

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

THE OHIO BELL TELEPHONE COMPANY,)	CASE NO. 1:01CV02057
)	
Plaintiff,)	JUDGE DONALD C. NUGENT
)	MAG. JUDGE HEMANN
vs.)	
)	
CORECOMM NEWCO, INC.,)	RESPONSE OF PLAINTIFF AND
)	THIRD-PARTY DEFENDANTS TO
Defendant,)	CORECOMM'S NOTICE AND
vs.)	MEMORANDUM RE:
)	SUPPLEMENTAL AUTHORITY
AMERITECH CORP., et al.,)	
)	
Third-Party Defendants.)	

INTRODUCTION

Plaintiff, The Ohio Bell Telephone Company, and Third-Party Defendants, Ameritech Corporation, Ameritech Services, Inc., SBC Communications Inc., SBC Operations, Inc., and SBC Services, Inc. (collectively, "Counterdefendants") hereby respond to the filing by Defendant CoreComm Newco, Inc. ("CoreComm") submitting as supplemental authority the decision of the Second Circuit Court of Appeals in Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp., No. 01-7746 (2d Cir., June 20, 2002). For the reasons set forth below, the Trinko decision does not undermine the fundamental bases of Counterdefendants' Motion to Dismiss, and does not provide a basis for denying the Motion as CoreComm suggests.

ARGUMENT

A. The Trinko Decision is Expressly Limited To Claims Brought By Consumers, And Its Reasoning Is Not Applicable to Claims by Competitors Such as CoreComm.

The decision by the Second Circuit in Trinko does not constitute persuasive authority in favor of CoreComm’s Amended Counterclaims here. The simplest reason is that the Trinko court expressly limited its decision to claims brought by telephone consumers, and declined to consider the viability of claims brought by competitors such as CoreComm. As the court wrote, “We note that this is an action brought by an injured consumer and not [a CLEC]. Our decision does not address whether [CLECs] seeking to enter the market may ever bring antitrust suits against the ILEC.” Trinko, *slip op.* at 37, n.16.

The Trinko case was brought by consumers who claimed their rights were violated by Bell Atlantic’s refusal to cooperate with CLECs in granting access to the Bell Atlantic network under the Telecommunications Act of 1996 (the “TCA”). The decision is based, in large part, on the court’s finding that “an individual consumer seeking damages” does not have remedies other than the antitrust laws to address the alleged misconduct. “Because this plaintiff has no remedy under the [TCA] for a violation of subsections (b) and (c) of section 251, the antitrust laws are the only place where it has a remedy for damage caused by the allegedly anticompetitive behavior . . . [T]he antitrust laws serve the purpose of affording the consumer compensation that the [TCA] does not provide.” Trinko, *slip op.* at 34.

The court expressly distinguished the limited options of the *consumer* plaintiff from the regulatory scheme available to a *competitor* who has the same complaints. “In this case, the main difference in the two frameworks is that AT&T [the CLEC] may seek remedy through the regulatory process while the consumer may seek remedy under the antitrust law. The two schemes complement rather than contradict each other.” Id., *slip op.* at 36. Indeed, the

consumers in Trinko brought their antitrust claims *after* the CLEC had already filed a regulatory complaint before the FCC challenging the ILEC's conduct under the TCA and an interconnection agreement, and collected millions of dollars from the ILEC through a consent decree. Id., *slip op.* at 6-7.

In contrast to the consumers in Trinko, CoreComm *does* have remedies under both TCA § 251 and its Interconnection Agreement with Counterdefendants. CoreComm has not hesitated to pursue its rights under the TCA in pending proceedings before the PUCO; and CoreComm is bringing contract claims under the parties' Interconnection Agreement in this very lawsuit. See Count I of Amended Counterclaims.¹

Given Trinko's limitation to consumer actions, and its care in exempting competitor cases from its ruling and distinguishing the position of competitors, the case does not provide authority, persuasive or otherwise, for evaluating CoreComm's allegations here. Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000), in contrast, did not limit its ruling or its reasoning to claims brought by consumers. In dismissing a complaint for failing to state a claim for illegal monopolization under Sherman Act § 2, Goldwasser focused not on the remedies available to the plaintiff, but the nature of the antitrust allegations against the ILEC.

