IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Verizon Communications Inc., Verizon New Jersey Inc.,
Verizon Pennsylvania Inc., Verizon Delaware Inc.,
Verizon Virginia Inc., Verizon Maryland Inc.,
Verizon Washington, D.C. Inc., and
Verizon New York Inc.,

Plaintiffs,

v.

ATX Communications, Inc., ATX Licensing, Inc.,
CoreComm New Jersey, Inc., CoreComm Virginia, Inc.,
ATX Telecommunications Services of Virginia, LLC,
CoreComm Maryland, Inc., and
CoreComm New York, Inc.,

Defendants.

Case No. 02-1374 (SLR)

PLAINTIFFS' OPENING BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO DISMISS COUNT I OF DEFENDANTS' COUNTERCLAIMS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

NATURE AND STAGE OF THE PROCEEDINGS 3

SUMMARY OF ARGUMENT 3

STATEMENT OF FACTS 5

A. The Telecommunications Act of 1996 5

B. ATX's Counterclaim 9

ARGUMENT 16

ATX'S ALLEGATIONS THAT VERIZON'S PERFORMANCE OF ITS DUTIES UNDER THE 1996 ACT WAS INADEQUATE DO NOT STATE A CLAIM UNDER SECTION 2 OF THE SHERMAN ACT 17

A. ATX Has Failed To Allege an "Essential Facilities" Claim 21

1. *ATX Does Not Allege That Verizon Has Denied ATX Access to Any Essential Facility* 21

2. *ATX Concedes That Verizon's Network Facilities Can Be Duplicated, and Therefore Are Not Essential* 23

3. *The Antitrust Laws Do Not Require Provision of Exclusive or Preferential Access* 25

4. *ATX Fails To Allege That Verizon Is Attempting To Extend Monopoly Power into a Distinct Market* 25

5. *The Essential Facilities Doctrine Never Requires a Defendant To Alter the Nature of Its Business or To Construct New Facilities* 27

6. *The Antitrust Laws Never Require Provision of Services for Resale at a Discount* 28

B. ATX Does Not State a Claim for Any Unlawful "Refusal to Deal" 29

C. Under Traditional Antitrust Principles, the 1996 Act's Regulatory Scheme Weighs Heavily Against Newly Creating the Access Duties ATX Urges 31

1. *The 1996 Act's Substantive Duties and Remedial Scheme Eliminate Any Risk to Competition from Access Disputes*.........32

2. *Interconnection Disputes Are Not Suitable Antitrust Claims for Institutional Reasons*.........35

CONCLUSION.........40

TABLE OF AUTHORITIES

Cases **Page**

Abcor Corp. v. AM Int'l, Inc.,
916 F.2d 924 (4th Cir. 1990) 19

Advanced Health-Care Servs., Inc. v. Giles Mem'l Hosp.,
910 F.2d 139 (4th Cir. 1990) 19, 25

Alaska Airlines, Inc. v. United Airlines, Inc.,
948 F.2d 536 (9th Cir. 1991) 21, 27, 35

Almeda Mall, Inc. v. Houston Lighting & Power Co.,
615 F.2d 343 (5th Cir. 1980) 28

American Football League v. NFL,
323 F.2d 124 (4th Cir. 1963) 24

American Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich,
108 F.3d 1147 (9th Cir. 1997) 32

Anserphone, Inc. v. Bell Atlantic Corp.,
955 F. Supp. 418 (W.D. Pa. 1996) .... *passim*

Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,
472 U.S. 585 (1985) 4, 19, 30

Associated Gen. Contractors of California, Inc. v. California State Counsel of Carpenters, 459 U.S. 519 (1983) 17

AT&T Co. v. Central Office Tel., Inc.,
524 U.S. 214 (1998) 37

AT&T Communications of Southern States, Inc. v. BellSouth Telecomms., Inc.,
268 F.3d 1294 (11th Cir. 2001) 20

AT&T Corp. v. Iowa Utils. Bd.,
525 U.S. 366 (1999) 6, 34, 35, 37, 39

Bell Atlantic Tel. Cos. v. FCC,
24 F.3d 1441 (D.C. Cir. 1994) 25

BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs. Inc.,
278 F.3d 1223 (11th Cir.), *vacated and reh'g en banc granted*,
297 F.3d 1276 (11th Cir. 2002).. 37

Cargill, Inc. v. Monfort of Colorado, Inc.,
479 U.S. 104 (1986) 18

Cavalier Tel., LLC v. Verizon Virginia Inc.,
208 F. Supp. 2d 608 (E.D. Va. 2002).. 2, 3, 20

City of Anaheim v. Southern Cal. Edison Co.,
955 F.2d 1373 (9th Cir. 1992).. 23

City of Pittsburgh v. West Penn Power Co.,
147 F.3d 256 (3d Cir. 1998)... 32

City of Vernon v. Southern Cal. Edison Co.,
955 F.2d 1361 (9th Cir. 1992)... 25, 27

Covad Communications Co. v. Bell Atlantic Corp.,
201 F. Supp. 2d 123 (D.D.C. 2002).. *passim*

Covad Communications Co. v. BellSouth Corp.,
299 F.3d 1272 (11th Cir. 2002), *petition for rehearing pending*,
No. 01-16064-C (11th Cir. filed Aug. 23, 2002)............................ 5, 16, 23, 24, 31

Cyber Promotions, Inc. v. America Online, Inc.,
948 F. Supp. 456 (E.D. Pa. 1996)... 24

Fineman v. Armstrong World Indus., Inc.,
980 F.2d 171 (3d Cir. 1992).. 27

Foremost Pro Color, Inc. v. Eastman Kodak Co.,
703 F.2d 534 (9th Cir. 1983)... 18

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

HyPoint Tech., Inc. v. Hewlett-Packard Co.,
949 F.2d 874 (6th Cir. 1991)... 28

Ideal Dairy Farms, Inc. v. John Labatt, Ltd.,
90 F.3d 737 (3d Cir. 1996).. *passim*

Illinois ex rel. Burris v. Panhandle E. Pipe Line Co.,
935 F.2d 1469 (7th Cir. 1991)... 26

Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.,
924 F.2d 539 (4th Cir. 1991) 21, 28, 29

Law Offices of Curtis V. Trinko v. Bell Atlantic Corp.,
305 F.3d 89 (2d Cir. 2002), *petition for cert. pending*,
No. 02-682 (U.S. filed Nov. 1, 2002) 5, 16, 24, 31, 33

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

MCI Telecomm. Corp. v. Bell Atlantic-Pennsylvania,
271 F.3d 491 (3d Cir. 2001), *cert. denied*, 123 S. Ct. 340 (2002) 8

MCI Telecomms. Corp. v. Illinois Bell Tel. Co.,
222 F.3d 323 (7th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001) 37

Oahu Gas Serv., Inc. v. Pacific Res., Inc.,
838 F.2d 360 (9th Cir. 1988) 27

Ohio Bell Tel. Co. v. CoreComm Newco, Inc.,
214 F. Supp. 2d 810 (N.D. Ohio 2002) 4, 5, 16, 22, 31

Olympia Equip. Leasing Co. v. Western Union Tel. Co.,
797 F.2d 370 (7th Cir. 1986) 1, 24, 31

Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc.,
836 F.2d 173 (3d Cir. 1988) 17

Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.,
998 F.2d 1192 (3d Cir. 1993) 11

Phonetele, Inc. v. American Tel. & Tel. Co.,
664 F.2d 716 (9th Cir. 1981) 36

Schuylkill Energy Res., Inc. v. Pennsylvania Power & Light Co.,
113 F.3d 405 (3d Cir. 1997) 20, 39

Seagood Trading Corp. v. Jerrico, Inc.,
924 F.2d 1555 (11th Cir. 1991) 19

South Austin Coalition Cmty. Council v. SBC Communications Inc.,
274 F.3d 1168 (7th Cir. 2001), *cert. denied*, 123 S. Ct. 81 (2002) 17, 23

Southern Pac. Communications Co. v. AT&T Co.,
740 F.2d 980 (D.C. Cir. 1984) 19

Southwestern Bell Tel. Co. v. Connect Communications Co.,
225 F.3d 942 (8th Cir. 2000) 37

Square D Co. v. Niagara Frontier Tariff Bureau,
476 U.S. 409 (1986) 36

Taffet v. Southern Co.,
967 F.2d 1483 (11th Cir. 1992) 37

Taylor Publ'g Co. v. Jostens, Inc.,
216 F.3d 465 (5th Cir. 2000) 32

Town of Concord v. Boston Edison Co.,
915 F.2d 17 (1st Cir. 1990) 32, 34, 36

United States v. Microsoft Corp.,
253 F.3d 34 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001) 1

United States v. Terminal Railroad Ass'n,
224 U.S. 383 (1912) 35

United States Football League v. NFL,
842 F.2d 1335 (2d Cir. 1988) 19

United States Telecom Ass'n v. FCC,
290 F.3d 415 (D.C. Cir. 2002), *limited stay granted*,
No. 00-1012, *et al.* (D.C. Cir. Sept. 4, 2002) 23, 34

Valet Apartment Servs., Inc. v. Atlanta J. & Const.,
865 F. Supp. 828 (N.D. Ga. 1994), *aff'd mem.*, 50 F.3d 1039
(11th Cir. 1995) 21

Verizon Communications Inc. v. FCC,
122 S. Ct. 1646 (2002) 6, 20, 26

Verizon Maryland Inc. v. Public Serv. Comm'n,
122 S. Ct. 1753 (2002) 37

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

Wegoland Ltd. v. NYNEX Corp.,
27 F.3d 17 (2d Cir. 1994) 37

Administrative Decisions

First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) 8

Fourth Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 15435 (2001) 13

Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953 (1999), *aff'd*, *AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000) 12, 14

Memorandum Opinion and Order, *Application of BellSouth Corp., et al., for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599 (1998) 15, 30

