

No. 00-3864

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

---

SOUTH AUSTIN COALITION	)	
COMMUNITY COUNCIL, WALTER	)	
RYAN JR., THEODORE CHABRAJA,	)	
ANITA B. HULL, ROBERT RIFKIN and	)	
PATRICK A. STEFFES	)	Appeal from the
on behalf of themselves and all others	)	United States District Court for
similarly situated,	)	the Northern District of Illinois,
	)	Eastern Division
Plaintiffs-Appellants,	)	
	)	No. 99 C 7232
vs.	)	
	)	Judge Blanche M. Manning
SBC COMMUNICATIONS INC. and	)	
AMERITECH CORPORATION,	)	
	)	
Defendants-Appellees.	)	

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**BRIEF FOR DEFENDANTS-APPELLEES  
SBC COMMUNICATIONS INC. AND AMERITECH CORPORATION**

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## **CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

(formerly known as Certificate of Interest)

Appellate Court No: 00-3864

Short Caption: South Austin Coalition Community Counsel v. SBC Communications Inc. and Ameritech Corporation

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement stating the following information in compliance with [Circuit Rule 26.1](#) and [Fed. R. App. P. 26.1](#). **Each attorney is asked to complete and file a Disclosure Statement with the Clerk of the Court as soon as possible after the appeal is docketed in this Court. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):

SBC Communications Inc.

Ameritech Corporation

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mayer, Brown & Platt

Boies, Schiller & Flexner LLP

Crowell & Moring

McDermott, Will & Emery

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

SBC Communications Inc. has no parent corporation. SBC Communications Inc. is the parent of Ameritech Corporation.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

There is no publicly held company that owns 10% or more of the stock of SBC Communications Inc.

**The Court prefers the statement be filed immediately following docketing;** but, the disclosure statement shall be filed with the principal brief or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. The attorney furnishing the statement must file an amended statement to reflect any material changes in the required information. The text of the statement (i.e. caption omitted) shall also be included in front of the table of contents of the party's main brief.

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## **STATEMENT OF JURISDICTION**

The statement of jurisdiction in appellants' brief is complete and correct.

## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Whether plaintiffs' incoherent allegations satisfy established pleading standards applicable to complex antitrust cases.
2. Whether plaintiffs have stated the elements of a claim under Section 7 of the Clayton Act based on the "actual potential competition" theory.
3. Whether the Clayton Act's express exemption from Section 7 liability for common carrier acquisitions, where there is no "substantial competition" between the parties to the acquisition, bars plaintiffs' suit.
4. Whether a collateral antitrust suit is the proper vehicle for plaintiffs' challenge to the FCC's approval of the SBC-Ameritech merger, where plaintiffs actively participated in the FCC proceeding, raised the same issues before the FCC that they raise here, failed to seek judicial review of the FCC's decision, and seek the same remedy from the district court that they sought unsuccessfully from the FCC.

## STATEMENT OF THE FACTS

### *1. The Original Suit*

Shortly after SBC announced its intention to acquire Ameritech in May 1998, plaintiffs filed an antitrust suit to block the merger. Because the merger was still being evaluated by federal and state regulatory agencies, the district court dismissed plaintiffs' complaint for lack of ripeness. This Court affirmed, explaining:

It is impossible to analyze a potential-competition claim without understanding the barriers to entry that future rivals must surmount. Regulatory agencies can raise or lower these barriers. Perhaps the FCC will condition its approval on changes that facilitate rivals' entry. Until the agencies have had their say, it is impossible to perform the sort of antitrust analysis that is integral to a potential competition case.

*South Austin Coalition Community Council v. SBC Communications Inc.*, 191 F.3d 842, 845 (7th Cir. 1999).

