

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

THE OHIO BELL TELEPHONE COMPANY,	:	Case No. 1:01 CV 2057
	:	
Plaintiff and Counterdefendant,	:	JUDGE DONALD C. NUGENT
	:	MAGISTRATE JUDGE HEMANN
	:	
vs.	:	
	:	NOTICE AND MEMORANDUM RE
CORECOMM NEWCO, INC.	:	SUPPLEMENTAL AUTHORITY IN
	:	OPPOSITION TO PLAINTIFF'S
Defendant, Counterclaimant,	:	MOTION TO DISMISS COUNT 2
and Third-Party Plaintiff,	:	OF DEFENDANT'S FIRST
	:	AMENDED COUNTERCLAIM
	:	
vs.	:	
	:	
AMERITECH CORP., <i>et al.</i> ,	:	
	:	
Third-Party Defendants.	:	
.....	:	

Defendant/Counterclaimant CoreComm NewCo, Inc. ("CoreComm") respectfully submits this supplemental authority in opposition to Plaintiffs' Motion to Dismiss Count 2 of CoreComm's First Amended Counterclaims. On June 20, 2002, the United States Court of Appeals for the Second Circuit reversed a district court decision relied upon by Ameritech in

support of its motion. See *Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corporation*, No 01-7746 (2d Cir. June 20, 2002) (attached). The Court of Appeals' decision squarely addresses and conclusively rejects many of the arguments advanced by Ameritech.

Like this Court, the Second Circuit faced arguments that the antitrust laws never prohibit a monopolist from refusing to deal with its competitors, and that the 1996 Telecommunications Act somehow precludes application of the antitrust laws to markets for local telephone service. The district court had dismissed this customer class action alleging that the local monopoly telephone company refused to interconnect its network on reasonable terms with a competitive local telephone company. The trial court had decided that a monopolist does not have a general duty to cooperate with its competitors, and that the complaint's allegations stated, at most, violations of the 1996 Telecommunications Act, not antitrust claims. The Second Circuit reversed and remanded, holding that although there is no general duty to cooperate with competitors, a monopolist may not use its market power to exclude competition. It also held that an allegation that an incumbent monopolist denied a competitor adequate access its local network states an antitrust claim without regard to whether this conduct also violates another statute. In reaching these holdings, the Second Circuit expressly rejected *dicta* in the Seventh Circuit's *Goldwasser* decision, *dicta* on which Ameritech's motion to dismiss Count 2 was substantially premised.

In its carefully reasoned decision, the Second Circuit adopted a number of points that were also made by CoreComm in opposing Ameritech's motion, including the following:

- (1) while a monopolist's alleged failure to interconnect its network to competitive firms on reasonable terms may violate the 1996 Telecommunications Act, it may also support an antitrust claim "under a number of theories," Slip Op. at 30; CoreComm's

- Opposition to Ameritech’s Motion to Dismiss Counts 2 and 3 of First Amended Counterclaims and Third-Party Complaint (“CoreComm’s Brief”) at 4-10, CoreComm’s Reply to Ameritech’s Supplemental Authority and in Opposition to Ameritech’s Motion to Dismiss Count 2 of Defendant’s First Amended Counterclaim (“CoreComm’s Reply”) at 4 n.9;
- (2) “[t]here is no ‘plain repugnancy’ between the antitrust laws and the Telecommunications Act,” Slip Op. at 32; CoreComm’s Brief at 19;
 - (3) “a monopolist has a duty to provide competitors with reasonable access to ‘essential facilities,’” Slip Op. at 30; CoreComm’s Brief at 9;
 - (4) the complaint does not assert complete denial of access, but only denial of access “on a par” with the incumbent’s access to its own network, Slip Op. at 7 (quoting complaint) but this “may state a claim under the ‘essential facilities’ doctrine,” Slip Op. at 31; CoreComm’s Brief at 6, 10;
 - (5) a complaint alleging that the defendant holds “monopoly power over a wholesale market . . . [for] telecommunications [facilities],” and has used its power to gain monopoly power in a related “retail market in which telecommunications carriers sell local phone service to consumers,” states a claim for monopoly leveraging in violation of the Sherman Act, Slip Op. at 31; CoreComm’s Reply at 4 n.9;
 - (6) “[w]hile . . . a monopolist has no general duty to cooperate with its competitors, [it] . . . ‘may not . . . use its power, whether obtained lawfully or not, to prevent or impede competition,’ ” Slip Op. at 29, *quoting United States Football League*, 842 F.2d 1335, 1360-61 (2d Cir. 1988); CoreComm’s Brief at 6-7;

