 1996 Act 'imposes duties on ILECs that are not found in the antitrust laws,'" these duties under the 1996 Act "'do not conflict with the antitrust laws either, they are simply more specific and far-reaching obligations that Congress believed would accelerate the development of competitive markets.'" Order at 15 (quoting 222 F.3d at 401). But the court also quoted the *Goldwasser* court's conclusion that the 1996 Act is "'more specific legislation that must take precedence over the general antitrust laws, where the two are covering precisely the same field.'" Order at 17 (quoting 222 F.3d at 401). Thus, although the court did not precisely articulate the standard it would apply to Covad's complaint, it appeared to draw from *Goldwasser* a rule requiring dismissal of any antitrust claim "'inextricably linked to the claims under the 1996 Act'" rather than "'divorced from [the] 1996 Act context'" and "'freestanding.'" *See* Order at 16-17 (quoting 222 F.3d at 401).[5]

[5]The court noted but rejected the arguments advanced by the United States and the Federal Communications Commission in an amicus brief filed in *Intermedia Communications, Inc. v. BellSouth*, No. 01-10224-JJ (11th Cir.), *dismissed,* Aug. 3, 2001. *See* Order at 24.

Turning to the allegations in Covad's complaint, the district court acknowledged that, in some circumstances, a monopolist's unilateral refusal to deal may violate the antitrust laws. Order at 21-22. Although Covad had argued that its Sherman Act claims were *not* based on the theory that violations of the 1996 Act automatically constitute antitrust violations, the district court characterized Covad's allegations that BellSouth had denied competitors access to essential facilities as "aris[ing] from BellSouth's duties under the 1996 Act and Covad's interconnection agreement with BellSouth." Order at 23. The alleged denials of access, the court said, without further explanation, "clearly represent affirmative duties which are above and beyond the requirements of the Sherman Act." *Id*. at 24.

The Court also found Covad's allegation that BellSouth had intentionally delayed processing Covad orders "'inextricably linked' with BellSouth's duties under the 1996 Act," and held that it therefore failed to state a claim under Section 2 of the Sherman Act. Order at 25 (quoting *Goldwasser*). And the court dismissed Covad's price squeeze allegations "for the same reasons that its essential facilities allegations fail," *i.e.*, because they were "intertwined with" and "related to BellSouth's duties under the 1996 Act." Order at 26-28 & n.14. Similarly, the district court found claims based on misappropriation of customer information to be "included under the 1996 Act" and, for that reason, not properly the basis for an antitrust action. Order at 30. It let stand Covad's "monopoly leveraging"

allegations only to the extent they were based on "misleading advertising and other activities not implicated by the 1996 Act," rather than on "BellSouth's failure to permit collocation to competitors." Order at 33-34. In contrast, the court expressed skepticism about, but did *not* dismiss, allegations regarding "predatory advertising and promotion," finding that "these allegations could be considered 'freestanding antitrust claims' outside the coverage of the 1996 Act." Order at 29-30.[6]

In order to permit appeal of the dismissed claims, which were the crux of its antitrust case, Covad voluntarily dismissed those few claims or portions of claims as to which the district court had denied BellSouth's motion. Final judgment was entered on October 11, 2001, and Covad appealed.

SUMMARY OF ARGUMENT

1. Congress intended the Telecommunications Act of 1996 to foster competition in all telecommunications markets. In addition to imposing new obligations on incumbent local exchange carriers to open their markets to competition, Congress clearly provided that the 1996 Act does not repeal or limit the Sherman Act's application to anticompetitive conduct in telecommunications

[6]One allegation, relating to BellSouth's delay in providing its own DSL services, was dismissed for failure to state a claim under Section 2, "even disregarding the holding of *Goldwasser*." Order at 25-26, 43. The court's disposition of Covad's antitrust claims under state law largely paralleled disposition of the federal claims. Order at 34, 36, 43. The district court also dismissed Covad's other claims under state law and the 1996 Act. Order at 36-43.

markets. It enacted an express antitrust savings clause, in addition to a general savings clause. Thus, conduct that would have violated the Sherman Act before passage of the 1996 Act is still prohibited by the Sherman Act, whether or not it also violates the 1996 Act.

