

ORAL ARGUMENT SCHEDULED FOR APRIL 15, 2003

No. 02-7057

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

COVAD COMMUNICATIONS CO., et. al.,
Plaintiffs-Appellants,

v.

BELL ATLANTIC CORPORATION, et. al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**BRIEF AMICUS CURIAE OF
BELLSOUTH CORPORATION, SBC COMMUNICATIONS INC.,
AND UNITED STATES TELECOM ASSOCIATION
IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) **Parties and Amici.** Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellants Covad Communications Company, et al.

Amici Curiae for Appellants: AT&T Corp., Association for Local Telecommunications Services, Competitive Telecommunications Association, Z-TEL Communications, American ISP Association, ATX Communications, Inc., Covad Telephone, LLC., and the States of New York, Connecticut, Kansas, Maine, Maryland, Minnesota, Nevada, and Utah.

Amici Curiae for Appellees: BellSouth Corporation, SBC Communications Inc., and U.S. Telecom Association.

Amici Curiae Supporting Neither Party: The United States and the Federal Communications Commission.

(B) **Rulings Under Review.** References to the rulings at issue appear in the Brief for Appellants Covad Communications Company, et al.

(C) **Related Cases.** This case has not been on review previously before this Court or any other court. We are aware of no related cases.

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RULE 26.1 DISCLOSURE STATEMENT

BellSouth Corporation (“BellSouth”) is a publicly held corporation. BellSouth has no parent company. No publicly held company has a 10 percent or greater ownership interest in BellSouth. Insofar as relevant to this litigation, the general nature and purpose of BellSouth is to provide (directly or through subsidiaries) telephone and other telecommunications and related services.

SBC Communications Inc. (“SBC”) is a publicly held corporation. SBC has no parent company. No publicly held company has a 10 percent or greater ownership interest in SBC. Insofar as relevant to this litigation, the general nature and purpose of SBC is to provide (directly or through subsidiaries) telephone and other telecommunications and related services.

The United States Telecom Association (“USTA”) changed its name from the United States Telephone Association on October 18, 1999. USTA is a not-for-profit trade association representing the interests of some 600 facilities-based incumbent wireline providers of local telephone service throughout the United States. USTA also has international members that provide local exchange services in other jurisdictions, and associate members that include consultants, manufacturers, banks, investors, and other parties with interests in the industry. USTA has no parent company, subsidiaries, or affiliates for which disclosure is required.

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GLOSSARY

1996 Act	Telecommunications Act of 1996
BOC	Bell Operating Company
CLEC	Competitive Local Exchange Carrier
Collocation	Placement of telecommunications equipment on premises of incumbent local exchange carrier
DSL	Digital Subscriber Line
FCC	Federal Communications Commission
FTC	Federal Trade Commission
ILEC	Incumbent Local Exchange Carrier
<i>Pennsylvania 271 Order</i>	Memorandum Opinion and Order, <i>Application of Verizon Pa. Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania</i> , 16 FCC Rcd 17419 (2001), <i>appeal pending, Z-Tel Communications v. FCC</i> , No. 01-1461 (D.C. Cir.)
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INTEREST OF THE AMICI CURIAE

BellSouth and SBC are incumbent local exchange carriers (“ILECs”) in their respective regions. USTA is the leading trade association for the local telephone industry, representing some 670 facilities-based incumbent wireline providers which operate more than 80 percent of the country’s local access lines.

BellSouth and SBC have entered into thousands of agreements with competing local exchange carriers (“CLECs”) pursuant to the Telecommunications Act of 1996 (“1996 Act”). Because the parties to these agreements are competitors, disputes frequently arise between them. Most of these disputes are resolved informally or, where necessary, before the state commissions that oversee inter-carrier relations. Nevertheless, BellSouth and SBC each face antitrust suits in which CLECs seek to have interconnection disputes resolved by antitrust courts and juries instead of by the expert agencies designated by Congress. Permitting this suit to go forward would encourage CLECs to ignore the administrative framework prescribed by Congress in the 1996 Act and instead resort to costly antitrust litigation that raises a substantial risk of imposing inconsistent standards.

STATEMENT OF THE ISSUES

Amici will address the practical implications of Covad’s argument that (1) it has stated an antitrust claim by alleging that Verizon provided it with insufficient assistance, and (2) its allegations should be resolved through antitrust litigation rather than through the remedial framework of the 1996 Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

Covad contends that Verizon violated the antitrust laws by providing it with access to Verizon's central office space, local loops, operations support systems ("OSS"), and transport that was insufficient or delayed or too costly. A053. The district court, in a comprehensive and thoughtful opinion, properly recognized that such allegations, involving issues addressed in interconnection agreements executed between Covad and Verizon pursuant to the 1996 Act, do not state an antitrust claim.

An ILEC's duties to provide the type of assistance to rivals sought by Covad derive from the 1996 Act, not from the antitrust laws. Under the Act, ILECs must assist competitors both in entering the local telephone business and in taking away the ILECs' customers. In particular, ILECs must "share their own facilities" with competitors at cost and provide wholesale services at deep discounts. *Verizon Communications v. FCC*, 122 S. Ct. 1646, 1654 (2002). As explained in *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), requiring this sort of affirmative assistance to rivals would be a fundamental departure from existing antitrust law.