¹ CoreComm's claim in its Notice and Memorandum re Supplemental Authority that it could not recover damages in a regulatory proceeding is not true. Whatever damages CoreComm is entitled to for Counterdefendants' alleged failure to comply with the parties' Interconnection Agreement could be recovered in court on a breach of contract claim. And the claim that "many" of CoreComm's allegations arise outside of the interconnection agreement is a gross exaggeration at best. As Counterdefendants have shown in prior briefing, CoreComm's incidental allegations regarding three ancillary services (i.e. voice mail, "privacy manager," and inside wire maintenance) are a tiny part of CoreComm's 270-paragraph Counterclaims. Those services are not covered by the parties' Interconnection Agreement precisely because regulatory rulings have held Counterdefendants have *no obligation whatsoever to share those services with competitors*. Those scant allegations do not give rise to an antitrust claim, and do not justify turning what is at best a regulatory and contract dispute into a federal antitrust case.

Goldwasser's finding that allegations amounting to a breach of an ILEC's duty to share its network under the TCA do not amount to violations of the antitrust laws draws no distinction based on the identity of the plaintiff. This Court should follow the Goldwasser decision, and find that CoreComm cannot turn violations of duties created solely under the heightened obligations of the TCA into claims for illegal monopolization under Section 2 of the Sherman Act.

B. Contrary to the Reasoning Applied to Consumer Claims in Trinko, Allowing CoreComm's Antitrust Claims Will Conflict With Several Aspects of the TCA Enforcement Regime.

One of the reasons the court in Trinko declined to follow the reasoning of the Goldwasser decision was its conclusion that allowing claims such as the Trinko consumers' would not interfere with the TCA. The Trinko court noted that the ILEC defendants had not identified any way in which allowing the consumers to advance an antitrust claim would conflict with the regulatory regime applicable to the ILEC under the TCA. *See Trinko, slip op.* at 35. The Trinko decision does not support CoreComm's position and does not inform this or any other court how to deal with suits brought by CLECs.

Counterdefendants have articulated several ways in which allowing CoreComm to advance an antitrust claim *would* lead to potential conflicts with the regulatory scheme of the TCA. Perhaps most importantly, given CoreComm's alleged need for more effective access to Counterdefendants' "essential" network, injunctive relief would obviously be critical to CoreComm's claims to an extent inapplicable to the consumer Plaintiffs in Trinko.² A federal

² The Trinko court explicitly acknowledged the potential for conflict when courts grant injunctive relief, which the court called "more problematic" than damages. Trinko, slip op. at 38-39. "[C]ourts must be both mindful and wary of the strong possibility that injunctive relief could have the unintended consequence of disrupting the regulatory scheme." Trinko, slip op. at 40. The Trinko decision does not articulate in any convincing way why awarding massive treble damages against an ILEC that had complied with obligations according to a regulatory body would create any less of a conflict than injunctive relief. The Goldwasser decision makes no such false distinction between the antitrust penalties

court's determination of what constitutes "reasonable" access, and what changes regarding billing, service, and technology Counterdefendants must undertake, could conflict directly with orders issued by the PUCO interpreting and enforcing the parties' Interconnection Agreement. CoreComm has sought enforcement of that agreement -- based on the same conduct challenged here -- before the PUCO on more than one occasion.

Moreover, the antitrust laws' standard of immediately competitive markets is not consistent with the gradual change from regulated monopolies to competition implemented, and still ongoing, under the TCA. Under the approach advocated by CoreComm, a lay jury with no expertise in the highly technical requirements associated with interconnection duties could be asked to find anticompetitive conduct by an ILEC toward its competitor, even though the ILEC had expressly complied with all contractual duties under its interconnection agreement already approved (and sometimes imposed) by the PUCO.