### *2. Agency Reviews*

All the reviewing agencies now have had their say. The Antitrust Division of the Department of Justice ("DOJ"), the FCC, the Illinois Commerce Commission ("ICC"), and the Public Utilities Commission of Ohio ("Ohio PUC") each reviewed and approved the merger, after imposing extensive conditions that facilitate new competitive entry.<sup>1/</sup>

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<sup>1/</sup> As did plaintiffs in both their Complaint and brief, we refer herein to the published agency orders. See *General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1080 (7th Cir. 1997) (court may consider "matters of public record" on motion to dismiss).

**a. Department of Justice**

As this Court noted, the DOJ “concluded that the merger is generally compatible with competition.” *South Austin*, 191 F.3d at 842. After exhaustive review pursuant to the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, the DOJ filed a proposed consent decree terminating its antitrust investigation and dismissing its complaint, subject to the parties’ divestiture of certain overlapping cellular properties. *United States v. SBC Communications*, 1999 WL 1211458, at \*2-3 (D.D.C. Aug. 2, 1999). The DOJ concluded that “there is no reason under the antitrust laws to proceed with further litigation if the divestitures of the cellular system assets are carried out in the manner required by the proposed Final Judgment.” *Id.* at \*27. The district court approved the consent decree, thereby allowing the merger to proceed. *Id.* at \*11. No appeal was taken from that disposition.<sup>2/</sup>

**b. Federal Communications Commission**

The FCC then reviewed the merger under the statutory public interest test. *In re Applications of Ameritech Corp.*, Mem. Op. And Order, FCC 99-279, ¶¶ 39-45 (Oct. 8, 1999) (“FCC Order”) (App. B1). The FCC’s public interest test employs a more stringent standard than the Clayton Act. Unlike an antitrust court, which considers only whether acquisitions

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<sup>2/</sup> The cellular overlap resulted from a January 1999 transaction in which SBC acquired Comcast Cellular Corporation. That transaction would have resulted in cellular telephone service competition between SBC and Ameritech in the St. Louis area and in three markets in Illinois. *United States v. SBC*, 1999 WL 1211458, at \*15. Ameritech’s overlapping cellular assets were sold to a joint venture of GTE and Georgetown Partners. See *SBC Completes Acquisition of Ameritech*, Press Release (Oct. 8, 1999), available at <http://www.epixtech.com/ls/press/1999/9968.asp>.

“substantially lessen competition” (15 U.S.C. § 18), the FCC will not approve a merger unless “it will enhance competition.” FCC Order ¶¶ 49-50.<sup>3/</sup>

In the 14-month FCC proceeding, some 60 interested parties – including antitrust enforcement officials, telephone industry regulators, economists, and public interest advocates – filed comments and offered their views at public forums. See FCC Order ¶¶ 39-45 & Appendix A. Plaintiffs here were among the parties participating and filing comments. See Public Comment on behalf of South Austin Community Coalition Council, Walter Ryan Jr., Theodore Chabraja, Anita B. Hull and Robert Rifkin (Supp. App. Tab 1). All parties had an opportunity to review, pursuant to a protective order, the confidential and proprietary documents submitted by SBC and Ameritech. FCC Order ¶ 40.

Pursuant to its regulatory authority, see 47 C.F.R. § 63.01, the FCC imposed unprecedented and far-reaching conditions on the merging parties in a 244-page order and 213-page appendix.<sup>4/</sup> The FCC designed its merger conditions to ensure “more open” local markets in the regions served by SBC and Ameritech, to foster out-of-region competition,

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<sup>3/</sup> As commentators have noted, “the FCC sees its role as that of a shadow DOJ, analyzing mergers under the public interest standard to determine how they will influence competition in the telecommunications industry.” R. Barkow & P. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. Chi. Legal F. 29, 29. The FCC’s analysis of “competitive effects” is “exceedingly broader than anything the Department analyzes,” particularly with respect to “potential competition.” *Id.* at 45.