The 1996 Act embodied a new regulatory regime, with an elaborate system of compulsory negotiation and arbitration and enforcement by state and federal administrators, to implement the ILECs' new statutory obligations. Within this comprehensive framework, carriers have negotiated thousands of interconnection agreements specifying their rights and duties. Yet, according to Covad, all this is for naught, and any dissatisfied carrier may take such disputes to court and demand treble damages. The practical result is that lay juries will be invited to second-guess expert

agencies with regard to complex regulatory policy issues they are ill-equipped to resolve and to impose duplicative damage awards for violations already remedied or that could be remedied by the agencies.

Nevertheless, two courts of appeals have departed from *Goldwasser* and ruled that a determination whether such allegations can support an antitrust claim must await discovery. See *Law Offices of Curtis V. Trinko v. Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir. 2002), petition for cert. filed, 71 U.S.L.W. 3352 (Nov. 1, 2002) (No. 02-682); *Covad Communications v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002). The *Trinko* and *Covad* decisions have been sharply criticized.

In an unsolicited amicus brief supporting Verizon's petition for certiorari in *Trinko*, the Solicitor General and Federal Trade Commission expressed the Government's view that "[t]he Second Circuit's decision is erroneous" because it "dramatically expands antitrust liability for failure to assist rivals." SG *Trinko* Br. 8, available at <http://www.usdoj.gov/atr/cases/f200500/200558.pdf>. The Government was particularly critical of the *Trinko* decision for "endorsing essential facilities and monopoly leveraging theories that are uncabined by any requirement that the challenged conduct be exclusionary or predatory — *i.e.*, that the refusal not make economic sense *except* as an effort to diminish competition." *Id.* at 9. The Government explained that the Second Circuit's failure to require specific allegations showing such exclusionary or predatory conduct "improperly trivializes the antitrust laws and encourages litigants to seek antitrust remedies for ordinary commercial and regulatory disputes," which "could threaten substantial disruption of the telecommunications industry." *Ibid.*

An equally harsh critique of the Eleventh Circuit’s decision in *Covad* was offered by Judge Tjoflat (joined by Judges Anderson and Birch) in dissent from denial of rehearing. Judge Tjoflat forcefully explained that antitrust law has “never required the extensive, court-administered forced-access regime” imposed by the 1996 Act and that the panel majority’s decision to allow Covad’s suit to proceed therefore represents “bad policy, undermines Congress’s regulatory scheme, and usurps regulatory power that belongs to the FCC under the 1996 Act by placing it in the hands of federal courts.” 2002 WL 31845247, *2, *4 (11th Cir. Dec. 20, 2002). This Court should adopt the sound legal and practical reasoning of the Seventh Circuit in *Goldwasser*, the Solicitor General and the FTC in *Trinko*, and Judge Tjoflat in *Covad* and affirm the district court.

ARGUMENT

I. THE SEVENTH CIRCUIT’S RULING IN *GOLDWASSER* WAS CORRECT AND COMPELS DISMISSAL OF COVAD’S ANTITRUST CLAIMS.

In *Goldwasser*, Ameritech’s alleged exclusionary practices were virtually the same as those alleged by Covad, including “undue delays” in accessing Ameritech’s facilities and “refus[als] to allow its competitors to connect” on “just, reasonable, and nondiscriminatory terms.” 222 F.3d at 395. Judge Diane Wood’s trenchant examination of the intersection between antitrust and telecommunications law in *Goldwasser* was sensible and consistent with antitrust precedents. Although Covad characterizes *Goldwasser* as a “functional immunity” decision (Br. 17), the Seventh Circuit expressly disavowed any reliance on immunity doctrine. 222 F.3d at 401. Instead, it affirmed dismissal on two grounds, both firmly established in antitrust law, which apply directly here.

The first ground is that the “affirmative duties to help one’s competitors” imposed by the 1996 Act “do not exist under the unadorned antitrust laws.” 222 F.3d at 399-400. Accordingly, it would be “illogical” to “equate a failure to comply with the 1996 Act with a failure to comply with the antitrust laws.” *Id.* at 400. The second ground is that Congress “entrusted supervision” of interconnection duties to expert regulatory agencies and “created a system of negotiated agreements through which this would be accomplished.” *Id.* at 399-400. As a practical matter, Judge Wood explained, the 1996 Act’s procedures are not “compatible” with antitrust resolution of interconnection claims: “The elaborate system of negotiated agreements and enforcement established by the 1996 Act could be brushed aside by any unsatisfied party with the simple act of filing an antitrust action,” and “[c]ourt orders in those cases could easily conflict with the obligations the state commissions or the FCC imposes under the § 252 agreements.” *Id.* at 400-401.

Dismissal of Covad’s complaint follows *a fortiori* from *Goldwasser*. In *Goldwasser*, consumers claimed not only an incumbent’s violation of performance duties but also its broad failure to allow competitors to interconnect and compete. In this case, by contrast, Covad admits that it *is* interconnected and providing DSL service on a nationwide basis. Br. 8. In fact, its website represents that “Covad services are currently available across the United States” and that its “network currently covers more than 40 million homes and business and reaches approximately 40 to 45 percent of all US homes and businesses.” See <http://www.covad.com/companyinfo>. Covad complains only that it is getting delayed, inadequate, and overpriced collocation, loops, and transport. Br. 9-10.