Memorandum Opinion and Order, *Application by Verizon New England Inc., et al., for Authorization To Provide In-Region, InterLATA Services in New Hampshire and Delaware*, WC Docket 02-157, FCC 02-262 (rel. Sept. 25, 2002) 12

Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419 (2001), *appeal pending*, *Z-Tel Communications, Inc. v. FCC*, No. 01-1461 (D.C. Cir. filed Oct. 17, 2001) 14

Memorandum Opinion and Order, *Application by Verizon Virginia Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Virginia*, WC Docket No. 02-214, FCC 02-297 (rel. Oct. 30, 2002) 12

Memorandum Opinion and Order, *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 FCC Rcd 11277 (2000) 38

Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 FCC Rcd 22781 (2001) 8, 11

Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999), *petitions for review granted*, *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *limited stay granted*, No. 00-1012, *et al.* (D.C. Cir. Sept. 4, 2002) 8, 15, 30, 38, 39

Statutes and Regulations

1996 Act § 601(c) 35

47 U.S.C. § 203 8

47 U.S.C. § 251(c)(1) 8, 10

47 U.S.C. § 251(c)(3) 7, 10, 36

47 U.S.C. § 251(c)(4) 7, 28

47 U.S.C. § 251(c)(4)(A) 7

47 U.S.C. § 251(c)(6) 7, 13

47 U.S.C. § 251(d)(1) 8

47 U.S.C. § 252 .... 10, 38

47 U.S.C. § 252(a)(1) 8, 36

47 U.S.C. § 252(b) 9

47 U.S.C. § 252(c) 9

47 U.S.C. § 252(e)(1) 1

47 U.S.C. § 252(h) 9

47 U.S.C. § 252(i) 9

47 U.S.C. § 271(c)(2)(B)(i) 7

47 U.S.C. § 271(c)(2)(B)(ii) 7, 14

47 U.S.C. § 271(c)(2)(B)(xiv) 7

47 C.F.R. § 51.319 13

47 C.F.R. § 51.323 13

47 C.F.R. § 51.323(c) 13

47 C.F.R. § 51.323(f)(1) 13

47 C.F.R. § 51.323(f)(5) 13

47 C.F.R. § 51.323(f)(6) 14

47 C.F.R. § 51.323(k)(1)-(3) 13

47 C.F.R. § 51.323(*l*)(1)-(4) 13

Other Materials

141 Cong. Rec. H8465 (daily ed. Aug. 4, 1995) 35

Evaluation of the New York Public Service Commission, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295 (FCC filed Oct. 19, 1999) 12

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2002):

Volume 1A 32
Volume 3 18
Volume 3A 27, 34

10 Phillip E. Areeda, Einer Elhauge & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2002) 29

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PRELIMINARY STATEMENT

In their antitrust counterclaim, defendants (collectively, "ATX") allege that plaintiffs (collectively, "Verizon") have violated the antitrust laws by failing to make Verizon's telephone network facilities available to ATX with sufficient speed and efficiency. According to ATX, Verizon was required – or should have been required – to make these facilities available pursuant to state-approved agreements implementing Verizon's duties under the Telecommunications Act of 1996 (the "1996 Act" or the "Act"). ATX argues that Verizon's performance under those agreements, known as "interconnection agreements," 47 U.S.C. § 252(e)(1), constitutes "exclusionary conduct" by a monopolist causing injury to a competitor.

ATX's allegations, however, confront a fundamental limitation on an alleged monopolist's duties under section 2 of the Sherman Act: even a monopolist has no duty, under the antitrust laws, to *assist* a competitor to enter the market. "There is a difference between positive and negative duties, and the antitrust laws . . . have generally been understood to impose only the latter." *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 375-76 (7th Cir. 1986) (internal quotation marks omitted). Although the antitrust laws prohibit a monopolist from certain (unjustified) active impairments of rivals' *independent* efforts to challenge the monopoly, *see, e.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.) (en banc), *cert. denied*, 534 U.S. 952 (2001), they do *not* require a monopolist to "help its competitors enter the market so that they could challenge its monopoly," *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 400 (7th Cir. 2000) (internal quotation marks omitted). Accordingly, "the duties of affirmative assistance set forth in the 1996 Act exist outside the parameters of

pre-existing antitrust law," and Verizon's "failure to comply with those duties . . . does not constitute 'exclusionary' conduct as a matter of law." *Covad Communications Co. v. Bell Atlantic Corp.*, 201 F. Supp. 2d 123, 130 (D.D.C. 2002) (dismissing antitrust case against Verizon); *see also Verizon New Jersey, Inc. v. Ntegrity Telecontent Servs., Inc.*, 219 F. Supp. 2d 616 (D.N.J. 2002) (same); *Cavalier Tel., LLC v. Verizon Virginia Inc.*, 208 F. Supp. 2d 608 (E.D. Va. 2002) (same).

ATX's effort to evade that basic rule – by accusing Verizon of denying access to "essential facilities" or an unlawful "refusal to deal" – cannot disguise the fact that ATX's allegations here implicate disagreements about the *terms* of access, where access has already been granted. Such disputes may be grist for the 1996 Act's regulatory mill, but Third Circuit law makes clear that they do not state a claim under section 2. *See Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996); *Anserphone, Inc. v. Bell Atlantic Corp.*, 955 F. Supp. 418, 428-29 (W.D. Pa. 1996). What is more, the Sherman Act: (1) has never required a defendant to provide access to facilities that a competitor admittedly is able to duplicate; (2) has never required a defendant to abandon facilities or to provide a competitor preferential access; and (3) has never required a defendant to transform itself involuntarily to accommodate a competitor. The 1996 Act, as interpreted and enforced by the Federal Communications Commission ("FCC") and state public utility commissions, requires all of these things. Precisely for this reason, the regulatory obligations imposed by that federal statute have no counterpart under the antitrust laws. Accordingly, ATX's antitrust counterclaim should be dismissed.

NATURE AND STAGE OF THE PROCEEDINGS

On August 12, 2002, Verizon filed a Complaint for Monetary and Declaratory Relief in order to collect charges for services rendered that ATX refused to pay, requesting both a judgment in its favor for the millions of dollars owed to it by ATX, as well as a declaration that Verizon has not violated the antitrust laws. On September 24, 2002, ATX filed its Answer, With Affirmative Defenses and Counterclaims. Those counterclaims contained, among other things, a purported antitrust counterclaim that ATX had threatened when Verizon sought to collect the money ATX owed. Verizon now files this Motion to Dismiss ATX's putative antitrust counterclaim.

SUMMARY OF ARGUMENT

1. As the weight of authority and first principles of antitrust law confirm, ATX cannot state an antitrust claim by alleging that Verizon has failed to perform well enough its affirmative duties to assist competitors in entering the local telecommunications market imposed by the 1996 Act. *Goldwasser*, *supra*; *Ntegrity*, *supra*; *Covad v. Bell Atlantic*, *supra*; *Cavalier*, *supra*.

2. ATX's allegations fail to state a claim under the so-called "essential facilities" doctrine. First, ATX fails to state a claim because it has not pleaded (and cannot plead) that it has been denied access to those facilities. Under Third Circuit law, that is fatal to its claim. *Ideal Dairy*, *supra*; *Anserphone*, *supra*.

3. ATX also fails to state a claim under the essential facilities doctrine because it not only fails to allege that it cannot duplicate Verizon's facilities; it also affirmatively alleges that it can duplicate them, and that it is attempting to do so. Facilities that a competitor can duplicate are, by definition, not essential. Even ignoring

these problems with ATX's essential facilities claim, that doctrine has never required a competitor to abandon its facilities.

4. ATX also does not allege that Verizon is trying to leverage its monopoly from one market to the next, a prerequisite for essential facilities claims that have been permitted to go forward in this context. And even if ATX did include such allegations, the Third Circuit has rejected the theory of monopoly leveraging.

5. The essential facilities doctrine does not, as ATX demands, require a competitor to change the nature of its business or to build new facilities. Nor do the antitrust laws require Verizon, or any other firm, to offer its services to competitors at wholesale prices for resale to consumers.

6. ATX has failed to state a claim under the "refusal to deal" doctrine, because there was no voluntary arrangement in place to begin with, and the refusal to enter into such an agreement does not forgo short-term benefits in favor of long-run monopoly profits. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Ohio Bell Tel. Co. v. CoreComm Newco, Inc.*, 214 F. Supp. 2d 810 (N.D. Ohio 2002).

7. Well-established principles of antitrust law weigh heavily against creating new antitrust duties of access in this context. Many cases recognize that when there is a detailed regulatory scheme in place, the need for intervention by antitrust law is greatly decreased. Use of antitrust law in this context would allow, and indeed require, antitrust courts and juries to second-guess regulators and micromanage terms and conditions offered in the telecommunications industry.

8. For all of these reasons, the out-of-circuit cases that ATX will undoubtedly cite in support of its position are not persuasive authority here. *Law Offices of Curtis V. Trinko v. Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir. 2002), *petition for cert. pending*, No. 02-682 (U.S. filed Nov. 1, 2002); *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002), *petition for rehearing pending*, No. 01-16064-C (11th Cir. filed Aug. 23, 2002); *Ohio Bell, supra.* First, each of these cases conflicts with *Ideal Dairy*, because each suggests that mere disputes over terms of access to an allegedly essential facility, where access is being provided, can state a claim under section 2 – a proposition that *Ideal Dairy* rejects. Second, each of these cases effects an unprecedented and wholly unwarranted expansion of liability under section 2, in conflict with sound authority. This Court should follow the reasoning of *Goldwasser* – which was authored by an antitrust scholar and former Deputy Assistant Attorney General in the Antitrust Division of the Department of Justice – as have the vast majority of district courts confronted with these issues. Indeed, the only district court in this Circuit to rule on claims like ATX's – acting after *Covad* and *Trinko* were decided by the courts of appeals – dismissed the complaint. *Ntegrity, supra.*

9. ATX's counterclaim should accordingly be dismissed.

STATEMENT OF FACTS

A. The Telecommunications Act of 1996

This case can only be understood against the backdrop of the 1996 Act, which imposes unprecedented duties on incumbent local telephone companies – who had generally been operating under state-authorized exclusive franchises – to assist rivals in entering the very local telephone market in which the incumbents continue to compete.