The United States and the FCC believe it is essential that the developing case law reflect the congressional intent that the 1996 Act complement rather than displace the Sherman Act, affording the public the benefits of all the tools Congress has chosen to foster competition in this critical sector of the economy. Parts of the Seventh Circuit's opinion in *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), however, have created some confusion about the relationship between the federal antitrust laws and the 1996 Act. Incumbent providers of local telecommunications services have argued, as BellSouth did below, that if their alleged conduct is subject to the 1996 Act, or related to obligations under that Act, it cannot also be subject to Sherman Act scrutiny. This position is inconsistent with the 1996 Act's express terms and with the law regarding implied antitrust immunity and statutory repeal.

It is not clear from the district court's order why it dismissed most of Covad's antitrust claims in light of Covad's representation that those claims do *not* rest on any contention that violation of the 1996 Act automatically establishes a Sherman Act violation. It appears, however, that the district court, relying on *Goldwasser*,

erroneously concluded that the 1996 Act creates, in effect, implied antitrust immunity. The court dismissed all antitrust claims that it viewed as based on conduct "inextricably linked to," "intertwined with," "related to," "included under" or "implicated by" the 1996 Act. Order at 25, 28 & n.14, 30, 33. While the court stated that some of the allegations in the claims it dismissed "represent affirmative duties which are above and beyond the requirements of the Sherman Act," Order at 24, it made no effort to explain that conclusion in terms of antitrust analysis; it looked only to the relationship of the alleged conduct to the 1996 Act.

2. The United States and the FCC take no position as to whether Covad's complaint stated a claim under the Sherman Act. It is not true that, as BellSouth apparently argued below, an incumbent monopoly provider of local telecommunications services cannot, as a matter of law, violate the antitrust laws by refusing to provide rivals access to its network on reasonable terms. Under well-established antitrust principles, a monopolist's refusal to deal on reasonable terms with a rival without a legitimate business justification may, in certain circumstances, violate Section 2 of the Sherman Act. The scope of any antitrust duty to deal is limited. Alleged failures to meet the 1996 Act's affirmative obligations, to which many paragraphs of Covad's complaint were devoted, do not in themselves give rise to Sherman Act liability. At the same time, valid claims under the Sherman Act must not be dismissed on the ground that the facts supporting them are "related to"

or "intertwined with" 1996 Act obligations. Accordingly, the district court erred to the extent it dismissed Covad's antitrust claims on such grounds without analyzing them under antitrust standards.

ARGUMENT

I. THE TELECOMMUNICATIONS ACT OF 1996 DOES NOT PRECLUDE APPLICATION OF THE ANTITRUST LAWS TO EXCLUSIONARY CONDUCT BY AN INCUMBENT PROVIDER OF LOCAL TELECOMMUNICATIONS SERVICES

A. The 1996 Act Expressly Provides That It Creates No Antitrust Immunity

As the Seventh Circuit observed in *Goldwasser*, the Telecommunications Act of 1996 was intended to "bring the benefits of deregulation and competition to all aspects of the telecommunications market in the United States, including especially local markets." *Goldwasser*, 222 F.3d at 391. *See also* 1996 Act, pmbl., 110 Stat. 56; *AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3d 1322, 1324 (11th Cir. 2000), *vacated on other grounds*, 223 F.3d 1324 (11th Cir. 2000), *reinstated*, 250 F.3d 1307 (11th Cir. 2001), *vacated on reh'g en banc*, 260 F.3d 1320 (11th Cir. 2001), *appeal dismissed*, 264 F.3d 1314 (11th Cir. 2001). The 1996 Act added a new Part II, 47 U.S.C. 251 *et seq*., entitled "Development of Competitive Markets," to Title II of the Communications Act of 1934. Section 251, 47 U.S.C. 251, requires all telecommunications carriers to interconnect with other carriers, and specifically requires incumbent local exchange carriers to comply with a series of

obligations designed to facilitate entry by competitive local exchange carriers. The Act specifies procedures pursuant to which agreements relating to those obligations are to be negotiated and approved, 47 U.S.C. 252, and facilitates local exchange competition in other ways, including the removal of state and local regulatory barriers to entry, 47 U.S.C. 253.