Such routine business disputes between contracting parties provide far less support for an antitrust lawsuit than the broader claims dismissed in *Goldwasser*. See also *United States Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474, 485 (1932) (affirming dismissal of antitrust suit where “the allegations either constitute direct and basic charges of violations of [statutory] provisions or are so interrelated with such charges as to be in effect a component part of them”).

The *Goldwasser* court did not set forth a “topsy-turvy view of the law.” AT&T Br. 21. It properly recognized that the myriad inter-carrier disputes over loop and trunk provisioning, collocation, and other aspects of the interconnection process are not antitrust issues and are best resolved by expert regulators. It properly took into account a competing carrier’s full opportunity to seek contract provisions through negotiation and arbitration that would protect it against such routine operational problems. Its analysis rested on longstanding principles basic to antitrust law and gave practical effect to Congress’s intent that expert regulators oversee the interconnection process.

II. COVAD’S ALLEGATIONS OF ROUTINE PERFORMANCE PROBLEMS ARE NOT OF ANTITRUST CONCERN.

A. Covad Alleges Only Violations Of The 1996 Act, Not Of The Antitrust Laws.

As the Government correctly observes, Covad alleges mere “deficiencies in the manner” with which Verizon carried out its 1996 Act duties. U.S./FCC Br. 13. Disputes of that type do not implicate the Sherman Act’s objective of protecting competition. As the Supreme Court has explained, “business behavior that is improper for various reasons” is not the proper focus of “treble-damages antitrust cases.” *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 137 (1998); *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945)

(affirming dismissal of antitrust claims alleging unfair treatment of contracting party). Expanding the antitrust laws to reach such conduct, as Covad seeks, would undermine the fundamental premise of antitrust law — that vigorous competition, not compelled sharing of resources, yields output and prices that optimally benefit consumers. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-768 (1984).

Prior to the 1996 Act, no antitrust court would have required a firm to give up profitable retail sales by selling at substantial discounts to competing retailers. See *Verizon Communications*, 122 S. Ct. at 1681 (competitor access to network facilities was “something brand new under the 1996 Act”); *United States v. AT&T*, 604 F. Supp. 316, 324 (D.D.C. 1985) (AT&T consent decree did not seek “artificial creation of competition by enabling [rival] interexchange carriers to share AT&T’s interexchange capabilities and facilities”). As the 1996 Act’s antitrust savings clause makes clear, Congress’s policy decision to include such a novel requirement in the Act did not “modify” these established limits on antitrust law. Pub. L. No. 104-104, § 601(b), 110 Stat. 56, 143 (1999), reprinted as note to 47 U.S.C. § 152. Thus, the district court properly rejected Covad’s attempt to transform alleged 1996 Act violations into an antitrust claim. Covad’s reliance on the same factual allegations of unsatisfactory loop and collocation provisioning to support both its antitrust and state common-law claims shows that it has simply placed an antitrust label on what are at most breach of contract or tort claims. Allowing Covad to bootstrap such claims into a treble-damages antitrust suit would encourage other CLECs to do the same, thereby impeding competition on the merits and burdening the courts. As Judge Tjoflat put it, “I cannot think of a situation [in] which an

ILEC would be liable in breach and yet a creative plaintiff's lawyer could not also allege that the breach was made with an eye toward benefitting the ILEC and thus preserving the ILEC's position in the relevant market." *Covad*, 2002 WL 31845247, at *6 n.17.

To avoid these detrimental consequences, the antitrust laws are directed only to "exclusionary or predatory conduct," which the Government correctly defines as "conduct that would not make economic sense unless it eliminated competition." U.S./FCC Br. 17. See also *Southern Pac. Communications v. AT&T*, 740 F.2d 980, 999 n.19 (D.C. Cir. 1984) (conduct is exclusionary only if not "reasonable in light of [defendant's] business needs"). As the Government notes, *Covad*'s failure to raise "specific allegations" of "exclusionary or predatory conduct" is "striking." U.S./FCC Br. 25. To be sure, *Covad* alleges in conclusory fashion that Verizon's conduct was "without legitimate or sufficient business justification." A112. But as the Government has explained, such a "conclusory assertion" of exclusionary or predatory conduct is insufficient because it is "inherently implausible when measured against the regulatory scheme" in the 1996 Act. *SG Trinko* Br. 13-14. *Covad* has not alleged *how or why* it would make economic sense for Verizon to assist rivals in taking away Verizon's customers. It therefore has not sufficiently alleged exclusionary or predatory conduct. See *Dickson v. Microsoft Corp.*, 309 F.3d 193, 213 (4th Cir. 2002) (federal notice pleading standards do "not alter the basic pleading requirement that a plaintiff set forth facts sufficient to allege each element of his claim").