- (7) “[a]bsent ‘plain repugnancy,’ we will not assume that a regulatory statute implicitly repeals the antitrust laws,” Slip Op. at 32; CoreComm’s Brief at 19;
- (8) “[m]oreover, the [Telecommunications] Act contains a specific savings clause, . . . [whose] meaning . . . is plain on its face and must guide our analysis,” Slip Op. at 33; CoreComm’s Brief at 20;
- (9) “the plaintiff’s antitrust claim does not merely allege that the defendant violated section 251. In fact, it does not mention section 251 at all. . . . [T]here is no requirement that an allegation that otherwise states an antitrust claim must not rely on allegations that might also state a claim under another statute,” Slip Op. at 31-32; CoreComm’s Brief at 25-26;
- (10) the antitrust laws supplement the regulatory regime in an important way by providing remedies unavailable under that scheme, and “[o]ne of the purposes of the [antitrust laws] . . . is to compensate victims of antitrust violations for their injuries,” Slip Op. at 33-34, quoting *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977); CoreComm’s Brief at 18-19;
- (11) although the *Goldwasser* court said that detailed legislation (such as the Telecommunications Act) should take precedence over more general laws (like the antitrust laws), “controlling case law does not support the theory that legislation meant to encourage competition necessarily takes precedence over the general antitrust laws,” Slip Op. at 35; CoreComm’s Brief at 20-21; and
- (12) while “[a]n overly broad injunction might interfere with the regulatory framework . . . this is not a reason to dismiss the suit at this stage. . . . It is possible that court

intervention could be appropriate in some limited circumstances” and damages “can be tailored to award one-time relief,” Slip Op. at 38, 37; CoreComm’s Brief at 22.

The fact that *Trinko* was brought by an injured customer, not a local telephone competitor, does not limit the decision’s significance for this case with respect to the issues that the *Trinko* court examined and decided. *Goldwasser* was also a customer case, and Ameritech has urged that precedent on this court. Moreover, in supporting its conclusions, the *Trinko* court cites as precedent competitor cases as well as government and customer actions. As to the issues presented in *Trinko*, therefore, the Second Circuit’s holdings are directly applicable here. Most importantly, its discussion of the complementary, “in synch” relationship between the Telecommunications Act and the Sherman Act clearly rejects the defendant’s notion that there is an inherent tension between the two statutes or some unfairness in requiring incumbent firms to comply with both.

Although the Second Circuit expressly declined to address another issue not presented to it – whether a competitive company may bring its own antitrust case for any anticompetitive breach of an interconnection contract – the court did not rule out such a possibility. Slip Op. at 25, 36-37, and 37 n.16. It merely noted that additional issues not raised in *Trinko* might apply. It made this observation in the context of a case in which the parties had agreed to pursue remedies for breach solely through the regulatory process and where that regulatory process had already provided the injured competitors with \$10 million in damages.¹

¹ CoreComm’s interconnection agreement with Ameritech expressly preserves all legal remedies for breach. Indeed, Ameritech has chosen to bring its claims that CoreComm failed to pay sums due under the interconnection agreement in this federal action, rather than in a regulatory proceeding. Many of CoreComm’s antitrust allegations arise outside of its interconnection agreement with Ameritech and could not be addressed, even in a limited way, through regulatory

Even before *Trinko*, some district courts had declined to follow *Goldwasser*, which asserted novel theories of antitrust law. The Second Circuit's decision significantly bolsters the precedent rejecting *Goldwasser* and provides important further support for denial of Ameritech's motion to dismiss CoreComm's antitrust counterclaim.

Respectfully submitted,



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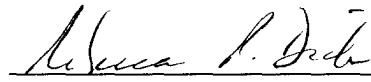
Attorneys for CoreComm Newco, Inc.

Dated: June 25, 2002

proceedings. Nor are damages available to CoreComm through the regulatory process. Under *Trinko*, these factors argue for application of the antitrust laws.

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2002, I caused a copy of the foregoing Notice and Memorandum to be filed electronically with the Court. Notice of this filing is thereby sent to all parties by operation of the Court's electronic filing system. Parties can access this filing through the Court's system.



Rebecca P. Dick

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and Third-Party Plaintiff CoreComm
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