The 1996 Act contains two provisions expressly stating Congress' intent that the Act *not* create any antitrust immunity. Section 601(c)(1), the general savings clause, provides that "[t]his Act . . . shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided." Pub. L. No. 104-104, Title VI, § 601(c)(1), 110 Stat. 56, 143. Section 601(b)(1) specifically provides that "nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." Pub. L. No. 104-104, Title VI, § 601(b)(1), 110 Stat. 56, 143.

As this Court emphasized in *AT&T Wireless*, 210 F.3d at 1327-28, the plain language of a statute is normally controlling, and Congress is "at liberty to leave other remedial avenues open," even when it provides a comprehensive regulatory scheme through a statute such as the 1996 Act. Thus, in holding that the Act posed no obstacle to recovery under 42 U.S.C. 1983, this Court applied the general savings clause to "forbid[ ] [it] from construing the [1996 Act] to 'modify, impair, or supersede' other laws"; it declined to "second guess the plain meaning of this

language." 210 F.3d at 1328. In light of Congress' decision to include an additional savings clause directed specifically to the antitrust laws, there is even less reason to second guess Congress' decision here.[7]

The legislative history confirms the plain meaning of the savings clauses -- Congress did not intend an implied repeal or limitation of the antitrust laws. The Conference Report notes that an "underlying theme[]" of the 1996 Act is that "the [Federal Communications] Commission should be carrying out the policies of the Communications Act, and the DOJ should be carrying out the policies of the antitrust laws." H.R. CONF. REP. NO. 104-458, at 201 (1996). The Act's savings clauses "prevent[] affected parties from asserting that the [Act] impliedly pre-empts other laws." *Id*.

Understanding that Congress intended the antitrust laws to continue to apply to local telecommunications markets and to complement the 1996 Act's procompetitive deregulatory framework, the FCC has made clear that "nothing in . . . [the FCC's] implementing regulations is intended to limit the ability of persons to

---

[7]Prior to passage of the 1996 Act, courts uniformly held that the Communications Act did not immunize from the antitrust laws regulated carriers' conduct involving a denial of access to the local network. *See, e.g., MCI Communications v. AT&T*, 708 F.2d 1081, 1101-04 (7th Cir. 1983); *Phonetele, Inc. v. AT&T*, 664 F.2d 716, 726-35 (9th Cir. 1981); *United States v. AT&T*, 461 F. Supp. 1314, 1320-30 (D.D.C. 1978). There was thus no pre-1996 implied immunity defense, and the express savings clauses Congress chose to include in the 1996 Act made clear that this fundamental relationship between the Sherman Act and the Communications Act did not change.

seek relief under the antitrust laws." Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 61 Fed. Reg. 45476, 45494 (1996). Indeed, even BellSouth, in seeking authority from the FCC to begin providing long distance service pursuant to the 1996 Act (which requires a showing that its local markets have been opened to competition (*see* 47 U.S.C. 271)), argued that "[a]ll of the Act's and the Commission's specific statutory and regulatory protections are backed up by federal and state antitrust laws." Brief in Support of Second Application by BellSouth for Provision of In-Region, InterLATA Services in Louisiana at 100 (July 9, 1998), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=2106630006.

B. The Regulatory Framework of the 1996 Act Creates No Basis for Implied Antitrust Immunity

Despite the 1996 Act's express savings clause, some incumbent local exchange carriers have argued that the antitrust laws do not apply to any conduct that may be subject to the Act. BellSouth has asserted that it does not seek "implied immunity" in this case. Reply at 20-21. Its argument below and the district court's opinion, however, extensively quoted *Goldwasser*, and the district court apparently applied what amounts to a rule of implied antitrust immunity or repeal for conduct subject to the 1996 Act. There is no basis for such immunity, and the district court

was obligated to assess the merits of Covad's allegations under Sherman Act standards.[8]

The clear language of the 1996 Act's antitrust savings clause makes it unnecessary for the Court to go any farther before rejecting BellSouth's contention that private antitrust actions would somehow "undermine the Act's remedial scheme" (Reply at 15-17). Congress already has determined that the 1996 Act and the antitrust laws are not incompatible. Moreover, the kind of analysis courts have employed where Congress has provided less clear guidance leads inexorably to the same result. The district court erred to the extent it dismissed antitrust claims without considering them under the Sherman Act standards.