As the Supreme Court recently explained, the 1996 Act created "something brand new" – "the wholesale market for leasing network elements." *Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646, 1681 (2002). It forced incumbent local exchange carriers ("ILECs") like Verizon to change their local telephone businesses: they could no longer simply provide local service to end-user customers, but now had to rent pieces of their local networks ("unbundled network elements") to new competitors that could displace them in using those leased pieces to provide local service to end users instead.

The pieces had to be rented out, moreover, at low rates based on "cost," a standard implemented through a "novel ratesetting" methodology requiring rates just "short of confiscating the incumbents' property," specifically in order "to give aspiring competitors every possible incentive to enter local retail telephone markets." *Id.* at 1661. The new regime, as implemented, further required turning over space in ILECs' buildings ("collocation"), and creating new databases and other facilities, to aid competitors in using the incumbent's network to displace the incumbent in providing local service. *See id.* at 1683-86; *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371-73, 386-87 (1999). The compelled transformation of the ILECs' local businesses was described by a "leading backer of the Act in the Senate" as "'extraordinary'" precisely because it told "'private industry that this is what they have to do in order to let the competitors come in and try to beat your economic brains out.'" *Verizon*, 122 S. Ct. at 1661 (quoting 141 Cong. Rec. 15572 (1995) (Sen. Breaux)).

Thus, Congress did not choose "a simple antitrust solution to the problem of restricted competition in local telephone markets," under which exclusive franchises would be outlawed, new entrants would be allowed to compete, and the incumbent

telephone companies would be simply "prohibited from engaging in affirmatively exclusionary acts." *Goldwasser*, 222 F.3d at 399. Instead, Congress, "in an effort to jump-start the development of competitive local markets, . . . imposed a host of special duties on the ILECs; it entrusted supervision of those duties to the FCC and the state public utility commissions; and it created a system of negotiated agreements through which this would be accomplished." *Id.* at 399-400.

The key provisions of the 1996 Act are sections 251 and 252. In particular, section 251(c)(3) requires incumbents to make available "unbundled network elements" – piece parts of the incumbent's physical network, including telephone lines, high-capacity transport facilities, and the systems required to order those facilities – to competing carriers on "just, reasonable, and nondiscriminatory" terms and conditions. 47 U.S.C. § 251(c)(3). Section 251(c)(4) mandates that incumbents "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." *Id.* § 251(c)(4)(A). And section 251(c)(6) requires ILECs to provide competitive local exchange carriers ("CLECs") with "collocation" – space in the incumbents' central offices[1] for placement of the CLECs' equipment – on "rates, terms, and conditions that are just, reasonable and nondiscriminatory." *Id.* § 251(c)(6).[2]

In addition to establishing substantive requirements, the 1996 Act creates a detailed and innovative remedial scheme to ensure that the Act is implemented

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[1] A "central office" houses the telephone company's switching equipment, and is the point where customer lines are connected to the network, and the network's switches are connected to each other.

[2] Compliance with these duties is a pre-requisite to an ILEC entering the market for long distance under section 271 of the Act. *See* 47 U.S.C. § 271(c)(2)(B)(i), (ii), and (xiv).

expeditiously, with due regard for the state public utility commissions' traditional role in regulating local telecommunications, the expertise of the FCC, and parties' private preferences. *See generally MCI Telecomm. Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 500-01 (3d Cir. 2001), *cert. denied*, 123 S. Ct. 340 (2002). As an initial matter, Congress directed the FCC "to establish regulations to implement the requirements" of section 251. 47 U.S.C. § 251(d)(1). In response, the FCC has adopted thousands of pages of regulations, which elaborate in comprehensive and constantly evolving detail the specific duties encompassed within the more general requirements set forth in sections 251(b) and (c), and elsewhere in the 1996 Act.[3]

To implement the 1996 Act's requirements, CLECs and ILECs may negotiate interconnection agreements "to fulfill the duties described" in the Act and the FCC's regulations. 47 U.S.C. § 251(c)(1). Such agreements must include "a detailed schedule of itemized charges" – in essence, a tariff, *cf. id.* § 203 – "for interconnection and each service or network element included in the agreement." *Id.* § 252(a)(1). If the parties are able to agree, the terms of their agreement are binding (once approved by the appropriate state public utility commission) "without regard to the standards set forth in subsections (b) and (c) of section 251." *Id.* If the parties cannot agree after a specified period of time elapses, either party may petition the appropriate state public utility commission to

[3] *See, e.g.*, First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") (subsequent history omitted); Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), *petitions for review granted, United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *limited stay granted*, No. 00-1012, *et al.* (D.C. Cir. Sept. 4, 2002); Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 FCC Rcd 22781 (2001) ("*Triennial Review NPRM*").

arbitrate their disagreements in accordance with the standards set forth in the 1996 Act. *Id.* § 252(b), (c). Whether their agreement is negotiated or arbitrated, parties must submit the agreement to the state commission for final approval in accordance with the standards set forth in the Act. Once an agreement is approved, its terms are legally binding on the parties, it must be maintained on file for public inspection, and any other telecommunications carrier may take service pursuant to its terms. *Id.* § 252(h), (i).

B. ATX's Counterclaim

ATX began taking advantage of the Act's regime of compelled sharing in 1997 by entering into interconnection agreements with Verizon entities in Massachusetts, New York, New Jersey, Pennsylvania, Delaware, Virginia, Maryland, and the District of Columbia. Rather than negotiate a new agreement, ATX decided to take service under previously existing agreements between Verizon and other CLECs (specifically, MCImetro and AT&T) pursuant to the "opt-in" provision of section 252(i).

Shortly after Verizon began providing service to ATX under those interconnection agreements, ATX began withholding payment. When Verizon notified ATX that it would have to make good on its payment obligations, ATX sent a letter from its outside counsel threatening to sue Verizon for alleged antitrust violations. Verizon was thus compelled to file this lawsuit to collect tens of millions of dollars in charges that ATX has failed to pay and to obtain a declaratory judgment that Verizon has not violated the antitrust laws. ATX's antitrust counterclaim followed.

ATX's counterclaim focuses exclusively on its ability to gain access to Verizon's facilities or services. Thus, the counterclaim alleges that:

- Verizon has provided "substandard performance in implementing various types of collocation," Answer, With Affirmative Defenses and Counterclaims (filed Sept.

24, 2002) (D.I. 14) ("Countercl.") ¶ 275; *see id.* ¶¶ 275-285, which ATX claims it needs in order to gain access to Verizon's telephone wires reaching ATX's customers;

- ATX's customers experienced "technical problems with the 'last-mile' lines that ATX leases from Verizon," *id.* ¶ 286;

- ATX's customers have experienced "outages and other serious service difficulties," *id.* ¶ 287; *see id.* ¶¶ 287-288, 298;

- "technical failures have plagued conversions of ATX customers" from one form of resale service (that is, provision of services at wholesale rates for resale) to a different form of resale service (provision of service as a package of network elements known as an unbundled network element platform or "UNE-P") that affords ATX a greater profit, *see id.* ¶¶ 289-297;

- Verizon has placed burdens on the use of its UNE-P service and has refused to allow ATX to resell Verizon's voice mail and operator services to ATX's customers in some states, *see id.* ¶¶ 306-324;

- Verizon's ordering and billing systems have been unreliable and too slow, *see id.* ¶¶ 328-337.

All of the matters raised by ATX's counterclaim are explicitly addressed by the 1996 Act, the FCC's implementing regulations, and the parties' agreements. These include the following statutory and regulatory duties:

<u>Duty to Negotiate in Good Faith</u>, 47 U.S.C. § 251(c)(1): ATX claims that Verizon delayed entering into negotiations with it in order to slow its competitive entry. Countercl. ¶ 274. Congress, however, established a short timetable for negotiations in 47 U.S.C. § 252, and a complete remedy in state commission arbitration proceedings, which are likewise subject to short statutory deadlines.

<u>Duty to Provide Unbundled Network Elements</u>, 47 U.S.C. § 251(c)(3): ATX alleges that the piece parts of Verizon's network to which Verizon provides it access (specifically, certain "loops") are inferior to the same network elements that Verizon uses for its retail customers. Countercl. ¶ 286. ATX also argues that Verizon has caused

difficulties to its customers in switching from one form of reselling of Verizon's services (resale) to another form, which comes at a deeper discount (UNE-P).[4] Countercl. ¶¶ 289-297. Verizon's duties to provide loops and other UNEs to ATX are addressed specifically and in detail in the various interconnection agreements between the parties. *See* MCImetro-Bell Atlantic Agreement ("MCImetro Agreement")[5] Attach. III (Seitz Aff. Exh. 1); Bell Atlantic-AT&T Agreement ("AT&T Agreement")[6] Attach. 2 (Seitz Aff. Exh. 2); MCImetro-NYNEX Agreement ("NYNEX Agreement")[7] Attach. III (Seitz Aff. Exh. 3).

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[4] UNE-P has been defined by the FCC as "the combination of unbundled loops, switches, and transport elements." *Triennial Review NPRM*, 16 FCC Rcd at 22802 n.102.