B. Covad's Allegations Do Not State An Antitrust Claim Under The "Refusal To Deal" Or "Essential Facilities" Theories.

Covad attempts to resuscitate its antitrust claims by pinning a "refusal to deal" or "essential facilities" label on them. But Covad has not alleged a refusal to deal, only a failure to deal on Covad's preferred terms. See *Movies of Tarzana v. Pacific Theatres*, 828 F.2d 1395, 1399 (9th Cir. 1987) (distributors "did not refuse to deal" but simply offered to provide product "a few weeks later than [plaintiff] desired"). Nor has Covad alleged the elements of a monopolization claim under the essential facilities theory. Covad may find it *convenient* to obtain the access it seeks to Verizon's facilities, but "to be an essential facility, a facility must be essential." *Midwest Gas Servs., Inc. v. Indiana Gas Co.*, ___ F.3d ___, 2003 WL 147697, at *8 (7th Cir. Jan. 22, 2003). As Judge Tjoflat put it, antitrust law does not permit "horizontal competitors that find it financially inconvenient to build their own physical plant [to] simply tap the resources of the incumbent/monopolist or else sue for treble damages." *Covad*, 2002 WL 31845247, at *4.

"[S]cholars have raised very serious questions about the wisdom of the essential facilities doctrine as a justification for judicial mandates of competitor access." *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 427 n.4 (D.C. Cir. 2002), petition for cert. filed, 71 U.S.L.W. 3416 (Dec. 3, 2002) (No. 02-858). That skepticism is understandable: permitting competitors to take a free ride on a purported monopolist's investment is more likely to stunt than promote competition, creating a "disincentive to invest in innovation and creating complex issues of managing shared facilities." *Id.* at 427. See also 3A

Areeda & Hovenkamp, ANTITRUST LAW ¶ 771, at 172 (2d ed. 2002). This risk of undermining the bedrock purpose of the antitrust laws — spurring investment and innovation so as to lower producer costs and consumer prices — counsels against expanding this problematic and controversial doctrine. See *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1357-1358 (Fed. Cir. 1999) (“an unwarranted extension” of essential facilities doctrine risks harm to competition); *Alaska Airlines v. United Airlines*, 948 F.2d 536, 542-546 (1991).

Moreover, application of the essential facilities doctrine to an ILEC’s performance would require *judicial* supervision of highly technical industry issues. For example, Covad wants the district court and a lay jury to determine the availability of collocation space in Verizon’s central offices; the proper power charges for collocation spaces; the adequacy of Verizon’s digital signal testing of loops; the proper length of loops; the proper time frame for provisioning loops; the adequacy of high-capacity transport pipes between central offices; and even whether a “stairway or security system” in Covad’s collocation space was “unnecessary.” Br. 10, 25. Such technical detail is the very stuff of regulation and not within the province of the courts or juries. See Hovenkamp, *The Monopolization Offense*, 61 Ohio St. L.J. 1035, 1044 (2000) (“antitrust courts are not public utility agencies”). For that reason, this Court grants “special deference” to expert agencies where the issues involve “a high level of technical expertise in an area of rapidly changing technological and competitive circumstances.” *Sprint Communications v. FCC*, 274 F.3d 549, 556 (D.C. Cir. 2001).

Covad raises just such issues. As this Court has noted, “there are many different types of loops, including two-wire loops, four-wire loops, analog loops, digital loops, fiber loops, and copper loops,” as well as “countless uses to which loops can be put, including residential service, business service, voice service, data service, alarm service, and so on.” *AT&T v. FCC*, 220 F.3d 607, 624 (D.C. Cir. 2000). The “intensely practical difficulties” of regulating the provisioning and usage of such devices are best left to the expert regulators. *Verizon Communications*, 122 S. Ct. at 1668. As Judge Tjoflat concluded, trial courts should not serve as “quasi-regulatory agencies [that] would have to oversee sharing between rivals.” *Covad*, 2002 WL 31845247, at *4.

Covad and its amici rely on *MCI v. AT&T*, 708 F.2d 1081 (7th Cir. 1983), *Otter Tail Power v. United States*, 410 U.S. 366 (1973), and *Aspen Skiing v. Aspen Highlands Skiing*, 472 U.S. 585 (1985). But in each of these cases, unlike here, the defendant was already engaged in the business of providing to outsiders the facility or service denied the plaintiff. Failing to provide a facility or service to a competitor that the defendant was profitably selling to others raised a presumption of predatory discrimination.

AT&T argues (Br. 31) that the *MCI* decision supports Covad’s claim because *MCI* sought the use of dedicated local “private line” circuits from AT&T. In fact, *MCI* sought a private line *service* that AT&T was freely selling to others pursuant to tariff. As the FCC explained in an order quoted by the district court and relied on by the court of appeals in *MCI*, “Bell presently has arrangements * * * with numerous independent telephone companies for access to its local distribution facilities for the purpose of enabling Long Lines and the independent telephone companies to provide FX and CCSA

services.” See *MCI v. AT&T*, 462 F. Supp. 1072, 1092 (N.D. Ill. 1978), quoting *Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers*, 46 F.C.C.2d 413, 426 (1974); see also *MCI*, 708 F.2d at 1097. In addition, AT&T expressly defended its discrimination against MCI and in favor of other independent telephone companies on the ground that MCI was a competitor: “With respect to its arrangements with the independent telephone companies for FX and CCSA services, Bell states that the independent companies do not operate on parallel routes or duplicate Bell's facilities and are therefore not competitors.” 46 F.C.C.2d at 428. Covad does not and cannot allege any such predatory discrimination on the part of Verizon because Verizon has never provided to noncompetitors the facilities and services demanded by Covad. Thus, as the Seventh Circuit held in *Goldwasser*, dismissing claims like those of Covad is fully consistent with that court’s prior ruling in *MCI*.