---

[8]In this Circuit, an appeal raising a similar issue involving the relationship between the 1996 Act and the antitrust laws was dismissed on the parties' motion prior to argument. *Intermedia Communications, Inc. v. BellSouth Telecommunications Inc.*, No. 01-10224-JJ, *dismissed*, Aug. 3, 2001. As the district court noted, there have been several other district court decisions granting or denying motions to dismiss antitrust actions against incumbent local exchange carriers. *See* Order at 17 n.10. The precise grounds for these decisions are not entirely clear. Some of them appear to have applied a form of antitrust immunity based on *Goldwasser*. Others appear to be based on the court's analysis of whether or not plaintiff had alleged the essential elements of its antitrust claim or presented evidence sufficient to survive summary judgment. Of course, neither *Goldwasser* nor any district court decision binds this Court.

1. Implied Antitrust Immunities Are Disfavored and Strictly Limited

"[E]xemptions from the antitrust laws are . . . strongly disfavored," *Square D Co. v. Niagara Frontier Tariff Bureau Inc.*, 476 U.S. 409, 421 (1986). This well established principle reflects the status of the antitrust laws as a "'fundamental national economic policy.'" *Nat'l Gerimedical Hosp. & Gerontology Center v. Blue Cross*, 452 U.S. 378, 388 (1981) (quoting *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 218 (1966)). It also reflects the cardinal rule of statutory construction that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). As the Supreme Court recently reiterated: "'the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.'" *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 2001 WL 1560870, at *10 (U.S. Dec. 10, 2001) (quoting *Morton v. Mancari*, 417 U.S. at 550).

Accordingly, "'[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.'" *Nat'l Gerimedical*, 452 U.S. at 388 (quoting *United States v. Nat'l Ass'n of Sec. Dealers*, 422 U.S. 694, 719-20 (1975) ("*NASD*")). In particular: "'Repeal is to be regarded as implied only if necessary to

make the [subsequent law] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.'" *Id.* at 389 (quoting *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963)).

In applying these principles, even in the context of heavily regulated industries, the Supreme Court has "refused . . . a blanket exemption, despite a clear congressional finding that some substitution of regulation for competition was necessary." *Nat'l Gerimedical*, 452 U.S. at 392. *See also, e.g.*, *Carnation*, 383 U.S. at 217-19 (declining to find "an unstated legislative purpose to free the shipping industry from the antitrust laws"); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372-74 (1973) (finding no legislative "purpose to insulate electric power companies from the operation of the antitrust laws" despite Federal Power Commission regulation). Instead, to justify immunity, a defendant must convincingly show a "plain repugnancy" between the applicable regulatory scheme and enforcement of the antitrust laws. *E.g., Gordon v. New York Stock Exch.*, 422 U.S. 659, 682 (1975).

2. There Is No Clear Repugnancy Between the Sherman Act and the Telecommunications Act of 1996

In *Goldwasser*, the Seventh Circuit affirmed the district court's dismissal of an antitrust action alleging that an incumbent local exchange carrier violated both

the 1996 Act and Section 2 of the Sherman Act by refusing to interconnect on reasonable terms and otherwise failing to permit entrants access to the incumbent's network. The court held that "the 1996 Act imposes duties on ILECs that are not found in the antitrust laws." 222 F.3d at 401. Plaintiff cannot automatically establish an antitrust violation simply by proving that the defendant failed to comply with the 1996 Act. *Id*. at 400. To this extent, the United States and the FCC believe that the *Goldwasser* court was plainly correct.

The Seventh Circuit disclaimed any holding that the 1996 Act "confers implied immunity on behavior that would otherwise violate the antitrust law," observing that "[s]uch a conclusion would be troublesome at best given the antitrust savings clause in the statute," and that the 1996 Act's "duties do not conflict with the antitrust laws either; they are simply more specific and far-reaching obligations." 222 F.3d at 401. The court concluded, however, that the *Goldwasser* plaintiffs had failed to allege any conduct that could be "divorced from its 1996 Act context such that it states a freestanding antitrust claim"; their allegations that a monopolist controlled and unreasonably refused to provide access to essential facilities "appear[ed] to be inextricably linked to the claims under the 1996 Act." *Id*.