[5] This agreement was adopted by ATX in New Jersey, Pennsylvania, Virginia and the District of Columbia. Although the agreements do differ from state to state – *e.g.*, the choice of law provision generally selects the jurisdiction in which the interconnection agreement will be performed – the terms in all four agreements are identical in relevant respects, and therefore, in order to avoid overburdening the Court with paper, Verizon provides herewith only a copy of the most recent amended agreement from Pennsylvania. As with all exhibits to this motion, this agreement is attached to the Affidavit of Collins J. Seitz, Jr., filed contemporaneously herewith (cited as "Seitz Aff. Exh. __"). The Pennsylvania Agreement is Seitz Aff. Exh. 16-18. Verizon would be happy to supply the Court with copies of the agreements from all four jurisdictions if the Court so desires. Verizon has also included an attachment that contains only the excerpts of the agreements cited in this motion for the Court's convenience. *See* Seitz Aff. Exh. 1-15.

Verizon further notes that in considering this motion, this Court is permitted to take notice of the terms of the interconnection agreements that have been included as an appendix hereto. *See Ntegrity*, 219 F. Supp. 2d at 631 n.5; *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993) (a "court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss" without converting the motion into a motion for summary judgment "if the plaintiff's claims are based on the document").

[6] This agreement was adopted by ATX in Delaware and Maryland. As with the MCImetro Agreement, the terms in both agreements are identical in relevant respects. Only a copy of the Delaware agreement is attached. *See* Seitz Aff. Exh. 19-21.

[7] This agreement was adopted by ATX in New York. *See* Seitz Aff. Exh. 22-23.

Verizon is also subject to requirements that it report "performance data" with respect to its provision of UNEs and other services to competing carriers on a regular basis as a result of gaining authority to provide long-distance service under section 271 of the Act. In New York, for example, the state commission has ordered Verizon to report "a series of 152 measurements or metrics." Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 4165, ¶ 431 (1999) ("*New York Order*"), *aff'd*, *AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000). Verizon is also required to give competitors bill credits in the event it "fails to satisfy pre-determined performance standards on a set of 122 performance measures." *Id.* at 4166, ¶ 432. The New York Public Service Commission has stated that the Performance Assurance Plan it adopted "go[es] well beyond the [FCC] requirements," and requires Verizon "to achieve service quality that exceeds the [FCC] requirements in specificity and degree." Evaluation of the New York Public Service Commission at 3, 4, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295 (FCC filed Oct. 19, 1999). Similar plans exist in the other states in which Verizon has been granted authority to offer long-distance service. *See, e.g.*, Memorandum Opinion and Order, *Application by Verizon Virginia Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Virginia*, WC Docket No. 02-214, FCC 02-297, ¶ 198 (rel. Oct. 30, 2002); Memorandum Opinion and Order, *Application by Verizon New England Inc., et al., for Authorization To Provide In-Region, InterLATA Services in New Hampshire and Delaware*, WC Docket 02-157,

FCC 02-262, ¶¶ 169-170 (rel. Sept. 25, 2002). Because Verizon has been granted authority to offer long-distance service in all of the jurisdictions at issue in this case except for Maryland and the District of Columbia, it has Performance Assurance Plans in place throughout much of the region relevant to this suit. The FCC has also adopted detailed regulations setting forth requirements with respect to the provision of unbundled network elements by ILECs. *See* 47 C.F.R. § 51.319.

Duty to Provide Collocation, 47 U.S.C. § 251(c)(6): ATX's counterclaim alleges that Verizon has provided collocation in an untimely fashion, and has overcharged it for power at collocation sites. Countercl. ¶¶ 275-285; *cf.* 47 C.F.R. § 51.323 (regulations governing collocation). Verizon's obligations with respect to collocation are set forth in the various interconnection agreements between the parties. *See* MCImetro Agreement Attach. V, §§ 2.1, 2.5, 2.17-2.24 (Seitz Aff. Exh. 4); AT&T Agreement Attach. 3, §§ 2.1, 2.5, 2.17-2.24 (Seitz Aff. Exh. 5); NYNEX Agreement Attach. V, §§ 3.1, 3.3, 4.1-4.2, 4.7 (Seitz Aff. Exh. 6). Moreover, the FCC has adopted what it has characterized as "specific and detailed national collocation rules." Fourth Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 15435, 15440, ¶ 9 (2001).[8]

[8] The FCC has modified those rules on several occasions, in light of changing technology and federal appellate court decisions interpreting the 1996 Act. *See* 16 FCC Rcd at 15436-41, ¶¶ 3-11. These rules provide detailed guidance on the allocation of space and the types of equipment that a competitive carrier may physically locate on an incumbent's premises, including a "first-come, first-served" rule, 47 C.F.R. § 51.323(f)(1), rules regarding the types of physical collocation that must be offered, *id.* § 51.323(k)(1)-(3), and the establishment of deadlines for exchange of information and the final provisioning of collocation space, *id.* § 51.323(*l*)(1)-(4). The FCC's rules assign specific disputes over the timing or technical feasibility of various forms of collocation to the state commissions in the first instance. *See id.* § 51.323(c) (incumbent must justify denial of collocation of particular equipment to state commission); *id.* § 51.323(f)(5)

Miscellaneous Complaints: ATX also complains about Verizon's repair and maintenance services. The interconnection agreements between the parties set forth Verizon's obligations in this regard. *See* MCImetro Agreement Attach. VIII, § 5 (Seitz Aff. Exh. 7); AT&T Agreement Attach. 5 (Seitz Aff. Exh. 8); NYNEX Agreement Attach. VIII, § 6 (Seitz Aff. Exh. 9). Agreed-upon ordering procedures are also set forth in those documents. *See* MCImetro Agreement Attach. VIII, § 2.2 (Seitz Aff. Exh. 10); AT&T Agreement Attach. 4 (Seitz Aff. Exh. 11); NYNEX Agreement Attach. VIII, §§ 2.2, 3 (Seitz Aff. Exh. 12). ATX also puts forward many complaints about Verizon's bills. All of the agreements have provisions for billing dispute resolution. *See* MCImetro Agreement Attach. VIII, § 3.1.9 (Seitz Aff. Exh. 13); AT&T Agreement Attach. 6, § 19 (Seitz Aff. Exh. 14); NYNEX Agreement Attach. VIII, § 4.1.18.2 (Seitz Aff. Exh. 15). ATX has aired its complaints with Verizon's bills with the FCC several times in connection with Verizon's applications to provide long-distance service. That expert agency has seen no merit in such complaints. *See* Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419, 17445, ¶ 42 (2001) (concluding that "Verizon's wholesale billing systems provide competing carriers a meaningful opportunity to compete," and therefore satisfy the requirements of 47 U.S.C. § 271(c)(2)(B)(ii)), *appeal pending*, *Z-Tel Communications, Inc. v. FCC*, No. 01-1461 (D.C. Cir. filed Oct. 17, 2001); *New York Order*, 15 FCC Rcd at 4076-77, ¶ 228.

(state commission to determine if virtual collocation is "not technically feasible"); *id.* § 51.323(f)(6) (incumbent may restrict warehousing of space by competitors if it "proves to the state commission that space constraints make such restrictions necessary").

In some cases, ATX claims that Verizon's obligations under the parties' interconnection agreements do not go far enough to satisfy ATX. For example, pursuant to FCC regulations, Verizon has no obligation to make its voice mail or operator services available to ATX for resale. The FCC considered at length, as required by the 1996 Act, whether ILECs should have to provide competitors with unbundled access to their operator services, and concluded that "lack of access to the incumbents' OS/DA [operator services and directory assistance] service on an unbundled basis does not materially diminish a requesting carrier's ability to offer telecommunications service." *UNE Remand Order*, 15 FCC Rcd at 3891, ¶ 441. The FCC reached this conclusion based on extensive study and discussion of third-party alternatives in the marketplace, *id.* at 3894-95, ¶¶ 447-449, as well as the fact that the 1996 Act, while not requiring ILECs to provide access to their actual operator services, does require ILECs to give nondiscriminatory access to the databases used for provision of those services, *id.* at 3899, ¶ 457. In the end, the FCC's expert judgment was that not requiring ILECs to offer their operator services to CLECs on an unbundled basis was "consistent with the goals of the [1996] Act, because it will reduce competitors' reliance on the incumbent's network and create new opportunities for competitors of OS/DA service to differentiate their services through increased quality and decreased prices." *Id.* at 3904, ¶ 464. The FCC has similarly interpreted the 1996 Act not to require ILECs to provide "information services" such as voice mail for resale. *See* Memorandum Opinion and Order, *Application of BellSouth Corp., et al., for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599, 20781, ¶ 314 (1998) ("*Second Louisiana Order*").

ARGUMENT

ATX's antitrust counterclaim is based exclusively on its assertion that Verizon has failed to make its local network facilities and services available to ATX in a manner that would promote ATX's efforts to displace Verizon as provider of local service in the markets where ATX is attempting to compete. Such allegations cannot support a claim under section 2 of the Sherman Act because Verizon has no duty *under the antitrust laws* to provide the type of affirmative assistance to competitors that the 1996 Act requires. Precisely for that reason, the Seventh Circuit – in *Goldwasser* – and district courts in this Circuit and around the country have dismissed claims that are indistinguishable from ATX's counterclaim here. *See supra* pp. 1-2.

ATX will attempt to rely on two recent appellate decisions, *Trinko* and *Covad*, that have reversed district court decisions dismissing claims implicating 1996 Act duties. Those decisions – which rejected an irrelevant theory of "implied immunity" from antitrust liability and revived claims based on monopoly leveraging theories squarely rejected by this Circuit – provide no basis for declining to follow the correct substantive antitrust analysis in *Goldwasser* and its progeny. Nor does the district court's decision in *Ohio Bell* present this Court with any reason to allow ATX's claims to go forward. That case explicitly relied on a "constructive" denial of access to the ILEC's supposedly essential facilities – but under *Ideal Dairy* and *Anserphone* such constructive denials are not legally sufficient to state a claim in this Circuit. This Court should instead follow the persuasive and correctly reasoned precedent from a sister district court in this Circuit in *Ntegrity* and dismiss ATX's claim.