Such potential conflicts with the carefully crafted scheme of the TCA are exactly what concerned the court in Goldwasser. They should concern this Court as well, and compel the same result -- dismissal of CoreComm's antitrust counterclaims.

C. Counterdefendants Have Not Asserted Implied Antitrust Immunity, Which Is Another Apparent Basis on Which Trinko Declined to Follow Goldwasser.

There is another reason that the Trinko decision is not persuasive authority for this Court to reject the analysis of Goldwasser: The Trinko court seemed to reject Goldwasser on a basis that the Seventh Circuit expressly disavowed as its holding. In discussing and declining to follow Goldwasser, the Trinko court applied the test for "implicit immunity from the antitrust laws." Trinko, *slip. op.* at 32-33. The Second Circuit found that implied immunity was not met

that could be imposed through a judgment second guessing state commissions. This Court should rely on the more sound reasoning of the Goldwasser decision on this point.

because, among other reasons, there was no “plain repugnancy” between the antitrust laws and the TCA. Id.

Yet the court in Goldwasser made clear that it did *not* base its decision on implied antitrust immunity. Goldwasser, 222 F.3d at 401. Counterdefendants here have been equally clear that they are not relying on that doctrine in this case. Goldwasser held that the TCA “imposes duties on the ILECs that are not found in the antitrust laws.” Id. at 401. Those duties do not necessarily conflict with antitrust duties, but they are “more specific and far-reaching” than any obligations the antitrust laws impose. Under Goldwasser, when the duties allegedly violated by an ILEC are only the heightened duties created by the TCA, their violation does not give rise to an antitrust claim. Id. Simply put, where the duties a plaintiff claims were violated are not obligations created by the antitrust laws, a plaintiff cannot transform their violation into a Sherman Act claim by using antitrust language. Such a holding is hardly novel.

That is exactly what CoreComm has alleged here: the violation of supposed duties of cooperation with fledgling competitors that have never been recognized by an antitrust court, but rather came into being under the TCA. The TCA by its own terms does not modify the antitrust laws or create new obligations under those laws. Given that CoreComm’s specific allegations do not state a recognized antitrust claim, nothing in the Trinko decision changes the defects in CoreComm’s Sherman Act claim.

D. Notwithstanding the Trinko Decision, CoreComm Does Not State Antitrust Claims That Would Have Existed In the Absence of the TCA.

The Trinko court provides scant analysis of the actual allegations made in that case in ruling that the consumer complaint “may” state antitrust claims under essential facilities or monopoly leveraging theories. See Trinko, *slip op.* at 31. Counterdefendants have shown this Court in prior briefing that absent the TCA, CoreComm’s Amended Counterclaim *would not*

state a claim for any recognized antitrust violation. The limited commentary provided by the Trinko court in evaluating the claims in that case does not save Count II of CoreComm's Amended Counterclaim here, because CoreComm's allegations do not state an antitrust claim.

1. The Trinko Analysis Does Not Support A Finding of An Essential Facilities Claim Here.

The Trinko court's finding that the complaint in that case may state an essential facilities claim does not save CoreComm's Section 2 claim for several reasons.

As Counterdefendants have articulated before, CoreComm has not identified a case where the essential facilities doctrine has been applied to conduct wholly within one market. See Counterdefendants' Reply at 21-25, and cases cited therein. The essential facilities cases cited by the Trinko court state the same touchstone of an essential facilities claim. In Southern Pacific Communications Co. v. American Telephone and Telegraph Co., 740 F.2d 980 (D.C. Cir. 1984), the claim involved the denial of a facility in the local telephone market, being used to block entry into the long-distance market. "By using its control over access to these essential facilities, [plaintiff alleges] 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." Id. at 1008 (emphasis added). Likewise, in Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 568 (2d Cir. 1990), the Second Circuit itself noted that the policy behind the essential facilities doctrine "is to prevent a monopolist in a given market (here, bodybuilding magazines) from using its power to inhibit competition in another market (here, nutritional supplements for bodybuilders)." Id. at 568 (emphasis added).³ These cases do not stand for

³ Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985), also cited by the Trinko court, was not decided on essential facilities grounds. U.S. v. Terminal R.R. Assoc., 224 U.S. 383 (1912), was concerned with a *conspiracy* claim under Sherman Act § 1 -- a claim nowhere asserted by CoreComm. See Trinko, *slip op.* at 30.