The Seventh Circuit went on to say that, even if the antitrust allegations of the complaint were not "inextricably linked" to the claims under the 1996 Act, it would conclude that "procedures established under the 1996 Act for achieving competitive

markets" are not "compatible with the procedures that would be used to accomplish the same result under the antitrust laws." 222 F.3d at 401. The court suggested that "the elaborate system of negotiated agreements and enforcement established by the 1996 Act could be brushed aside by any unsatisfied party with the simple act of filing an antitrust action," and that "[c]ourt orders in those cases could easily conflict with the obligations the state commissions or the FCC imposes." *Id*. Thus, the Seventh Circuit concluded: "The 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." *Id*.

The meaning of this dicta is unclear. Yet in the present case, at the urging of BellSouth, the district court extensively quoted and apparently looked to *Goldwasser* in applying, in effect, a rule of implied antitrust immunity. *See* Order at 16-17 (quoting 222 F.3d at 401). This was error. Even if the 1996 Act's express savings clauses were not conclusive, there would be no "clear repugnancy" or "irreconcilable conflict" that could provide a basis for implying immunity or giving the 1996 Act "precedence" to oust the antitrust laws.

As then-Judge Kennedy explained in rejecting a telecommunications provider's argument for implied antitrust immunity based on regulation of the standards for interconnection to the network, "[t]he rules for implying antitrust immunity on the basis of regulatory statutes reflect two broad concerns: the agency

must have sufficient freedom of action to carry out its regulatory mission, and the regulated entity should not be required to act with reference to inconsistent standards of conduct." *Phonetele, Inc. v. AT&T*, 664 F.2d 716, 732 (9th Cir. 1981) (citing *NASD*, 422 U.S. at 722-25; *Gordon*, 422 U.S. at 689). Neither concern provides any justification for implied antitrust immunity in this case.

In contrast to *NASD* and *Gordon*, this case does not involve a regulatory agency granted statutory authority to approve, in furtherance of other regulatory goals, *anticompetitive* conduct that would otherwise violate the antitrust laws. Rather, as the Seventh Circuit emphasized in *Goldwasser*, the 1996 Act imposes specific obligations on incumbent local exchange carriers to assist competing carriers in some ways that go well beyond what the antitrust laws would require. Neither, on the other hand, would the antitrust laws prohibit such assistance, which Congress intended as a means of promoting competition. There is no reason to anticipate, therefore, that enforcement of the antitrust laws would pose an obstacle to the FCC or state authorities carrying out their regulatory missions under the 1996 Act or that enforcement of the antitrust laws and the 1996 Act would subject incumbent local exchange carriers to inconsistent standards of conduct.

The mere fact of overlapping authority does not justify implied antitrust immunity. *See, e.g., Otter Tail*, 410 U.S. at 372-74 (utility subject to Federal Power Commission regulation is not immune from antitrust prosecution for anticompetitive

refusal to interconnect); *Phonetele,* 664 F.2d at 733-34 ("To permit a court additionally to hold the same conduct [that the FCC had not approved and eventually held unreasonable under the public interest standard] unlawful under the Sherman Act does not jeopardize any policy adopted by the agency."). This is not to say that it is impossible for questions of regulatory policy to become relevant to antitrust analysis. But courts are capable of finding ways to avoid conflict with regulatory requirements. Overlapping regulation, therefore, cannot justify implying an antitrust exemption, in light of the clear congressional choice expressed in the antitrust savings clause of the 1996 Act and the lack of clear repugnancy between these "competition-friendly" statutes (*Goldwasser,* 222 F.3d at 391).