<sup>4/</sup> Plaintiffs’ appendix omits Appendix C to the FCC Order, as well as the separate statements of four Commissioners. We therefore have included these materials in the Supplemental Appendix at Tab 2. Appendix C sets forth in detail the conditions to the merger.

and to improve residential phone service. FCC Order ¶¶ 5, 422, 436. These conditions, *inter alia*,

- make it easier for competitors to interconnect with and obtain facilities from SBC/Ameritech by requiring uniform and enhanced electronic Operating Support Systems, collocation and interconnection, and special assistance to small competing carriers (FCC Order ¶¶ 371-372, 381-387);
- reduce competitors' cost of entry by requiring that critical negotiated terms in any SBC/Ameritech interconnection contract be made available to all carriers (exceeding the "most favored nation" provisions of the Telecommunications Act of 1996), as well as by requiring deep promotional discounts to rivals to stimulate competition for local residential services (*id.* ¶¶ 388, 390-393);
- encourage other incumbent carriers to compete within the SBC/Ameritech region by requiring SBC/Ameritech to enter 30 markets outside their service territory (*id.* ¶¶ 398-399); and
- promote the deployment of advanced services, such as DSL (a form of high-speed Internet access), including requirements addressing the ordering, sale, and pricing of "unbundled network elements" that competitors may employ to provide DSL service (*id.* ¶¶ 370, 373-375).

The FCC found that, after the merger, "competition in the provision of local exchange services, including advanced services, will increase both inside and outside the merged firm's region" (FCC Order ¶ 4); the conditions will "reduc[e] the risk and costs associated with entry into SBC and Ameritech territories, particularly with respect to residential and advanced services markets, [and] stimulate entry into these markets" (*id.* ¶ 422); and the conditions "will prove beneficial in jumpstarting residential competition by lowering entry barriers for residential competition [and will] greatly reduce the costs of entry over the long run" (*id.* ¶ 440). The FCC ultimately concluded, based on the "voluminous record," that with these conditions, the SBC-Ameritech merger would promote competition and satisfy the

public interest test. *Id.* ¶¶ 4, 581. Plaintiffs did not seek rehearing of the FCC’s ruling (authorized by 47 U.S.C. § 405(a)), nor did they seek judicial review in a federal court of appeals (authorized by *id.* § 402(b)).<sup>5/</sup>

**c. Illinois Commerce Commission**

After extensive proceedings, the ICC also approved the merger in a 262-page order. Order, Docket No. 98-0555, 1999 WL 1331303 (ICC Sept. 23, 1999) (“ICC Order”) (Supp. App. Tab 3).<sup>6/</sup> The ICC found that the merger, even without conditions, would produce substantial procompetitive benefits in Illinois and was unlikely to have any adverse effect on retail rates. *Id.* at 109, 122. Nevertheless, the ICC added numerous conditions (cumulative to the FCC’s) designed to strengthen competition, avoid competitive risks, and enhance

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<sup>5/</sup> An appeal of the FCC Order was filed by the Association of Communications Enterprises. It involved only a narrow issue concerning the merged company’s provision through a subsidiary of certain advanced telecommunications services for resale. The court of appeals modified only that part of the FCC Order relating to establishment of the subsidiary, thereby requiring additional protective conditions. See *Association of Communications Enters. v. FCC*, 235 F.3d 662 (D.C. Cir. 2001), on remand, *In re Ameritech Corp.*, FCC 01-82, CC 98-141 (Mar. 07, 2001). In return for granting a partial waiver of one merger condition, the FCC later imposed numerous additional requirements to “ensure that competitors have the ability to compete effectively in the advanced services marketplace.” *In re Applications of Ameritech Corp.*, Second Mem. Op. and Order, FCC 00-336, 2000 WL 1269831, ¶ 1 (Sept. 8, 2000).