The legal insufficiency of ATX's allegations "is not the kind of question that requires further development of a factual record" and is therefore "proper for resolution under Rule 12(b)(6)." *Goldwasser*, 222 F.3d at 401. Even at the pleading stage, attachment of labels like "anticompetitive" is "inadequate in itself to sustain a complaint." *Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173 (3d Cir. 1988) (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1108 (7th Cir. 1984)). "'The defendants' alleged activity must be scrutinized to determine whether such a characterization is appropriate.'" *Id.* (quoting *Car Carriers*, 745 F.2d at 1108). A complaint that is long on detail is nonetheless subject to dismissal if the facts alleged do not constitute an antitrust violation: "a pleader may volunteer enough to show that the claim cannot succeed, and then dismissal under Rule 12(b)(6) follows." *South Austin Coalition Cmty. Council v. SBC Communications Inc.*, 274 F.3d 1168, 1171 (7th Cir. 2001), *cert. denied*, 123 S. Ct. 81 (2002). The Court "must assume that [ATX] can prove the facts alleged in its . . . [counterclaim]. It is not, however, proper to assume that [ATX] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged." *Associated Gen. Contractors of California, Inc. v. California State Counsel of Carpenters*, 459 U.S. 519, 526 (1983).

ATX'S ALLEGATIONS THAT VERIZON'S PERFORMANCE OF ITS DUTIES UNDER THE 1996 ACT WAS INADEQUATE DO NOT STATE A CLAIM UNDER SECTION 2 OF THE SHERMAN ACT

All courts of appeals to have examined claims like ATX's "are in agreement on one principle; that violations of the 1996 Act, standing alone, do not create liability under the general antitrust laws." *Ntegrity*, 219 F. Supp. 2d at 629. ATX's allegations here fall squarely within that rule: all of the allegations of the counterclaim "stem only from

Verizon's performance under the express terms of the interconnection agreements. . . . Those obligations alone cannot form the basis of an antitrust action." *Id.*

ATX nonetheless attempts to dress up its regulatory claims in the language of antitrust by claiming that alleged delays in gaining access to unbundled elements of Verizon's network constitute a "refusal to make access to . . . essential facilities reasonably available to competitors." Countercl. ¶ 325. And it argues – despite the FCC's determination that Verizon has no obligation to make voice mail and operator services available to ATX – that Verizon's refusal to make those services available constitutes an illegal "refusal[] to deal." *Id.* ¶ 324. ATX is wrong. Under established principles of antitrust law, the allegations of the counterclaim do not describe anticompetitive conduct for purposes of section 2.

Doctrinal labels cannot alter the underlying requirements for all claims under section 2. A lawful monopolist is not just permitted but *encouraged* to compete vigorously to retain customers; cooperation with rivals is generally an antitrust problem, not an antitrust virtue. *See, e.g., Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116 (1986); *Olympia*, 797 F.2d at 375-76; *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 544-45 (9th Cir. 1983). Section 2 thus proscribes only "exclusionary" – *i.e.*, "predatory" or "anticompetitive" – conduct to define the critical difference between lawful and unlawful ways of holding onto as many customers as possible. Unlawful conduct must, first, tend to "impair[] the opportunities of rivals" in the free market, 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 651a, at 72 (2d ed. 2002) ("Areeda & Hovenkamp"), and, second, be something other than "'competition on the merits,'" *Aspen Skiing*, 472 U.S. at 605 n.32 (quoting 3 Phillip E. Areeda & Donald F.

Turner, *Antitrust Law* 78 (1978)) – which can equally damage rivals. The conduct must not be "reasonable in light of [the defendant's] business needs," *Southern Pac. Communications Co. v. AT&T Co.*, 740 F.2d 980, 999 n.19 (D.C. Cir. 1984); it must make no business sense except for later recoupment through monopoly prices, *see Aspen Skiing, supra*; *Advanced Health-Care Servs., Inc. v. Giles Mem'l Hosp.*, 910 F.2d 139 (4th Cir. 1990).

It is well recognized that this test broadly excludes "affirmative duties to help one's competitors," as distinguished from hindrance of rivals' independent efforts. *Goldwasser*, 222 F.3d at 400. "[A] monopolist is under no duty affirmatively to help or aid its competitors." *United States Football League v. NFL*, 842 F.2d 1335, 1361 (2d Cir. 1988) (internal quotation marks omitted). "The antitrust laws are not intended to support artificially firms that cannot effectively compete on their own." *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1573 (11th Cir. 1991); *see also Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 929-30 (4th Cir. 1990). This strong categorical distinction reflects both the fact that *independent* effort rather than dependency is what competition *is* and the obvious, normal business sense of a firm's refusing to "help its competitors enter the market," *Goldwasser*, 222 F.3d at 400 – here, by renting out and turning over its facilities at nearly confiscatory prices.

ATX attempts to plead around this limitation on section 2 by reciting that Verizon's "denials of reasonable access to its essential facilities" and "refusals to sell certain services . . . all run counter to [Verizon's] own short-term business interests in maximizing sales by taking full advantage of all possible sales channels." Countercl. ¶ 229; *see also id.* ¶ 301 ("Verizon has lost wholesale business that it otherwise would

have attracted"). But this bare allegation is "belied by both the remaining factual allegations and the law." *Schuylkill Energy Res., Inc. v. Pennsylvania Power & Light Co.*, 113 F.3d 405, 417 (3d Cir. 1997) (affirming Rule 12(b)(6) dismissal). As ATX itself acknowledges, "Verizon earns more revenue by serving . . . customers directly than it does by providing wholesale services to ATX or another competitive telephone company." Countercl. ¶ 303. The 1996 Act requires an *involuntary* transformation in ILECs' business, akin to requiring a car manufacturer to sell component parts for the convenience of a rival manufacturer, at all-but-confiscatory prices. *See Verizon*, 122 S. Ct. at 1661; *AT&T Communications of Southern States, Inc. v. BellSouth Telecomms., Inc.*, 268 F.3d 1294, 1297 (11th Cir. 2001). Verizon would sacrifice no ordinary business interests by refusing to provide voluntarily the accommodations that ATX desires. Indeed, as the courts have recognized – and ATX effectively concedes – Verizon did not and would not voluntarily surrender facilities used to serve an end-user customer paying full retail rates simply to receive much lower wholesale rates from a competitor. *See Cavalier*, 208 F. Supp. 2d at 616 ("Absent the 1996 Act, Verizon undoubtedly would not provide such assistance.").

The *Cavalier* court's conclusion is plainly correct. Suppose that, in 1995, a potential rival had approached Verizon and said, "we would like to offer service to your retail customers, but we can only do so by using the same facilities – and, in some cases, reselling the same services – that you currently use to serve those customers. We therefore would like you to agree to provide those services and facilities to us at a very low rate, even though it will mean a sacrifice of revenue for you. Indeed, the rate *must* be below your retail rate so that we can make a profit. We also insist that you develop

complex new ordering and billing systems to facilitate our efforts, even though doing so will provide no benefit to your business and customers." No private business could agree to such terms. But such are the terms that have been imposed by the 1996 Act and the FCC's implementing regulations.

A. ATX Has Failed To Allege an "Essential Facilities" Claim

ATX cannot rely on the "essential facilities" doctrine to support its claim. That doctrine has been narrowly cabined, reflecting the anticompetitive dangers and problems of institutional competence inherent in creating such duties of affirmative assistance to competitors. ATX's claims cannot come within the narrowly cabined doctrine for several reasons.

1. ATX Does Not Allege That Verizon Has Denied ATX Access to Any Essential Facility

ATX does not and cannot allege the most basic element of an essential facilities claim under section 2: *denial of access* to an allegedly essential facility. *See Ideal Dairy*, 90 F.3d at 748; *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 544-45 (4th Cir. 1991); *see also Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 545-46 (9th Cir. 1991). To the contary, ATX concedes, as it must, that it *has* gained access to Verizon's network and its facilities – by its own admission, it provides service to hundreds of thousands of customers over facilities provided by Verizon. *See* Countercl. ¶ 242. ATX complains about the *quality* of its access, but the law of this Circuit makes clear that complaints about *quality* of access do not state a claim under section 2. *Ideal Dairy*, 90 F.3d at 748; *Anserphone*, 955 F. Supp. at 428-29; *see also Laurel Sand*, 924 F.2d at 545; *Valet Apartment Servs., Inc. v. Atlanta J. & Const.*, 865 F. Supp. 828, 833 (N.D. Ga. 1994), *aff'd mem.*, 50 F.3d 1039 (11th Cir. 1995).

In *Ideal Dairy*, the plaintiff claimed that the defendant had overcharged for access to an allegedly essential milk-processing facility, thereby hampering plaintiff's ability to compete; at the same time, it was undisputed that plaintiff continued to have access at that allegedly inflated price. *See* 90 F.3d at 742-43. The Third Circuit held that such allegations do not make out a claim precisely because the plaintiff continued to have access to the allegedly essential facility. *Id.* at 748. As courts in this Circuit have recognized, this principle prevents plaintiffs like ATX from attempting to transform disputes over terms, conditions, and quality of service into an antitrust claim. *Anserphone*, 955 F. Supp. at 428-29. Indeed, in *Anserphone* – a case involving allegations parallel to some of the allegations in ATX's counterclaim – the plaintiff claimed that the defendant telephone company had provided poor service, hampering its ability to compete with the telephone company in the provision of answering services. *See id.* at 424. But the court held that "such a 'constructive denial' is insufficient to prove antitrust liability *as a matter of law*." *Id.* at 429 (emphasis added). "Although plaintiff claims that the services provided by defendants were poor, like the plaintiff in *Ideal Dairy* who complained of overpriced services, plaintiff . . . cannot prove . . . that defendants denied the use of its facility to a competitor." *Id.* That conclusion squarely applies here.

