

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

THE OHIO BELL TELEPHONE
COMPANY,

Plaintiff and Counterdefendant,

vs.

CORECOMM NEWCO, INC.

Defendant, Counterclaimant,
and Third-Party Plaintiff,

vs.

AMERITECH CORP., *et al.*,

Third-Party Defendants.

.....

Case No. 1:01 CV 2057

JUDGE DONALD C. NUGENT
MAGISTRATE JUDGE HEMANN

**CORECOMM'S REPLY TO
AMERITECH'S
SUPPLEMENTAL
AUTHORITY AND IN
OPPOSITION TO
AMERITECH'S MOTION TO
DISMISS COUNT II
OF DEFENDANT'S FIRST
AMENDED COUNTERCLAIM**

CoreComm respectfully submits this reply to Ameritech's Supplemental Authority dated May 10, 2002, which Ameritech filed by agreement between the parties in support of its Motion to Dismiss Count II of CoreComm's First Amended Counterclaim. The district court rulings in *Stein, CalTech International Telecom Corp., MGC Communications, and Electronet Intermedia Consulting*, all of which refused to dismiss monopolization claims against incumbent local telephone companies, are based on well-established principles regarding the applicability and

scope of the antitrust laws.¹ Other decisions, such as the *Covad* decision relied upon by Ameritech in its supplemental filing, are inconsistent with Supreme Court and circuit court precedent and should not be followed.²

In Count II of its Counterclaim, CoreComm alleged that Ameritech disrupted efforts by CoreComm and other competitive local phone companies to compete against Ameritech in offering local telephone services to individuals and businesses. CoreComm contends that Ameritech's campaign to obstruct competition took a number of forms, including disconnecting service to CoreComm customers, misrouting their calls, and refusing to sell certain services to CoreComm – sometimes denying service altogether and sometimes refusing to deal except on unreasonable terms and conditions. Focusing only on CoreComm's allegations of refusals to deal, Ameritech cites the *Covad* decision as authority for the proposition that it had no antitrust obligation to deal with CoreComm in the first instance, even on terms it made available to any customer that did not attempt to compete against it.

The courts have long held that a monopolist may not refuse to do business with a competitor if its refusal preserves monopoly power and lacks any business justification. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927). This remains the law today. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). This principle was widely applied to the telephone industry prior to enactment of the 1996 Telecommunications Act, even though the 1934 Communications Act was silent as to antitrust jurisdiction. *Southern Pacific Communications Co. v. American Tel. & Tel. Co.*, 740 F.2d 1011

¹ *Stein v. Pac. Bell Tel. Co.*, No. C 00-2915 SI (N.D. Cal. Feb. 25, 2002) (Illston, J.); *Cal-Tech Int'l Telecom Corp.*, No. C-97-2105-CAL (N.D. Cal. Oct. 25, 2000) (Legge, J.); *MGC Communications, Inc. v. Sprint Corp.* (D. Nev. Dec. 13, 2000) (Pro, J.); *Electro-Net Intermedia Consulting, Inc. v. Sprint-Florida, Inc.*, No. 4:00cv176-RH (N.D. Fla. September 20, 2000) (Hinkle, J.).

² The *Covad* court appears to have been unaware of *CalTech*, *MGC*, and *Electronet*. *Covad Communications Co., v. Bell Atlantic Corp.*, No. 99-1046 (GK), Slip Op. at 11 n.19 (D.D.C. May 3, 2002).

(D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985); *MCI Comm's Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *United States v. American Tel. & Tel.*, 552 F. Supp. 131 (D.D.C. 1982). Congress clearly intended the antitrust laws to continue to apply to telephony following adoption of the 1996 Telecommunications Act, for it included in the Act an express antitrust savings clause. 47 U.S.C.A. § 152, *see* Historical and Statutory Notes, *Applicability of Consent Decrees and Other Law* at 53 (2001).

The district judge in *Covad* acknowledged the existence of the '96 Act's antitrust savings clause as well as the fact that Congress intended that the '96 Act "should not in any way alter the application or scope of existing antitrust law."³ But she appears to have concluded from this provision that the antitrust laws and the obligations imposed by the '96 Act are mutually exclusive.⁴ Nothing in the statute or its legislative history warrants such a result.

Indeed, the antitrust savings clause would be superfluous if the Act did not at least partially overlap with the antitrust statutes – otherwise there would be no basis for asserting antitrust immunity and no reason for a savings clause. The '96 Act, for example, has no clause preserving application of the environmental laws, since the two regimes do not overlap in any way. The *Covad* court turned the antitrust savings clause on its head.

The *Covad* court then addressed the plaintiff's essential facilities claims.⁵ Wholly ignoring the leading essential facilities cases – many of which involve telephone markets – she concluded that essential facilities cases are unusual in a regulatory context.⁶ But in fact, most

³ *Covad*, Slip Op. at 12-13.

⁴ *Id.* at 10-13.

⁵ Notably, the court failed to consider refusal-to-deal analysis outside of the essential-facilities context.

⁶ In its recent decision on pricing under the '96 Act, the Supreme Court explained why local telephone infrastructure is an essential facility, "It is easy to see why a company that owns a local exchange . . . would have an almost

essential facilities cases involve regulated industries. In a regulatory context such cases are more manageable for courts, which can leave to the regulators issues more appropriately addressed through regulatory processes, such as the appropriate fees for the products and services that, under the antitrust laws, must be sold.⁷ The notion that the antitrust laws do not apply to regulated industries has been rejected in numerous decisions involving industries across a broad spectrum of the United States economy, including telephony.⁸ Antitrust immunity is the rare exception, not the rule.⁹

Almost two decades ago, the pre-divestiture, consolidated AT&T argued that any actions it took in *compliance* with the 1934 Communications Act and associated regulations were

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. A newcomer could not compete with the incumbent to provide local service without coming close to replicating the incumbent's entire existing network, the most costly and difficult part of which would be laying down the last mile of feeder wire, the local loop, to the thousands (or millions) of terminal points in individual houses and businesses. *Verizon Comm's Inc. v. Federal Communications Commission*, Nos. 00-511, 00-555, 00-587,00-590, and 00-602, Slip Op. at 18 (May 13, 2002).