CoreComm's proposition that allegations of a party's unilateral failure to allow a competitor to use a facility in the same market in which they both were competing state an essential facilities claim.

The Amended Counterclaim only alleges denial of reasonable access to a facility completely *within* a single market. The only markets alleged by CoreComm are local retail markets (both business and residential) for telephone services. CoreComm alleges Ameritech has monopoly power in those markets, and is acting to illegally maintain that power, including by denying reasonable access to a facility in the same markets. See Amended Counterclaims ¶¶ 109, 110, 111, 113, 150 (all alleging conduct within local retail markets). The alleged "essential facility" -- the physical infrastructure constituting the "last mile" that allows Counterdefendants to connect to retail customers -- is wholly within the local service markets in which CoreComm seeks to compete. No case cited by CoreComm or the Trinko court finds an essential facilities claim based on such "one-market" allegations.

CoreComm's essential facilities claim cannot be saved by a belated argument (found nowhere in the Amended Counterclaim) that the "last mile" is part of a "wholesale market" monopolized by Counterdefendants. Counterdefendants are providers of retail local telephone service. They have never been in the business of providing segments of their network on a wholesale basis to a market of wholesale buyers. C.f., Laurel Sand & Gravel, Inc. v. CSX Transp., Inc., 924 F.2d 539, 544-45 (4th Cir. 1991) (rejecting essential facilities claim where defendant does not rent its facilities to competitors in market in existing course of business; requiring access would turn defendant into "toll collector").

Counterdefendants do not share their network with competitors like CoreComm by choice. They share their network because they are compelled to do so by pervasive regulation

under the TCA. Every aspect of Counterdefendants' sharing of their network is controlled by regulation. Counterdefendants do not have the power to deny CoreComm access to their network because regulators determine what access will be granted and what sanctions will apply if Counterdefendants violate duties to provide access. To the extent that negotiated interconnection agreements provide additional rights, those rights are governed by contract law and the remedies for violating those rights are contract remedies.

The Trinko court's reliance on Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), which it characterized as allowing an antitrust claim to apply to "an industry regulated by a statute that was intended to encourage competition," is misplaced and does not support an essential facilities claim here. The power company in Otter Tail, which was in the business both of generating power for retail sale and of wheeling wholesale power for other companies, was regulated by the Federal Power Commission ("FPC") through the Federal Power Act ("FPA"). See id. at 365-66. The Otter Tail Court stressed that under the FPA, the FPC had very limited authority to order wheeling of power for the benefit of a rival utility that lacked its own generating capacity. Id. at 366. Congress had considered a broader "common carrier" provision in the FPA that would have *required* regulated utilities to wholesale and wheel power to competitors, but ultimately rejected that provision in favor of urging voluntary cooperation. Id. "The essential thrust of the [FPA] is to encourage voluntary interconnections of power. . . . Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships." Id. at 366.

The largely voluntary scheme of the FPA is dramatically different from the mandatory regime of the TCA, under which state and federal commissions have broad power to order interconnection and approve (and sometimes impose) the terms of parties' mandatory

cooperation. Thus Otter Tail is of no assistance in evaluating whether the essential facilities doctrine can be applied to compel the very same conduct that a state or federal regulatory agency already has the authority to compel and regulate. To allow an essential facilities claim in this context would turn federal courts into regulatory agencies, deciding what the terms of interconnection should be, with at best duplicative and at worst conflicting results. No case discussed by the Trinko court or cited by CoreComm has authorized that outcome.