The *Goldwasser* court may have meant that while the 1996 Act had no effect on the scope of antitrust *liability*, antitrust *remedies* could disrupt the regulatory scheme. *See Otter Tail*, 410 U.S. at 381 (a court, in fashioning antitrust remedy, "should [not] be impervious to [the regulated power company's] assertion that compulsory interconnection . . . will erode its integrated system and threaten its capacity to serve adequately the public"); *MCI Communications v. AT&T,* 708 F.2d 1081, 1105-06 (7th Cir. 1983) (citing *Otter Tail*); *Essential Communications Sys., Inc. v. AT&T,* 610 F.2d 1114, 1120-21 (1979) (although Communications Act does not confer blanket antitrust immunity, "[w]e recognize . . . that a given antitrust remedy might in specific instances present an actual or potential conflict with a duty

imposed by the FCC"). We agree that any antitrust relief should take account of regulatory policy and decisions in regulatory proceedings. The need to harmonize enforcement of complementary federal statutes, however, is not a proper basis for dismissing a complaint -- especially one seeking only damages -- at the pleadings stage. *Cf. Carnation*, 383 U.S. at 223 (reversing dismissal of antitrust action and remanding with instructions to stay pending outcome of related proceedings under the Shipping Act). The district court therefore erred to the extent it dismissed Covad's claims based on this "back door" form of implied antitrust immunity.

Any arguments that it would be better to leave local telephone competition issues solely to the regulatory agencies are simply misdirected. Congress did not provide that violations of the 1996 Act necessarily constitute violations of the antitrust laws, but neither did it limit the reach of the antitrust laws in light of the 1996 Act's new regulatory scheme. This Court should reject any suggestion that it reconsider the Congressional policy choice.

II. THE DISTRICT COURT FAILED TO DETERMINE WHETHER COVAD'S COMPLAINT STATES A CLAIM UNDER THE APPLICABLE SHERMAN ACT STANDARDS

The district court correctly summarized the elements of monopolization and attempted monopolization under Section 2 of the Sherman Act. *See* Order at 9-11. Although the district court also acknowledged the principle that, in certain circumstances, a monopolist may violate the Sherman Act by refusing to deal with a

would-be competitor on reasonable terms, Order at 21-22, the court erred to the extent it did not proceed to analyze whether Covad's allegations stated a claim under antitrust standards.

Section 2 of the Sherman Act prohibits (1) the willful acquisition or maintenance of monopoly power (2) by the use of exclusionary or predatory conduct "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *United States v. Griffith*, 334 U.S. 100, 107 (1948)); *Otter Tail*, 410 U.S. at 377. As the district court recognized, Order at 21, a firm is generally free to refuse to deal with its competitors. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986). But that freedom is not without limits. The district court correctly noted that in some circumstances, a monopolist's refusal to deal with a rival on reasonable terms may violate Section 2 of the Sherman Act. *See* Order at 21-22 (quoting *Mr. Furniture Warehouse, Inc. v. Barclays American/Commercial, Inc.*, 919 F.2d 1517, 1522 (11th Cir. 1990)). The application of this principle to regulated industries, including the telecommunications industry, is not a novelty. *See, e.g.*, *Otter Tail*, 410 U.S. at 377 (monopolist utility's refusal to provide wholesale power to municipally owned distribution systems in order "to destroy threatened competition" violated the Sherman Act); *MCI*, 708 F.2d at 1133 (AT&T violated the antitrust laws by denying a competing long-distance telephone service

provider interconnection to local exchanges, contrary to federal regulatory policy and without legitimate business or technical justification); *United States v. AT&T*, 524 F. Supp. 1336, 1360-61 (D.D.C. 1981) (declining to dismiss Section 2 claim alleging that AT&T anticompetitively discriminated against competing long distance carriers seeking interconnection to local network).

As the Supreme Court made clear in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 492 U.S. 585, 605 (1985), that a monopolist's conduct adversely affected a particular rival is not sufficient to establish a violation of the Sherman Act. The antitrust laws protect competition, not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). A plaintiff alleging unlawful monopolization must establish that the allegedly exclusionary conduct reasonably appeared capable of making a significant contribution to the maintenance of the defendant's monopoly power. 3 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 651c at 78 (1996). This would, of course, require consideration of the conduct's impact on the plaintiff's ability to compete and of the prospects of competition from other sources. Moreover, conduct is not deemed exclusionary for purposes of Section 2 of the Sherman Act unless it lacks a valid business purpose, i.e., it makes no business sense apart from its tendency to exclude and thereby create or maintain market power. *E.g.*, *Aspen*, 472 U.S. at 608.