Because Third Circuit law is clear on this issue, *Ohio Bell* is of no use to ATX. There, the district court used as the linchpin of its opinion that the defendant ILEC had allegedly refused to "'share[]'" its allegedly essential facilities "'on fair terms.'" 214 F. Supp. 2d at 818 (quoting *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 612 (6th Cir. 1987)). However, *Ideal Dairy* and *Anserphone* demonstrate that this

logic is inapplicable in the Third Circuit. This also serves to explain why both *Trinko* and *Covad* do not help ATX. The *Trinko* court never even addressed *Ideal Dairy*, and never considered whether a plaintiff could maintain an essential facilities claim where, as here, access is concededly being provided. And *Covad* distinguished *Ideal Dairy* both because the complaint in that case "does allege that Bell South sometimes denied access to its facilities outright," and because *Ideal Dairy* (and *Anserphone*) were decided at the summary judgment stage. 299 F.3d at 1287 & n.13. Here, ATX simply does not allege outright denial of access to any supposedly essential facility; it merely complains of a series of "serious service difficulties," Countercl. ¶ 287, of the kind that the court in *Anserphone* explained were insufficient to state a claim. Moreover, because ATX positively alleges that it was granted access (albeit on terms that ATX argues were inadequate), its allegations – even if true – do not state a claim under the antitrust laws, and dismissal is therefore warranted. *See Anserphone*, 955 F. Supp. at 428-29 (rejecting essential facilities claim "as a matter of law"); *cf. South Austin Coalition*, 274 F.3d at 1174.

2. *ATX Concedes That Verizon's Network Facilities Can Be Duplicated, and Therefore Are Not Essential*

As to all facilities (with the possible exception of the "last-mile" local loop, *see* Countercl. ¶ 266), ATX affirmatively avers that it intends to, and in fact is, *duplicating the very facilities that it seeks from Verizon. Id.* ¶¶ 241, 268, 270. This admission is fatal to an essential facilities claim, which applies *only* where (among other factors) "it would make *no economic sense* for competitors to duplicate the facility." *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 426 (D.C. Cir. 2002) ("*USTA*"), *limited stay granted*, No. 00-1012, *et al.* (D.C. Cir. Sept. 4, 2002); *see also Goldwasser*, 222 F.3d at 399; *City of*

Anaheim v. Southern Cal. Edison Co., 955 F.2d 1373, 1380 (9th Cir. 1992) ("[I]f the facility can be reasonably or practically duplicated it is highly unlikely, even impossible, that it will be found to be essential at all."); *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1148 (7th Cir. 1983) (refusing to find interconnection essential when there "was no sufficient explanation as to why MCI, on the one hand, was building its own network, and, on the other, was entitled to access in the interim to AT&T's facilities"); *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 456, 464 (E.D. Pa. 1996) (America Online not an essential facility because plaintiff did not "show[] any reason why it could not (other than perhaps because it would have to pay its own way) use its servers to create its own commercial online internet service or advertising web site and attempt to lure away AOL subscribers"). ATX not only insists that it makes economic sense for competitors to duplicate Verizon's facilities, ATX is engaged in that duplication right now. Its *sole* reason for desiring access to Verizon's facilities is as a way to finance its expansion.[9] Verizon has no obligation under the antitrust laws to support ATX's efforts to expand its business in this way. *Cf. Olympia*, 797 F.2d at 377 ("a firm that is not in that business is not required to lend money to a competitor merely because the loan would increase competition").

[9] These allegations again distinguish this case from both *Trinko* and *Covad*, in which the plaintiffs alleged (unlike ATX here) that the facilities that competitors sought could not be duplicated. *See Trinko*, 305 F.3d at 108 (plaintiffs alleged that "creating independent facilities would be prohibitively expensive"); *Covad*, 299 F.3d at 1276 (noting allegation that "the facilities controlled by BellSouth cannot practicably be duplicated").

3. *The Antitrust Laws Do Not Require Provision of Exclusive or Preferential Access*

With respect to ATX's complaints about access to local loop facilities, the essential facilities doctrine never applies where a competitor seeks "preferential access" to a given facility or where a competitor asks the owner to "abandon its facilities." *MCI v. AT&T*, 708 F.2d at 1133. For example, in *American Football League v. NFL*, 323 F.2d 124 (4th Cir. 1963), the plaintiff argued that the NFL had "occupied the more desirable" of potential sites for teams. The court rejected the claim, noting that "[i]t frequently happens that a first competitor in the field will acquire sites which a latecomer may think more desirable than the remaining available sites, but the firstcomer is not required to surrender any, or all, of its desirable sites . . . to enable the latecomer to compete more effectively with it." *Id.* That is the situation here: ATX seeks to require Verizon to surrender exclusive access over Verizon's facilities to permit it to supplant Verizon as the provider of retail telephone service over those facilities. In short, ATX does not want to *share* Verizon's facilities; it wants to *take* them. Likewise, ATX demands physical collocation, a permanent physical occupation of Verizon's property. *Cf. Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1444-47 (D.C. Cir. 1994) (striking down FCC's pre-1996 Act physical collocation rules). Section 2 has never required a defendant "to cease using its own facility so that [a rival] can begin using it." *City of Vernon v. Southern Cal. Edison Co.*, 955 F.2d 1361, 1366 (9th Cir. 1992).

4. *ATX Fails To Allege That Verizon Is Attempting To Extend Monopoly Power into a Distinct Market*

"[T]he central concern in an essential facilities claim is whether market power in one market is being used to create or further a monopoly in another market." *Advanced*

Health-Care, 910 F.2d at 150; *see also MCI v. AT&T*, 708 F.2d at 1132-33. But ATX alleges only markets for retail telecommunications services. *See* Countercl. ¶ 255. ATX's claim is thus directly analogous to a claim that the Seventh Circuit rejected in *MCI v. AT&T*. MCI argued that, to compete in the *long-distance* market, it required access to AT&T's *long-distance* facilities in areas where MCI did not yet offer service. The court rejected that argument for reasons that fully apply here. Because MCI was seeking to compete with AT&T in the long-distance market, it could hardly claim an entitlement to rely on AT&T's existing long-distance facilities to enhance its ability to compete. "AT&T's refusal to voluntarily assume 'the extraordinary obligation to fill in the gaps in its competitor's network,' did not suffice to support a finding that it was trying to maintain its monopoly of long-distance telephone service by anticompetitive means." *MCI v. AT&T*, 708 F.2d at 1149, *quoted in Illinois ex rel. Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1484 (7th Cir. 1991). But this is precisely what ATX seeks – use of Verizon's local facilities to compete in local markets. The 1996 Act requires this; the antitrust laws do not.

Because the essential facilities doctrine is concerned with the use of market power in one market to create or further a monopoly in a second market, ATX's counterclaim, which alleges only a single market, cannot state a claim under that doctrine. And ATX could not correct this failing simply by amending its counterclaim to allege a second and separate market for network elements, because, prior to the 1996 Act, no such market existed. *See Verizon*, 122 S. Ct. at 1681. ILECs, by making available unbundled network elements that were previously *unavailable on any terms*, are helping to promote competitive entry; they are not *extending* monopoly power in any sense. Even setting

aside these difficulties with the factual basis for such a claim, the Third Circuit has squarely rejected the theory of leveraging upon which the decisions in both *Trinko* and *Covad* rest. *See Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 205 (3d Cir. 1992) (Sherman Act does not reach unilateral conduct that "falls shy of threatened monopolization"); *see also Alaska Airlines*, 948 F.2d at 548 (same). As a result, Third Circuit law precludes ATX from stating a claim for essential facilities based on the discredited theory of monopoly leveraging.

5. The Essential Facilities Doctrine Never Requires a Defendant To Alter the Nature of Its Business or To Construct New Facilities

The essential facilities doctrine has never required a firm either to construct new facilities or to alter the nature of its business as a service provider to become instead a renter of its facilities for others to use to provide service directly. As to the former: "No case has suggested that the monopolist must build new capacity to satisfy a would-be sharer." 3A Areeda & Hovenkamp ¶ 773e, at 210; *accord City of Vernon*, 955 F.2d at 1366-67; *Oahu Gas Serv., Inc. v. Pacific Res., Inc.*, 838 F.2d 360, 368 (9th Cir. 1988). Yet ATX complains, for example, that Verizon "*established systems* for . . . ordering and provisioning . . . that were unreasonably convoluted and opaque," Countercl. ¶ 281 (emphasis added); failed to construct *new* collocation facilities, *see id.* ¶ 280; failed to develop *new* procedures to handle conversions of customers from resale service to service by "UNE-P," *see id.* ¶ 291; in short, failed to make the investments in new facilities and systems that would meet ATX's business needs. This has never been a duty under the antitrust laws.

As to the latter, the Fourth Circuit in *Laurel Sand* specifically rejected the plaintiff's claimed right of access to the defendant's railroad track for the simple reason

that the defendant was not in the business of renting track, as opposed to providing freight service to its customers. The court strictly defined the "feasibility" element of an essential facilities claim to defeat the claim: "[F]or CSX to rent track, it would alter its relationship to feeder railroads and transform itself into a 'toll collector.' It is not feasible for CSX as a transportation service-provider to grant trackage rights." 924 F.2d at 545; *see also id.* at 543 ("It is a legitimate purpose to seek to maintain the nature of one's business."). The 1996 Act requires Verizon to become a wholesaler of telecommunications network facilities. The antitrust laws impose no such duty.