CoreComm's own allegations preclude an essential facilities claim as a matter of law. None of the authorities Trinko cites recognizes an essential facilities claim based upon a unilateral denial of a facility in the same market into which the competitor hopes to enter or in a "market" that is created and controlled by regulation and in which regulators decide what access will be granted. This Court should not extend the essential facilities doctrine in such an unprecedented way.

2. CoreComm's Amended Counterclaim Does Not Set Forth a Claim for Monopoly Leveraging, And the Alleged Facts Would Not Support Such a Claim As a Matter of Law.

The discussion in Trinko of a monopoly leveraging claim similarly cannot save CoreComm's Amended Counterclaim from dismissal. CoreComm has never brought such a claim in this case. The 270 paragraphs of the Amended Counterclaim allege only one type of market, and are devoid of any allegation of "leveraging" (i.e., that Counterdefendants used monopoly power in one market to destroy or distort competition in another, distinct market).

As set forth above, CoreComm alleges that Counterdefendants have monopoly power in *local, retail markets*, and its conduct is designed to maintain its monopoly in the exact same *local, retail markets*. See Amended Counterclaim ¶¶ 109, 115, 150, 233, 252. There is no allegation of "leveraging" power from one market to another here, because all of the alleged

conduct took place entirely within local, retail service markets. Because CoreComm has not alleged Counterdefendants leveraged power from *one* market to another *distinct* market, the Amended Counterclaim fails to state a monopoly leveraging claim as a matter of law.⁴

CoreComm did not and cannot allege that Counterdefendants have “leveraged” power in one market to destroy competition in another, distinct market. The Amended Counterclaim does not state a monopoly leveraging claim, and Trinko’s discussion of that claim has no bearing on the viability of CoreComm’s Amended Counterclaim.

3. The Trinko Decision Provides No Support For CoreComm’s Argument That It Has Stated A Sham Litigation or “Price-Quality Squeeze” Claim.

Counterdefendants demonstrated in their Memorandum in Support and their Reply Brief that CoreComm’s allegations in the Amended Counterclaim do not state an antitrust claim as a matter of law under two purported theories on which CoreComm has heavily relied, those of sham litigation and a “price-quality squeeze.” See Counterdefendants’ Reply, at 10-13.

The Trinko decision has nothing to say about the viability of any such claim based on allegations like CoreComm’s against an ILEC. Accordingly, the Trinko opinion provides no support to CoreComm in its efforts to save its antitrust claims based upon those inapposite theories.

⁴ The finding of a monopoly leveraging claim by the Trinko court should not be accorded much weight in any event. Just last year in Virgin Atlantic (one of the cases cited in Trinko), the Second Circuit expressed its doubts that a monopoly leveraging claim even exists any longer as an independent antitrust claim: “More recently, we noted that uncertainty exists as to the continued scope of a monopoly leveraging claim as an independent cause of action in light of the Supreme Court’s opinion in Spectrum Sports [Inc., v. McQuillan], 506 U.S. 447, 458-59 (1993)]. Virgin Atlantic Airways Ltd. v. British Airways PLC, 257 F.3d 256, 272 (2001) (rejecting monopoly leveraging claim and questioning whether attempt to gain a “competitive advantage” in a second market could ever support a monopolization claim).

CONCLUSION

For the foregoing reasons, the Trinko case may represent a conflicting view from Goldwasser as to the viability of consumer claims against ILECs, but it does not provide a basis for this Court to find that competitor CoreComm states a claim for monopolization in violation of Section 2 of the Sherman Act. This Court should grant Counterdefendants' Motion to Dismiss Count II of the Counterclaim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2002, the foregoing **RESPONSE OF PLAINTIFF AND THIRD-PARTY DEFENDANTS TO CORECOMM'S NOTICE AND MEMORANDUM RE: SUPPLEMENTAL AUTHORITY** was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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