Similarly, the defendant in *Otter Tail*, unlike Verizon here, regularly sold access to its facilities to outside companies but refused to do the same for competitors. See 331 F. Supp. 54, 57 (D. Minn. 1971) (*Otter Tail* “regularly engages in the business of wheeling power”), aff’d in relevant part, 410 U.S. 366 (1973). Furthermore, the regulatory statute at issue in *Otter Tail* gave the Federal Power Commission “no authority” to order a utility to transmit electric power over its transmission lines to requesting municipalities. 410 U.S. at 375. The 1996 Act, however, authorizes the state commissions (with FCC back-up) to oversee ILECs’ treatment of CLECs. The heavy artillery of antitrust is not required to compel the very same affirmative assistance that Congress directed state and federal agencies to regulate. In industries subject to extensive regulation, ‘relief for

arbitrary refusals to deal should be left to common law remedies or to new legislation. * * * It is well within the province of the courts in determining the scope of § 2 to leave such matters to them.” 3 Areeda & Turner, ANTITRUST LAW ¶ 736e, at 275-276 (1978).

Likewise, in *Aspen* the defendant refused to accept from the plaintiff (or the plaintiff’s customers) the very full-price retail sales it was making to others and that it long had voluntarily provided to the plaintiff. Thus, the defendant totally deprived an existing joint venturer of access that it was providing to others. Covad continues to use Verizon’s facilities and services, none of which are provided to noncompetitors. Failure to perform as quickly as Covad demands is not a predatory denial of access to an essential facility. See *Ideal Dairy Farms v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996) (operational business that utilized defendant’s premises “was not denied use of [defendant’s] facilities”). No court ever has relied on the essential facilities doctrine to compel a firm to provide services to rivals at prices substantially below what it would charge consumers for those same services.

In sum, Covad has not alleged the type of predatory conduct that led to the rulings in *MCI*, *Otter Tail*, and *Aspen*. Absent such predatory conduct, there can be no antitrust violation based on failure to share.

C. Antitrust Litigation Of Covad’s Claims Is Not Necessary To Jump-Start Competition.

Covad’s amici would have this Court discard these settled antitrust principles because of a supposed lack of competition in local phone markets. See AT&T Br. 18. But as early as 2000, this Court noted “the evidence of growing competition in the New

York local telephone market.” *AT&T*, 220 F.3d at 633. The FCC’s latest (and judicially noticeable) statistics show that CLECs’ nationwide share of local telephone lines jumped from 4.3% in December 1999 to 11.4% in June 2002. FCC, *Local Telephone Competition: Status as of June 30, 2002*, Table 1 (Dec. 2002).¹ Covad and its amici ignore this *objective* evidence of increased local exchange competition, which confirms that Covad’s complaint does not state an antitrust claim. See *Dial A Car v. Transportation, Inc.*, 82 F.3d 484, 486 (D.C. Cir. 1996) (dismissing antitrust complaint that did not “allege facts that would show an anticompetitive impact on the market as a whole”); *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (a defendant’s conduct must harm “the competitive *process*” to be exclusionary).

In sum, adjudicating Covad’s allegations under the antitrust laws is both legally insupportable and practically unnecessary. Further, as explained below, antitrust adjudication would contravene Congress’s intent to have such allegations resolved by the state commissions and would undermine the administrative scheme established in the 1996 Act.

III. CONGRESS DID NOT INTEND TO HAVE INTERCONNECTION DISPUTES OF THIS TYPE RESOLVED THROUGH ANTITRUST SUITS.

A. Congress Enacted The 1996 Act To Avoid Judicial Micro-Management Of Inter-Carrier Relations.

Permitting antitrust adjudication of the type of claims raised by Covad would reimpose the micro-management by antitrust courts that Congress rejected in the 1996

¹ Available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom1202.pdf.

Act. Indeed, acceptance of Covad's position would exacerbate the problems inherent in judicial supervision of inter-carrier relations that led to the Act's passage.

Congress enacted this landmark legislation in the wake of the AT&T divestiture litigation, which had imposed a host of administrative responsibilities and burdens on the federal district court overseeing the Modification of Final Judgment ("MFJ"). For over twelve years, Judge Harold Greene was required to resolve complex and recurring disputes between telephone carriers that severely burdened the court. The serious problems generated by judicial administration of the telecommunications industry have been described by then Assistant Attorney General Charles Rule, head of the Antitrust Division, who stated that the "choice of the Department and decree court as substitutes" for "state regulators" was a "big mistake":

These tasks require not merely dollars and personnel, but technical expertise, regulatory experience, and a set of administrative procedures * * *. There is simply no way to coordinate the policies of the traditional regulators and the decree administrators. * * * The Department [and the decree court] ha[ve] become a bloody battleground on which allegedly aggrieved competitors seeking leverage in their competitive struggle against the [Bell Operating Companies] choose to fight. * * * In this war, the interests of consumers and the concerns of "discrimination" are seldom more than useful battle cries to a BOC rival. Unless you have served on the front lines of [this] peacekeeping force, it is hard to imagine the barrage of time-consuming and often petty complaints that constantly bombards the Department.