Disputes over the terms on which a potential rival may obtain access to an

incumbent local exchange carrier's network, whether or not they involve violations of the 1996 Act, will normally provide no basis for a finding of antitrust liability, provided the incumbent's conduct makes no significant contribution to maintenance of its monopoly. But if an incumbent engages in exclusionary conduct that effectively prevents the emergence of substantial competition, a dispute over terms of access may be part of a claim under Section 2.

Although the district court noted the general principles governing Section 2 claims, the court failed to determine whether Covad's complaint, if read with the liberality appropriate when deciding a motion under Rule 12(b)(6), sufficiently alleged the elements of a Section 2 violation.[9] BellSouth argued that the alleged conduct "*is* competition on the merits," Reply at 9 -- or, at most, would violate obligations imposed only by the 1996 Act, *see id.* at 11-15. Covad asserted that the allegations were "more than sufficient to state a Section 2 claim under well-settled antitrust theories" based on antitrust obligations that "existed before the Telecom Act," and that are "irrespective of" although "made clearer by" the express language

[9]Antitrust complaints are to be given a liberal construction at the pleading stage, and "should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811 (1993) (internal quotation marks omitted). Covad's complaint alleges facts in considerable detail. The question here is not the common one of whether facts have been pled in sufficient detail; it is whether those facts, if taken as true, amount to an *antitrust* violation.

of that Act. Opp. at 17, 19.

The district court never resolved this dispute as a matter of *antitrust* law. The court stated that Covad's allegations of exclusionary refusals to grant access to essential facilities "clearly represent affirmative duties which are above and beyond the requirements of the Sherman Act." Order at 24. Indeed, many of the detailed factual allegations in the complaint involve staples of 1996 Act controversy that have not been the basis of liability in antitrust cases. The United States and the FCC take no position on whether Covad's particular complaint sufficiently alleges a violation of Section 2 of the Sherman Act. Our point is that the district court's decision contains no careful analysis of the complaint in terms of what the Sherman Act does and does not require. Rather, it appears that the district court, relying on its reading of *Goldwasser*, conclusively and erroneously presumed that *no* conduct covered by the 1996 Act could also be subject to Section 2 of the Sherman Act.

CONCLUSION

The Court should reject any argument that the Telecommunications Act of 1996 creates implied antitrust immunity or otherwise precludes Sherman Act claims involving conduct also covered by the 1996 Act. Because the district court appears

to have dismissed most of Covad's antitrust claims on such grounds, this Court should vacate the district court's order dismissing those antitrust claims and remand for further proceedings.

Respectfully submitted.

CHARLES A. JAMES
Assistant Attorney General

JOHN ROGOVIN
Deputy General Counsel

R. HEWITT PATE
Deputy Assistant Attorney General

LINDA KINNEY
Associate General Counsel

CATHERINE O'SULLIVAN
NANCY C. GARRISON
Attorneys, Appellate Section
U.S. Department of Justice
Antitrust Division
601 D Street, N.W.
Washington, D.C. 20530
(202) 514-1531

JOHN E. INGLE
Deputy Associate General Counsel
Federal Communications Commission
Washington, D.C. 20554

DECEMBER 17, 2001

CERTIFICATE OF COMPLIANCE

I certify that this brief amici curiae complies with Fed. R. App. P. 29(d) and 32(a)(7)(B)(i). It has 6414 words, as counted by the word processing system used to prepare the brief (Word Perfect 7.0), and is printed in 14-point proportionally spaced serif type.

_____

Nancy C. Garrison

CERTIFICATE OF SERVICE

I, Nancy C. Garrison, certify that on this 17th day of December 2001, two copies of the BRIEF FOR UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION AS AMICI CURIAE were served by Federal Express next day delivery on each of the following counsel for the parties:

Michael K. Kellogg
Kellogg, Huber, Hansen, Todd & Evans
Sumner Square
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
Attorney for Appellees
BellSouth Corporation and BellSouth Telecommunications, Inc.

Alfred C. Pfeiffer, Jr.
McCutchen, Doyle, Brown & Enersen, LLP
Three Embarcadero Center
San Francisco, CA 94111-4067
Attorney for Appellants
Covad Communications Co. and DIECA Communications

NANCY C. GARRISON