<sup>6/</sup> The ICC Order is available at 1999 WL 1331303. However, because the Westlaw version does not have page references, we have placed the hard copy in the Supplemental Appendix. Instead of including the ICC Order in the Appendix, plaintiffs included only selections from a *proposed* order incorporating views of the ICC Staff that the ICC *rejected*. See App. B4. The ICC Order was amended on rehearing to clarify certain penalty provisions, see 1999 WL 1334698 (I.C.C. Nov. 15, 1999), and it was affirmed on appeal in *Neighborhood Learning Networks, Inc. v. Illinois Commerce Comm’n*, No. 1-00-0028 (Ill. App. Mar. 2, 2001) (unpublished).

consumer service, including a requirement that Ameritech Illinois allocate 50 percent of its net merger-related savings to competitors and retail customers. *Id.* at 246. Other conditions imposed on Ameritech Illinois included additional performance measurements (and penalties for failure to meet them), discounts for rival carriers, new and significant infrastructure investment requirements, and improved 911 operations and facilities. *Id.* at 239-260.

A particularly important set of conditions focuses on operations support systems (“OSS”), a term used to describe the systems and databases used by incumbent carriers to provide service to other carriers. Ameritech Illinois must enhance and expand the electronic interfaces that it offers requesting carriers for access to its OSS. The ICC established a three-phase process for these enhancements, which it recognized would “be a complex and expensive process” (ICC Order at 196), and which subject Ameritech Illinois to a comprehensive array of over 120 performance measures to be applied on a monthly basis, covering the results of its wholesale and retail operations. The performance measures impose rigorous standards on Ameritech Illinois, and failure to meet them requires payment of automatic, self-executing penalties to competing carriers. The ICC explained that implementation of these performance measures and standards “represents a substantial improvement over the status quo in Illinois, and will have procompetitive benefits for CLECs and end users in Illinois that would not exist absent the merger.” *Id.* at 228.

Unlike other consumer advocacy groups, plaintiffs here did not intervene or otherwise participate in the Illinois merger proceeding or appeal the ICC’s approval decision. ICC Order at 2-3.

**d. Ohio PUC**

In approving the merger, the Ohio PUC imposed additional requirements on Ameritech Ohio, going beyond those mandated by the FCC, to ensure that the merger promoted local competition. See Opinion and Order, Case No. 98-1082-TP-AMT, 1999 WL 397741 (Ohio PUC April 8, 1999) (“Ohio PUC Order”). The Ohio PUC required, *inter alia*, that Ameritech Ohio freeze residential rates for three years; compete for residential and business customers in four Ohio markets outside of Ameritech’s current service territory; increase infrastructure investment; offer a large promotional discount rate to competitors for unbundled loops and resold services; provide a level of interconnection equivalent to what it obtains as a new entrant outside its territory or which it provides elsewhere as an incumbent; and meet specified operational and service quality benchmarks or face substantial monetary penalties. *Id.* at \*7-\*24.

Following a full debate over competitive issues, the Ohio PUC found, in a 54-page order, that the merger as conditioned would “jumpstart” residential competition, benefit ratepayers, promote competition, diversity, and customer choice, and result in “reasonable rates, rentals, tolls, or charges.” Ohio PUC Order at \*7, \*15, \*28. There was no appeal.

\* \* \*

In sum, the SBC-Ameritech merger emerged from an agency review process of unprecedented thoroughness with numerous conditions addressing the complex technological and competitive issues that characterize today’s rapidly changing telecommunications marketplace. These conditions establish elaborate reporting and auditing procedures, are

backed by tough sanctions, and ensure continuous monitoring by the FCC and state commissions. As this Court anticipated, the agencies have “facilitate[d] rivals’ entry” and “lower[ed]” entry barriers in a focused and sophisticated manner to invigorate local exchange competition. *South Austin*, 191 F.3d at 845.