Antitrust and Bottleneck Monopolies: The Lessons of the AT&T Decree, reprinted in TELEMATICS, Dec. 1988, at 16. Acceptance of Covad's argument here would recreate these problems, but on a *vastly greater scale*. Instead of one district court hearing these

issues in equity, as under the MFJ regime, numerous federal courts would weigh in with their views on interconnection and preside over lengthy jury trials. Having juries decide these issues under generalized antitrust criteria would make little sense and inject uncertainty in an area to which Congress directed the FCC to bring clarity.

Congress therefore replaced Judge Greene's "government by consent decree," removed these intractable administrative controversies from the judiciary, and returned them to the FCC and state PSCs. 110 Stat. at 143 § 601(a); H.R. Conf. Rep. No. 104-458, at 198-201 (1996). As this Court has observed, the 1996 Act "fundamentally restructured local telephone markets by ending the BOCs' local monopoly" and "frees BOCs from all restrictions and obligations imposed by the MFJ." *AT&T v. FCC*, 220 F.3d at 611. Any attempt to have multiple antitrust courts and juries take the place of Judge Greene, oversee inter-carrier relationships, and supersede the new administrative scheme would clash with the 1996 legislation.

B. Congress Assigned Oversight Of Interconnection To The State Commissions.

Extending the antitrust laws to monitor the details of carrier interconnection, as Covad seeks, would be inconsistent with Congress's decision to entrust local carrier disputes to expert regulators. The 1996 Act's "novel" regulatory scheme "broadly extended [federal] law into the field of intrastate telecommunications," with the FCC overseeing national policies and state commissions playing the central role in "specified areas," including "interconnection agreements." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 385 n.10 (1999). Even before the 1996 Act, it had "become clear that comprehensive regulation of the rapidly advancing telecommunications markets was not

a task well suited to the federal courts.” *Goldwasser*, 222 F.3d at 393. That task is even less suitable now, after the Act has given expert agencies the “power to prevent or control the challenged conduct.” 1A Areeda & Hovenkamp, *ANTITRUST LAW* ¶ 243f, at 57 (2d ed. 2000).

The Supreme Court long has recognized that expert agencies often “are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure” to resolve intra-industry disputes. *Far East Conf. v. United States*, 342 U.S. 570, 574-575 (1952); see also *Howsam v. Dean Witter Reynolds*, 123 S. Ct. 588, 593 (2002) (the law presumes alignment of decisionmaker and “comparative expertise” to enable “a fair and expeditious resolution of the underlying controversy”). State commissions unquestionably have the expertise to resolve Covad’s grievances, as evidenced by their past and continuing resolution of such disputes. Just as federal regulators have “far more expertise than the courts on matters such as circuit designs, signal transmissions, noise attenuation, and echo return loss” (*Access Telecomms. v. Southwestern Bell Tel. Co.*, 137 F.3d 605, 609 (8th Cir. 1998)), the state commissions have superior expertise to address such matters as loop, trunk, and collocation provisioning. The state commissions also have ample authority to enforce interconnection duties. Although they may not have the authority to award treble damages, that does not mean that antitrust courts must adjudicate interconnection disputes. In *Pan Am. World Airways v. United States*, 371 U.S. 296, 311 (1963), the agency authorized to oversee the airline industry had “no power to award damages” but, as the Supreme Court explained, “Congress must have intended to give [the agency]

authority that was ample to deal with the evil at hand.” *Id.* at 312-313. The same is true here.

It is no answer to say that the state commissions did not approve the *particular* conduct alleged by Covad. See AT&T Br. 29. They approved the parties’ interconnection agreements and are best positioned to determine whether Verizon breached any duties imposed by those agreements and to correct any wrongdoing. That was the Supreme Court’s conclusion in *Hughes Tool v. TWA*, 409 U.S. 363 (1973), in which TWA alleged that the defendant (“Toolco”) unlawfully used its prior control of the airline to foreclose competition in the sale of aircraft. The Court held that the complaint had to be dismissed because Congress gave an administrative agency broad authority over airline transactions. *Id.* at 367-377. The Court rejected TWA’s contention that the agency had not approved “the precise way in which Toolco allegedly used [its] power to the disadvantage of TWA,” explaining that the issues raised in the complaint were “in the mainstream” of the agency’s statutory responsibility to insure that control acquisitions are in the public interest. *Id.* at 379, 382. Similarly, here, adjudicating interconnection disputes is in the “mainstream” of the state commissions’ responsibilities and overseen by the FCC.

However dissatisfied Covad may be with Verizon’s service, it holds the solution in its hands. It need only go to the appropriate state commissions, which have been willing and able to enforce 1996 Act obligations. Covad also may seek modification of its interconnection agreements through the Act’s negotiation and arbitration process. In addition, Covad may seek revocation of Verizon’s long distance authorization (see

Verizon Br. 5) or other sanctions from the FCC if it can prove Verizon's failure to comply with the competitive checklist in Section 271 of the 1996 Act. These regulatory remedies assure that neither valid interconnection requests nor access to any "essential facility" will be denied. Covad should not be able to launch a collateral antitrust challenge to conduct that is subject to regulatory controls in lieu of seeking statutorily authorized judicial review. See *AT&T*, 220 F.3d at 630-631 (rejecting view of AT&T and Covad that they could "collaterally attack orders" of the FCC instead of "filing a petition for review"). Covad's contention that antitrust remedies are required because the regulators may not act quickly enough (Br. 38) is difficult to take seriously in light of the notorious protraction of antitrust litigation.