6. The Antitrust Laws Never Require Provision of Services for Resale at a Discount

Access to services for resale – whether in the form of services provided at a wholesale discount under section 251(c)(4) or as a "platform" of network elements making up a complete service – has never been required under the antitrust laws. To the contrary, there are numerous cases holding that such resale is not required. *See Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343, 353 (5th Cir. 1980) ("By achieving the goal to resell electricity on the retail level, appellants will be merely plugging themselves into the flow of electricity and reaping profits as a non-competitive middleman."); *HyPoint Tech., Inc. v. Hewlett-Packard Co.*, 949 F.2d 874, 878 (6th Cir. 1991) (same); *MCI v. AT&T*, 708 F.2d at 1148-49. Such a rule makes sense because antitrust law is concerned with promoting *competition*, not non-competitive middlemen, with the goal of providing lower cost service to consumers. *See HyPoint*, 949 F.2d at 877-78. Section 2's aim of promoting cost reduction through competition would not be significantly advanced by compelling competition limited to the typically small marketing slice of a service; indeed, there often will be significant *added* costs in setting

up means for resale competition. The potential antitrust benefit from such resale, which must be a market-wide improvement, has always been recognized as too slight and uncertain to justify the countervailing costs. *See* 10 Phillip E. Areeda, Einer Elhauge & Herbert Hovenkamp, *Antitrust Law* ¶ 1766, at 418 (2d ed. 2002) (noting that *HyPoint* "correctly rejected [a resale] requirement as inconsistent with antitrust goals").

ATX's counterclaim does not merely complain about Verizon's supposed failure to make facilities and services available for resale; ATX also objects that Verizon has not done an adequate job of converting ATX's customers from one form of resale to another. *See* Countercl. ¶ 289. ATX alleges that Verizon was too slow to convert customers from simple resale service to service over UNE-P, thereby allegedly depriving ATX of an even deeper discount off of Verizon's retail rates. *Id.* ATX evidently believes that section 2 is intended to guarantee its ability to operate more profitably as a reseller of Verizon's services, at Verizon's expense. *See id.* (claiming that "UNE-P can be a profitable form of service"). ATX is wrong, as the law is clear that "the reasonable standard of the access factor can not be read to mean the assurance of a profit." *Laurel Sand*, 924 F.2d at 545.

B. ATX Does Not State a Claim for Any Unlawful "Refusal to Deal"

ATX claims that Verizon's refusal to make certain types of voice mail and operator services available at discounted rates to ATX for resale constitute "unreasonable refusals to deal." Countercl. ¶ 324. As an initial matter, it is undisputed that Verizon refuses to make such services available *only* where state commissions – in keeping with the determinations of the FCC – have declined to require Verizon to make those services available. *See id.* ¶ 313. Notably, in ruling that incumbents have no duty to make operator services available to competitors, the FCC determined that "alternative sources

of [operator services and directory assistance] are available as a practical, economic, and operational matter. . . . [N]ot requiring that incumbent LECs . . . unbundle [operator services and directory assistance] is consistent with the goals of the Act, because it will reduce competitors' reliance on the incumbent's network and create new opportunities for competitors of [such] service to differentiate their services through increased quality and decreased prices." *UNE Remand Order*, 15 FCC Rcd at 3904, ¶ 464. And Congress declined to require incumbents to make any information services available for resale at a discount. *See Second Louisiana Order*, 13 FCC Rcd at 20781, ¶ 314. It is simply inconceivable that a competitor should be permitted to use the antitrust laws to reverse the judgment of Congress and expert regulators.

In any event, in invoking the "refusal-to-deal" doctrine of *Aspen Skiing*, ATX ignores what made the conduct in that case "exclusionary." The Court held that the defendant had a duty: (a) to *continue* a voluntarily created business arrangement where (b) the defendant's termination involved a "sacrifice [of] short-run benefits and consumer goodwill" recoupable only through expected market power through reducing competition. 472 U.S. at 610-11.

The *Aspen Skiing* facts have no counterpart in this case. ATX's counterclaim does not allege that this is a case of terminating a voluntarily undertaken arrangement – one that, having been adopted voluntarily, might be presumed efficient so as to demand justification for its termination. As the Supreme Court recently confirmed in *Verizon v. FCC*, it was the 1996 Act that newly compelled these arrangements. And as Judge Posner has noted, "[t]he essential feature of the refusal-to-deal cases – a monopoly supplier's discriminating against a customer because the customer has decided to

compete with it – is missing here." *Olympia*, 797 F.2d at 377. ATX does not seek to purchase the retail services that Verizon makes available to its customers; ATX seeks to purchase specific services *at deeply discounted wholesale rates* for resale – a business that Verizon has never undertaken voluntarily, and which involves, as ATX concedes, a sacrifice of revenue. *See* Countercl. ¶ 303. This analysis is confirmed by the Ohio district court case upon which Verizon anticipates ATX will attempt to rely. *See Ohio Bell*, 214 F. Supp. 2d at 818 n.7 (rejecting apparently identical claim of refusal to deal because "there [was] no history of prior cooperation, and no allegation that SBC's cooperation with CoreComm would be profitable for SBC. The only basis alleged for any agreement or cooperation between SBC and CoreComm has been forced through regulation."). The Court should therefore reject ATX's claim of refusal to deal as a matter of law.

C. Under Traditional Antitrust Principles, the 1996 Act's Regulatory Scheme Weighs Heavily Against Newly Creating the Access Duties ATX Urges

The existence of an elaborate regulatory scheme under the 1996 Act governing the very conduct at issue in this case is a factor weighing heavily against expanding section 2 in the way that ATX advocates. This is true for two sets of reasons. First, the regulatory facts count heavily against expanding antitrust duties by eliminating any cognizable risk of competitive harm "needing" to be addressed through antitrust. Second, ATX's claims: (1) attack the judgments of expert regulators; (2) attempt to evade the limitations on Verizon's affirmative duties established by Congress and by regulators; and (3) threaten parallel litigation of issues concerning implementation of the 1996 Act. Those claims thus raise serious institutional concerns.

Critically, this has nothing to do with the question of antitrust "immunity" – despite the misconception of the *Trinko* and *Covad* courts. Rather, this analysis reflects the settled principle that the existence of regulation must be taken into account in evaluating the issues of antitrust policy properly resolved as a matter of law. *See Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990); *MCI v. AT&T*, 708 F.2d at 1106 ("'[A]ntitrust courts can and do consider the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation.'") (quoting 1 Phillip E. Areeda & D. Turner, *Antitrust Law* ¶ 223d (1978)); 1A Areeda & Hovenkamp ¶ 240d, at 15; *Covad v. Bell Atlantic*, 201 F. Supp. 2d at 132 ("consideration of existing regulatory mechanisms and the degree to which they already address the alleged threat to competition is necessary"). Where "alleged anticompetitive behavior [is] in an industry which is highly regulated," a court must take account of a "context which is substantially different from that of most antitrust cases." *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 263 (3d Cir. 1998).

1. The 1996 Act's Substantive Duties and Remedial Scheme Eliminate Any Risk to Competition from Access Disputes

The 1996 Act "dramatically alters the calculus of antitrust harms and benefits," *Town of Concord*, 915 F.2d at 25, making clear that there is no significant likelihood of competitive harm – that is, no "more-than temporary harmful effects on *competition*," *Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 482 (5th Cir. 2000) (internal quotation marks omitted), or "enduring adverse impact on competition itself," *American Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich*, 108 F.3d 1147, 1152 (9th Cir. 1997) – and hence no "need" to extend the antitrust laws to cover ATX's allegations. *See Goldwasser*, 222 F.3d at 400-01; *Covad v. Bell Atlantic*, 201 F. Supp. 2d at 132. The

basic fact is that the Act and its implementing regulations guarantee access "well beyond" anything that the antitrust laws might contemplate, including access at all-but-confiscatory prices well below any market rates. *Goldwasser*, 222 F.3d at 399, 400. No competitive harm cognizable in antitrust can realistically occur as long as the 1996 Act regime is effectively accessible for enforcement by ATX. There cannot be any doubt on that score.

The FCC and state regulators have been vigorous in addressing issues raised by CLECs in their active and continuing definition and re-definition of the specific obligations of ILECs like Verizon. Implementation of the duties is not left to ILECs, but requires extraordinarily close regulatory supervision at the behest of CLECs like ATX, which can present their demands for better terms to the regulators, with all terms subject to the regulators' affirmative approval. As to *every* term governing the ILEC's relationship with the CLEC, either the CLEC has agreed or the term has been imposed by the responsible agency. *Covad v. Bell Atlantic*, 201 F. Supp. 2d at 133 & n.21. Federal and state regulators also serve as enforcers of agreements once entered. *See supra* pp. 7-9. [10]

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[10] The fact that ATX, as a CLEC, can take advantage of this regulatory scheme is yet another factor differentiating this case from *Trinko*, a case that was brought by consumers rather than a competitor, and that expressly declined to answer the question whether "LECs seeking to enter the market may ever bring antitrust suits against the ILEC." *Trinko*, 305 F.3d at 112 n.19; *see also id.* at 110 ("Because this [consumer] plaintiff has no remedy under the Telecommunications Act 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 descrived in the amended complaint."); *id.* at 111 ("The [1996] Act does not give state regulatory agencies the power to award consumers compensation for injury caused by service disrupted by an ILEC that is unlawfully attempting to maintain its local monopoly."); *id.* at 112 (a CLEC "may seek remedy through the regulatory process while the consumer may seek remedy under the antitrust laws"); *Ntegrity*, 219 F. Supp. 2d at 628 ("[T]he *Trinko* plaintiffs . . . were not

The 1996 Act's long-distance-entry regime further guarantees compliance with its access duties (themselves greater than anything in antitrust). An ILEC's entry into the long-distance market is conditioned on such compliance, creating a major added incentive for Verizon, and federal and state regulators scrupulously review Verizon's compliance in judging its applications. CLECs have successfully urged adoption of "performance measures" plans, described above, with aggressive liquidated-damages provisions awarding compensation to CLECs for substandard performance. All of this guarantees 1996 Act compliance and "significantly diminishes the likelihood of major antitrust harm." *Town of Concord*, 915 F.2d at 25. Indeed, "[i]n this setting, there can be no significant harm to competition or anti-competitive effect *as a matter of antitrust law*." *Covad v. Bell Atlantic*, 201 F. Supp. 2d at 132 (emphasis added).