### **3. *The Renewed Lawsuit***

Plaintiffs filed a new complaint (“Complaint” or “Cmplt.”) on November 5, 1999. App. B26. It alleges that each named plaintiff is or was “an Ameritech Corporation customer” and purports to bring suit on behalf of a class of “all persons who are customers of local phone service in the area served by the merged company.” Cmplt. ¶¶ 3-9. Although the Complaint (p. 2) alludes to violations of the Telecommunications Act of 1996 (“1996 Act”), its only Count, labeled “Federal Antitrust,” alleges a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. Cmplt. ¶ 18. Plaintiffs contend that the merged company “will exercise monopoly power and lessen potential competition in the relevant markets,” and they seek divestiture relief under 15 U.S.C. § 26. Cmplt. pp. 2, 20.

As described in the Complaint (¶¶ 10-11), SBC and Ameritech were not actual competitors prior to the merger. Instead, the merger allegedly put an end to potential competition between the two firms. Plaintiffs generally aver that, prior to the merger, Ameritech planned to compete with SBC by offering local telephone service in St. Louis, and SBC planned to compete with Ameritech by offering local telephone service in Chicago. *Id.* ¶¶ 59, 64. The Complaint does not state, however, when such potential competition might have occurred. And it makes no mention of the FCC’s conclusion that SBC “had no existing

plans to enter out-of-region territories at the time of the merger” (FCC Order ¶ 83) or the ICC’s conclusion that there was no “reasonable probability” that SBC would provide local telephone service in Illinois “in the next two years” (ICC Order at 104). The Complaint also does not allege that the purported potential competition in St. Louis and Chicago would have brought greater competitive benefits to consumers than were achieved through the merger conditions imposed by the DOJ, the FCC, and the state commissions.

Even though the Complaint acknowledges that, prior to the merger, SBC and Ameritech each had “monopolies of local phone service” within their own separate territories, it inconsistently claims that the merger will increase market concentration nationwide. Cmpl. ¶¶ 36-37, 52. The Complaint admits that there are Competitive Local Exchange Carriers (“CLECs”) competing with the merged company and other CLECs that are potential entrants (*id.* ¶¶ 41-42), but it asserts that their market share is low and that the CLECs face “tremendous barriers to entry” (without stating what those barriers are or how they differ from barriers that SBC would have had to overcome in Chicago). *Id.* ¶ 47. Alleging that the merger “will cause price increases for local telephone service customers” and more “limited local telephone service choices” (*id.* ¶¶ 54-55), the Complaint seeks injunctive relief, specifically “divestiture of a substantial number of markets to competitors” or “an injunction unwinding the merger.” *Id.* p. 20.

#### 4. *The District Court Decision*

Defendants filed a motion to dismiss on several grounds. The district court dismissed the Complaint on the ground that plaintiffs lack standing. App. A3. The court first noted that Supreme Court authority requires sufficient allegations of antitrust injury from plaintiffs seeking injunctive relief. *Id.* at 5-6, citing *Cargill, Inc. v. Monfort, Inc.*, 479 U.S. 104, 111 (1986). In order to determine whether plaintiffs satisfied that requirement, the court summarized the “extensive agency review” and the “substantial conditions” imposed by the reviewing agencies “to secure consumer protection” and to promote “increased local competition.” App. A3, at 6-23. The court noted that the FCC’s merger approval came with “approximately thirty different conditions” which “require SBC to take measures to improve service for consumers and promote open markets” (*id.* at 9), and that the ICC and Ohio PUC imposed still more pro-competitive conditions (*id.* at 18-23). The court faulted plaintiffs for not taking any account of the conditions placed on the merger, as if they were “not a factor” in the court’s evaluation of the threat of injury posed by the merger. *Id.* at 25.

The district court also explained that plaintiffs had not pleaded facts showing an antitrust violation. Instead, plaintiffs simply asked the court “to marvel at the size of the SBC/Ameritech merger.” App. A3 at 26. The court concluded that plaintiffs do not satisfy governing pleading standards “by simply alluding to the proportions of the merger [and] leaving it to the court to infer a threat of an antitrust violation.” *Ibid.* Based on the “speculative and vague” nature of plaintiffs’ allegations, and in light of the reviewing agencies’ “thorough examination of the merger” which resulted in conditions that “ensure[d]

that competition did not suffer” and “saw to it that competition thrived,” the district court ruled that the Complaint does not satisfy the threshold for pleading an antitrust violation under Section 16 of the Clayton Act. *Ibid.*

### **SUMMARY OF ARGUMENT**

Defendants raise four independent grounds for affirmance of the district court’s judgment.