C. Antitrust Adjudication Of Interconnection Disputes Would Lead To Intolerable Conflicts With State Commission Determinations.

If the antitrust laws were stretched to reach interconnection claims like those raised by Covad, the remedial schemes of the Sherman Act and 1996 Act would "collide." See *Pan Am.*, 371 U.S. at 309-310; *Nextel Ptnrs. v. Kingston Twtnshp.*, 286 F.3d 687, 694-695 (3d Cir. 2002) (affirming dismissal of § 1983 claim because the adjudication of such a claim would "upset" the 1996 Act's "comprehensive" "remedial scheme").

Covad insists that a lay jury may apply general antitrust standards to complex and technical issues and to conduct subject to the 1996 Act's specific regulatory criteria. But these are the same issues assigned to (and continuously addressed by) the regulatory agencies. *E.g., Pennsylvania 271 Order*, 16 FCC Rcd. 17419, 17462 (Sept. 19, 2001)

(finding that Verizon did not discriminate in providing DSL loops). Conflicting judgments on such quintessentially administrative law questions would make chaos of the intricate regulatory scheme crafted by Congress, providing another reason not to stretch the antitrust laws to reach Covad's allegations. See *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 162 (1922); *Town of Concord v. Boston Edison*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.) (antitrust adjudication that "interferes with regulatory controls could undercut the very objectives the antitrust laws are designed to serve").

The fact that Covad has already raised the substance of its claims before the state commissions, both in complaint as well as in generic performance proceedings designed to establish general rules governing interconnection standards and remedies, underscores the seriousness of this conflict. See, e.g., Letter Order on Joint Motion by Verizon Massachusetts and Covad, 2001 WL 1882474 (Mass. D.T.E. 2001); Order No. 77988, 2002 WL 31219290 (Md. P.S.C. 2002), Order Establishing Additional Inter-Carrier Service Quality Guidelines, 2002 WL 31630755 (N.Y. P.S.C. 2002). It would be "strange indeed" if acts that Congress assigned to agency approval were subject to collateral antitrust attack. *Pan Am.*, 371 U.S. at 307-309. If that were the case, a party could file an antitrust suit "the day after" agency approval of the challenged conduct. *Hughes Tool*, 409 U.S. at 388. That cannot be what Congress intended. As Judge Tjoflat pointedly asked when faced with Covad's position, "Why would a CLEC ever sue only in contract when it can jettison the regulatory scheme and sue for treble damages in federal court?" *Covad*, 2002 WL 31845247, at *6.

Moreover, wielding the blunt instrument of antitrust to resolve disputes between the contracting parties would make the remedial provisions in the parties' highly detailed and PSC-approved interconnection agreements virtually meaningless. Interpreting and enforcing these agreements require application of contract principles in the specialized telecommunications context. Covad's failure to seek greater contractual protections in negotiations or arbitration is hardly ground for a treble damages claim. See *Associated Gen. Contractors v. California Council of Carpenters*, 459 U.S. 519, 526-527 (1983) (disputes arising "in the context of the bargaining relationship between the parties [are] plainly not subject to review under the federal antitrust laws").

For these reasons, antitrust resolution of claims like Covad's is not "compatible" with the 1996 Act's remedial regime. *Goldwasser*, 222 F.3d at 401. This conflict cannot be ironed out at the remedies stage, as the Government suggests (U.S./F.C.C. Br. 21). The statutory regime, which was modeled on the collective bargaining process (see First Report and Order, 11 FCC Rcd 15499, ¶155 n.292 (1996)), rests on the good-faith negotiation of private agreements containing performance standards and sanctions for noncompliance, all under the watchful eyes of expert administrative agencies. 47 U.S.C. § 251(c)(1); H.R. Conf. Rep. No. 104-458, at 198-201 (1996). That framework would be rendered meaningless if a party could resort to antitrust litigation whenever it became dissatisfied with the progress of negotiations or performance under resulting agreements. CLECs would have "an incentive to delay the negotiation of interconnection agreements, for any damages CLECs sustain because of an ILEC's failure to yield access to its network will potentially be subject to trebling by a district judge." *Covad*, 2002 WL

31845247, at *7 n.24. To prevent such a conflict, the Supreme Court long has held that the antitrust laws should not be expanded in a manner that disrupts good-faith bargaining governed by federal regulation. See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 242 (1996). The same principle applies under the 1996 Act.