At the same time, increasing the duties to assist competitors creates well-recognized *dangers* to antitrust law's objectives. As the leading antitrust scholars and jurists have unanimously observed, imposition of a duty to share (or here, surrender) productive assets to a competitor threatens serious consumer harm. On one hand, such a rule may discourage the incumbent from "building facilities . . . [that] benefit consumers." Phillip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 851 (1989); *see AT&T*, 525 U.S. at 428-29 (Breyer, J., concurring in relevant part). On the other, such a rule may discourage new entrants from "developing their own alternative inputs." 3A Areeda & Hovenkamp, ¶ 771b, at 172; *USTA*, 290 F.3d at 427. This is a particularly serious concern in the context of local telecommunications markets, because the 1996 Act's overriding goal is to "give[] new

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parties to the interconnection agreements, and needed protection under the antitrust laws.").

entrants the incentive to build their own local *facilities-based* networks." 141 Cong. Rec. H8465 (daily ed. Aug. 4, 1995) (Rep. Goodlatte) (emphasis added). "Increased sharing by itself does not automatically mean increased competition. It is in the *un*shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge." *AT&T*, 525 U.S. at 429 (Breyer, J., concurring in relevant part). Thus, elementary antitrust policy considerations – which remain unmodified by the 1996 Act, *see* 1996 Act § 601(c), *reprinted at* 47 U.S.C. § 152 note – compellingly support the *Goldwasser* court's rejection of a newly expanded antitrust duty for claims like ATX's. *See Covad v. Bell Atlantic*, 201 F. Supp. 2d at 131 ("[C]onduct that did *not* violate antitrust law prior to the 1996 Act does not now violate antitrust law after the Act.").

2. *Interconnection Disputes Are Not Suitable Antitrust Claims for Institutional Reasons*

The 1996 Act thus eliminates any meaningful competitive benefit from expanding antitrust law to encompass the duties of assistance at issue; at the same time, any such expansion would come with serious negative consequences traditionally recognized as shaping antitrust rules. It would also entail significant institutional concerns.

Entertaining ATX's claims would effectively transform antitrust courts into regulatory agencies, requiring detailed regulation of the prices and terms of access. This fact importantly distinguishes cases, like *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912), where a *group* of competitors excludes a disfavored rival: in that situation, "admission to a joint venture is a one-time remedy that does not require [the exertion of] day-to-day control [by the courts]." *Alaska Airlines*, 948 F.2d at 542 (internal quotation marks omitted; alterations in original). By contrast, when a monopolist is required to share an asset, the court must establish the terms – a job for

regulators, not courts. *See Town of Concord*, 915 F.2d at 25 ("antitrust courts normally avoid direct price administration").

The task is not only unsuitable for courts but presents plain prospects of interference with the state and federal regulators dealing with these very matters every day. *Goldwasser*, 222 F.3d at 401. In this way the 1996 Act regime, beyond eliminating any *need* for a newly expansive antitrust duty of assistance, in fact is incompatible with such a duty, which would require federal court adjudication of whether an ILEC has been insufficiently forthcoming in providing local loop facilities and other accommodations.

On the one hand, challenges to conduct that is *consistent* with the terms of a governing interconnection agreement would be impermissible collateral attacks on the agreement. *See* 47 U.S.C. § 251(c)(3) (requiring incumbents to make network elements available "in accordance with the terms and conditions of [interconnection] agreement[s]"); *id.* § 252(a)(1) (authorizing parties to enter into "binding agreements"). Thus, when ATX asserts that antitrust laws impose obligations different from those contained in the parties' interconnection agreements (*e.g.*, Countercl. ¶¶ 299, 306, 329, 335), it attempts to impose "inconsistent standards." *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 732 (9th Cir. 1981). Such challenges are barred by the filed rate doctrine, which forbids reliance on the supposedly anticompetitive effect of the terms of filed tariffs as a basis for antitrust liability. *See Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986). The rates, terms, and conditions at issue here were approved by the various state public utility commissions, subject to public inspection and available to all eligible carriers. ATX's challenges to the provisions of the parties' filed interconnection agreements – whether to rates or to the terms of service to be provided

for the specified rates – thus fall squarely within the filed rate doctrine. *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 225 (1998); *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 20 (2d Cir. 1994) ("the rationales underlying the filed rate doctrine apply equally strongly to regulation by state agencies"); *Taffet v. Southern Co.*, 967 F.2d 1483, 1494 (11th Cir. 1992) (finding that the filed rate doctrine applies to state-approved rates).

On the other hand, an antitrust court's independent adjudication of challenges alleging *violations* of interconnection agreements would interfere with the evident congressional commitment to expert agency decision-making. The 1996 Act contains a comprehensive regulatory scheme for any dispute concerning Verizon's duties under the 1996 Act – "formation and [public utility] commission approval of interconnection agreements" with judicial review in federal district court. *Verizon Maryland Inc. v. Public Serv. Comm'n*, 122 S. Ct. 1753, 1758 (2002). As all but one court of appeals to consider the question has held,[11] the authority granted to state public utility commissions to arbitrate and approve interconnection agreements encompasses the authority to resolve disputes concerning alleged violations of those agreements. *See, e.g.*, *Southwestern Bell Tel. Co. v. Connect Communications Co.*, 225 F.3d 942, 946-47 (8th Cir. 2000); *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 337-38 (7th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001); *but see BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs. Inc.*, 278 F.3d 1223, 1237 (11th Cir.), *vacated and reh'g en banc granted*, 297 F.3d 1276 (11th Cir. 2002). The FCC, which is entitled to *Chevron* deference on this issue, *see AT&T*, 525 U.S. at 397, has reached the same conclusion – enforcement, like arbitration and approval, of interconnection agreements is a state

[11] The sole opinion to hold otherwise has since been vacated.

commission "responsibility" within the meaning of 47 U.S.C. § 252, Memorandum Opinion and Order, *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 FCC Rcd 11277, 11279-80, ¶ 6 (2000). Indeed, that is an inevitable consequence of the way interconnection agreements are written: many of the duties are highly general, essentially incorporate statutory standards, and acquire concrete practical meaning only from agency application.

This applies not only to ATX's complaints about the quality of its access to Verizon's facilities, such as its complaints about Verizon's collocation practices and allegedly inferior last-mile facilities, but also (and with special force) to its complaints about Verizon's refusal to supply it with services to which the 1996 Act does not mandate that it be given access. As ATX admits in its counterclaim, the services to which it wishes to have access are those that "telecommunications statutes or regulations do not explicitly require [Verizon] to offer as a condition of qualifying to offer long-distance telephone service." Countercl. ¶ 306. If Verizon does not have an antitrust duty to offer access to the facilities that it is required to give access to under the 1996 Act, it follows *a fortiori* that it has no such duty to offer access to facilities that the 1996 Act does *not* require it to make available to its competitors. As the FCC itself has concluded, "the Act plainly imposes on [ILECs] a broader duty to deal with competitors than does the essential facilities doctrine." *UNE Remand Order*, 15 FCC Rcd at 3729, ¶ 60.

ATX's suggestion in this regard, that a court hearing an antitrust suit should determine anew whether certain services should be provided by ILECs, ignores the delicate balance struck by the 1996 Act. The 1996 Act requires state commissions to

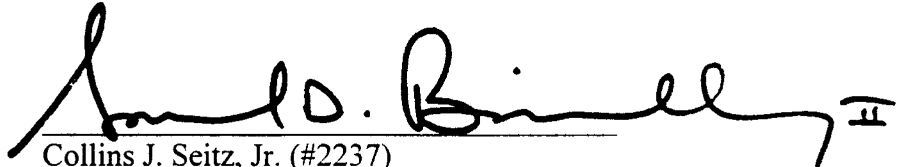
balance the requirement that competitors be allowed to use ILECs' facilities and services, on the one hand, and the strong procompetitive interest in encouraging new entrants to develop their own facilities and services to compete in the local telephone service market, on the other. *See AT&T*, 525 U.S. at 429 (Breyer, J., concurring in relevant part); *USTA*, 290 F.3d at 427 ("Each unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities."). Striking that balance requires the consideration of a host of factors dependent on a detailed understanding of the numerous components of the underlying technology, and on evolving market conditions, as well as a policy determination about the point at which obligations on ILECs foster unwarranted dependency by new entrants and thus actually suppress beneficial competition. *See, e.g.*, *UNE Remand Order*, 15 FCC Rcd at 3904, ¶ 464 (noting that it is "consistent with the goals of the Act" to "reduce competitors' reliance on the incumbent's network"). These are precisely the kinds of delicate expert determinations that should not be undone by antitrust courts and juries. *See Schuylkill Energy*, 113 F.3d at 414 (competitor's "complaints about . . . allegedly high rate base should be brought before the PUC, not to federal court on an antitrust complaint."); *Ntegrity*, 219 F. Supp. 2d at 632 ("The antitrust laws were designed to promote free competition and enhance consumer access to services, not to be an end-run around legislation imposing very specific duties.").

CONCLUSION

For the foregoing reasons, this Court should dismiss ATX's antitrust counterclaim.

Respectfully Submitted,

CONNOLLY BOVE LODGE & HUTZ LLP



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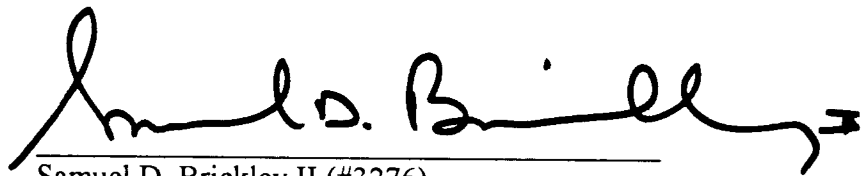

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