#### I.

The Supreme Court and this Court have insisted that, given the costs of modern antitrust litigation, antitrust plaintiffs must specify how the conduct they challenge injures competition and violates the antitrust laws. The bare legal conclusions in this Complaint – that entry barriers are “tremendous” (¶ 47) and that the merger “will lessen competition nationally” (¶ 57) – do not satisfy that pleading standard. The deficiency of this Complaint is particularly evident in its allegations of so many conflicting relevant markets. Plaintiffs assert that Ameritech and SBC were “monopolists” in their separate geographical areas; nonetheless, they repeatedly allege an increase in the Herfindahl-Hirschman Index (“HHI”) nationwide, as if all local telephone companies operate in one gigantic market. This is economic nonsense, not coherent antitrust pleading.

A particularly glaring defect is the Complaint’s failure to allege any error in the findings and conclusions of the expert agencies that spent months reviewing the merger. The DOJ determined that the merger, once the overlapping cellular assets were spun off, did not threaten competition. The FCC determined that the merger as conditioned would

affirmatively promote competition both in the Ameritech region and nationwide. The ICC and Ohio PUC agreed that the merger as conditioned would jump-start competition. As for plaintiffs' theory that the merger prevented potential competition by SBC in Chicago, the FCC found that prior to the merger SBC had "no existing plans" to provide local telephone service in the Chicago market (FCC Order ¶ 83), and the ICC agreed (ICC Order at 104).

Given these affirmative determinations by the expert agencies responsible for promoting competition in telecommunications services, which have been sustained on appeal, plaintiffs had a responsibility to allege how the agencies were wrong. The Complaint's patchwork of snippets from newspaper editorials and meaningless HHI figures is no substitute for such allegations.

## II.

The Complaint is also defective for failure to allege a legally sufficient theory of antitrust liability. Plaintiffs' allegations about the impact of the merger on potential competition in Chicago rest on the "actual potential competition" theory. But neither the Supreme Court nor this Court has ever accepted that theory, and numerous courts and commentators have criticized it as unduly speculative and administratively unworkable. It should not be recognized in a case such as this one, involving a merger affirmatively structured by expert regulators to strengthen the forces of competition.

Even if that theory provided a valid basis for a Clayton Act Section 7 claim, plaintiffs have not alleged its elements. The Complaint does not allege that, but for the merger, SBC would have offered local telephone service in Chicago in the near future, that AT&T, MCI-

WorldCom, and Sprint are not viable entrants, or that SBC's entry was necessary to deconcentrate the Chicago market. Those omissions are fatal to their actual potential competition claim.

### III.

Plaintiffs' claim also is flatly barred by the express exemption in paragraph 4 of Section 7 of the Clayton Act for acquisitions that extend the lines of a common carrier where there is no substantial competition between the parties to the acquisition. See 15 U.S.C. § 18. SBC and Ameritech did not substantially compete at the time of the merger, which extended SBC's lines into the Ameritech region. This Court's decision in *Navajo Terminals, Inc. v. United States*, 620 F.2d 594 (7th Cir. 1979), confirms the applicability of this exemption to common carrier transactions of this type. The legislative history clearly states that the statutory phrase "common carrier" covers any company providing local telephone service.