D. Giving Effect To The 1996 Act's Regulatory Framework Is Not A Grant Of Antitrust Immunity.

Covad and its amici argue strenuously that conduct subject to the 1996 Act is not immune from the antitrust laws. That argument is, as Judge Tjoflat put it, “a straw man.” *Covad*, 2002 WL 31845247, at *7. The decision below did not rely on the doctrine of immunity, Verizon does not invoke it, and the Seventh Circuit expressly disclaimed any such reliance in *Goldwasser*, 222 F.3d at 401. Covad’s insistence (Br. 16-17) that *any* bar to antitrust resolution of its claims amounts to “functional immunity” ignores the fact that substantive antitrust principles having nothing to do with immunity may, in particular regulatory contexts, bar an antitrust claim. For example, the Supreme Court rejected a contention that the filed rate doctrine, which precludes a treble damages antitrust challenge to a rate subject to agency approval, represents an “antitrust immunity.” *Square D v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 422 (1986). Reconciling the Sherman Act and 1996 Act to require state commission resolution of Covad’s allegations similarly raises no such immunity issue.

The judicial task here is to reconcile two procompetitive statutes. See *Goldwasser*, 222 F.3d at 396 (“the two laws are reconcilable”). As the Supreme Court has instructed, a provision in a regulatory statute that is “both a more recent and a more

specific expression of congressional policy” may take precedence over provisions in the Sherman or Clayton Act. *Minneapolis & St. Louis Ry. v. United States*, 361 U.S. 173, 186 (1959). Thus, as explained in *Goldwasser*, 222 F.3d at 401, the “more specific” 1996 legislation represents Congress’s current policy for promoting competition in local telecommunications markets, one that speaks directly to the type of claims raised by Covad.

Covad and its amici depart from the Supreme Court’s contextual approach to evaluating the relationship between regulatory statutes and the antitrust laws. *E.g.*, *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 91 (1975) (when applying the antitrust laws, “careful account must be taken of the pervasive federal and state regulation characteristic of the industry”); see Sullivan & Grimes, *THE LAW OF ANTITRUST* § 14.5, at 746 (2000). In each case, the Court analyzes the regulatory scheme as a whole and the type of conduct challenged to effectuate the intent of Congress and to gauge the practical consequences for effective regulatory supervision. See, *e.g.*, *Gordon v. New York Stock Exch.*, 422 U.S. 659, 684, 686 (1975) (deference to “oversight” agency is appropriate to “take advantage of its special expertise” and to avoid “any conflict arising between the regulatory scheme and the antitrust laws”); *Hughes Tool*, 409 U.S. at 387 (upholding dismissal of antitrust claim while recognizing that Federal Aviation Act did “not completely displace the antitrust laws” because agency was “expressly entrusted” with “only a fraction” of potential antitrust problems in the industry); *Pan Am.*, 371 U.S. at 305 (some practices regulated by agency were subject to antitrust enforcement but not those “basic in this regulatory scheme”); *National Gerimedical Hosp. v. Blue Cross*, 452

U.S. 378, 393 n.18 (1981). In short, the Supreme Court's cases are more sensitive to the practical factors actually at play in particular industries and relationships than Covad and its amici recognize. The practical impact of authorizing antitrust adjudication of Covad's claims would be unending antitrust litigation in the federal courts and conflicts between the courts and the designated agencies.

The incompatibility of antitrust resolution of Covad's claims with the state commissions' responsibility to resolve those same claims makes dismissal imperative. Allowing these costly and burdensome cases to lumber forward through discovery and possibly to trial would conflict with the Supreme Court's admonition that courts should dismiss deficient antitrust claims at the pleading stage rather than allow "a potentially massive factual controversy to proceed." *Associated Gen.*, 459 U.S. at 528 n.17. As recognized in *Goldwasser*, 222 F.3d at 401, this type of case does not raise "the kind of question that requires further development of a factual record" beyond the usual range of judicial notice. See also 2 Areeda et al., *ANTITRUST LAW* ¶ 307c, at 68, 71 (2d ed. 2000) (claims of a duty to deal and monopoly leveraging present questions of legal "policy, not of fact"). Permitting such claims to go forward, as the Government explains, risks encouraging CLECs to "routinely seek to transform their grievances into antitrust claims," which "could both undermine the competitive process [and] deter competitive conduct that would benefit consumers." U.S./FCC Br. 12.

These concerns are confirmed by the extraordinary proliferation of class action litigation that has come in the wake of Second and Eleventh Circuit decisions. Some two dozen class actions have been filed on these issues against SBC, BellSouth, and Qwest in

the just the last four months. A cottage industry is rapidly developing within the plaintiffs' bar devoted to monitoring disputes between ILECs and CLECs and racing into court with antitrust complaints that demand treble damages and attorneys' fees. These suits are not driven by any downturn in competition. In fact, the 1996 Act and its implementing regulations called into being a host of new carriers, who were given broad rights to force the ILECs to turn over existing facilities at bargain-basement prices. The predictable result was a plethora of "paper" carriers trying to get rich quick from arbitrage opportunities. After some of these carriers burdened themselves with excessive debt and poor managerial decisions, they resorted to antitrust litigation. See Peter Huber, *Telecom Undone—A Cautionary Tale*, COMMENTARY, Jan. 2003, at 34. The *in terrorem* effect of these multiplying treble-damages actions threatens to force costly settlements, regardless of the merits of the claims, while imposing enormous burdens on the courts.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(A)(7)(B) and 29(d) because it contains 6674 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that, on January 31, 2003, he caused two copies of the foregoing Brief Amicus Curiae of BellSouth Corporation, SBC Communications Inc., and United States Telecom Association in Support of Appellees to be deposited with the U.S. Postal Service, First-Class Mail, addressed to each of the following:

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