⁷ P. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 1989 ANTITRUST LAW JOURNAL 841, 853 at (6)(c).

⁸ See cases involving banking, securities, electric power, broadcasting, air travel, and other industries cited at p. 20 of CoreComm's Opposition to Ameritech's Motion to Dismiss Counts 2 and 3. The D.C. Circuit faced this same situation, albeit with the Civil Aeronautics Act and not the 1996 Act, and concluded:

[T]he same set of facts may give rise to both a violation of [the Act and] the antitrust laws. Although the second does not necessarily follow from the first, but is bottomed on its own statutory standards, the antitrust remedy of treble damages is not defeated by the fact that the Civil Aeronautics Act is also violated.

S.S.W., Inc. v. Air Trans. Ass'n., 191 F.2d 658, 664 (D.C. Cir. 1951). See also *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("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").

⁹ In its reply brief, Ameritech for the first time asserted that the essential facilities doctrine does not apply except where a firm attempts to leverage a monopoly in one market into monopoly power in a second market. Even if that is correct, it is irrelevant, because two markets are involved in this case. Ameritech is trying to use its monopoly over local telephone infrastructure – wires, switches, and related equipment, to preserve its valuable monopoly on services provided using that equipment. Similarly, in the sports stadium cases, a monopoly venue was prohibited from using its power over the infrastructure to gain a monopoly over sporting events to be held on its premises. See *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

automatically immune from the Sherman Act: this argument was consistently rejected by the courts.¹⁰ Ameritech carries the argument a step further by contending, in effect, that intentional *violations* of the '96 Act and associated regulations are automatically immune from the Sherman Act, even if they preserve monopoly power. This argument should be rejected as well.

In any event, the *Covad* decision is inapplicable here because of significant differences between the *Covad* complaint and the complaint in this case. CoreComm has alleged various anticompetitive actions by Ameritech that are not subject to the '96 Act, including refusal to sell voicemail services, inside wire maintenance, and call screening services, such as Privacy Manager. ¶¶ 212-18. Services like these are important to customers and CoreComm's inability to purchase them from Ameritech significantly impairs its ability to compete. Voicemail services, for example, are requested by approximately 20% of CoreComm's customers. ¶ 217.

CoreComm's allegation of sham litigation in this case also differs from the sham litigation claim in *Covad*.¹¹ *Covad* failed to assert that the alleged sham litigation had harmed it competitively,¹² but CoreComm alleges with specificity the types of competitive harm that have resulted from the sham litigation pursued by Ameritech. ¶¶ 191, 197-98, 202, 233.

Ameritech also asserts that it cannot be guilty of engaging in sham litigation in any proceeding that it did not initiate. In other words, Ameritech contends that there is no antitrust relief even if a party refuses to comply with its legal obligations, waits to be sued, then delays the

¹⁰ See description of argument in *MCI v. AT&T*, 708 F. 2d at 1101-05; see decisions in *Southern Pacific v. AT&T*, *MCI v. AT&T*, and *U.S. v. AT&T*, *supra* at 2.

¹¹ CoreComm's sham litigation claim in part reflects conduct about which the FCC has said, "SBC's apparent violations have forced other carriers to expend time and resources in state proceedings trying to obtain what SBC was already obligated to provide. See Notice of Apparent Liability for Forfeiture, *In the Matter of SBC Communications, Inc.*, 21 FCC Daily Digest No. 12 at 203, File No. EB-01-IH-0030 (Jan. 18, 2002), ¶¶ 22-23.

¹² *Covad*, Slip Op. at 21-22.

day of reckoning by filing one frivolous motion after another, prolonging the proceedings for the sole purpose of imposing costs on its opponent and in the process preserving its monopoly power. There is no basis in law or theory for this contention.

Ameritech reports that it has found no case in which a sham litigation charge was upheld based on a party's conduct in proceedings in which it was statutorily obligated to participate.¹³ This negative representation indicates that Ameritech has found no case in which a charge of sham litigation was *rejected* because it was based on conduct in a matter that the defendant did not initiate. Nor has CoreComm found such a case. Authoritative articulations of the sham litigation doctrine do not limit antitrust liability for sham litigation tactics to those engaged in by plaintiffs: sham litigation “encompasses situations in which persons use the governmental *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon.” *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991) (emphasis in original).

Rule 11 provides a useful comparison. It is not limited to filings made by the party initiating a proceeding, rather, no party may abuse the legal process by making baseless filings. Fed. R. Civ. Pro. 11; *see, e.g., Lockheed Martin Energy Systems, Inc. v. Slavin*, 190 F.R.D. 449, 458 (E.D.Tenn. 1999) (defendant's answer and other pleadings filed in bad faith, in order to cause unnecessary delay and needlessly increase the cost of the underlying litigation, in violation of Rule 11). Thus, there is no direct or indirect legal authority for Ameritech's argument.

The sham litigation doctrine prohibits litigation that is intended solely to and does impose costs on a competitor. Such conduct is equally harmful to competition whether or not the guilty

¹³ Ameritech's Memorandum re Supplemental Authority at 2-3.

party has initiated the proceeding. Thus, there is also no principled reason to confine it to abuses of only one side of the process.

CoreComm urges the Court to deny Ameritech's motion to dismiss Count II of CoreComm's First Amended Counterclaim.

Respectfully Submitted,

/signed/

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