### IV.

Plaintiffs' complaint is also an improper collateral attack on the FCC Order approving the merger. The Supreme Court has made clear that such regulatory rulings, subject to judicial review in the court of appeals, "obviate any necessity for the antitrust court to relitigate the issues actually disposed of by the agency decision." *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 306 (1973). This is a particularly strong case for application of the *Ricci* principle. Both the organizational plaintiff (South Austin) and the individual plaintiffs actively participated in the exhaustive FCC merger review. Represented by the same counsel as here, they submitted a detailed brief to the FCC raising the same allegations

that they raised in their district court Complaint. They seek the same remedy from the district court that they sought from the FCC, a remedy that the FCC was authorized to award. They chose not to challenge *any* of the FCC’s determinations by seeking judicial review in the court of appeals as authorized by federal law. In such circumstances, as this Court has held, allowing plaintiffs’ antitrust lawsuit to proceed would be “repugnant to the operation of the regulatory scheme.” *In re Wheat Rail Freight Rate Antitrust Litig.*, 759 F.2d 1305, 1314 (7th Cir. 1985).

Allowing plaintiffs’ antitrust suit to proceed would be particularly unwarranted because the FCC’s decision did not limit competition, as in most cases addressing “antitrust immunity” or “repugnance.” Instead, the FCC conditioned its approval of the merger on requirements designed to *lower* entry barriers and *promote* competition. A judicial finding that the merger is anticompetitive and unlawful would squarely conflict with the FCC’s expert determinations and nullify merger conditions that expert regulators believe would promote competition.

## **ARGUMENT**

### **I. PLAINTIFFS’ ANTITRUST COMPLAINT WAS PROPERLY DISMISSED FOR FAILURE TO SATISFY GOVERNING PLEADING STANDARDS.**

As the district court explained, the allegations in the Complaint are “speculative and vague,” do not “account for the conditions placed on the merger by the reviewing regulatory agencies,” and “leav[e] it to the court to infer a threat of an antitrust violation.” App. A3, at 25-26. Although the district court considered the Complaint’s deficiencies under the rubric

of standing, we believe it unnecessary to delve into the complexities of standing because it is so plain that plaintiffs' vague and confused allegations do not state a claim under the antitrust laws. See *Slaney v. International Amateur Athletic Fed'n*, 244 F.3d 580, 597 (7th Cir. 2001) ("an appellate court may affirm the district court's dismissal on any ground supported by the record," including failure to properly plead the elements of a statutory cause of action).

The district court did not subject plaintiffs to a "heightened pleading standard," as plaintiffs assert (Br. 13), but simply insisted that plaintiffs indicate how their allegations add up to a valid antitrust claim. The Federal Rules of Civil Procedure do not authorize plaintiffs to proceed with costly antitrust suits based on vague and conclusory complaints. As the Supreme Court has stressed in an antitrust case, "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983).

There is good reason for this pleading requirement. It "exposes the claimant who lacks an intelligible theory" and allows for early disposition. 2 P. Areeda et al., *ANTITRUST LAW* ¶ 307d, at 74 (2d ed. 2000). As this Court has recognized, early disposition of invalid claims is critical given "the costs of modern federal antitrust litigation and the increasing caseload of the federal courts," which "counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106

(7th Cir. 1984); see also *Havoco, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 553 (7th Cir. 1980) (“requiring costly and time consuming discovery and trial work would represent an abdication of our judicial responsibility [if] the allegations of the complaint fail to establish the requisite elements” of an antitrust claim). Under Fed. R. Civ. P. 8, the “price of entry” to discovery in “costly and burdensome” antitrust cases is “a factual predicate concrete enough to warrant further proceedings.” *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999). See also *Pennsylvania ex rel. Zimmerman v. Pepsico, Inc.*, 836 F.2d 173, 179 (3d Cir. 1988) (vague antitrust claim “no more complies with Rule 8 than an allegation which says only that a defendant made an undescribed contract with the plaintiff and breached it”).

The Complaint fails to meet these standards. Its “bare legal conclusion[s]” (*Carriers*, 745 F.2d at 1106) – that the merger will result “in a direct lessening of competition” in the SBC and Ameritech geographic service areas (p. 2), that “CLECs face tremendous barriers to entry into new markets” (§ 47), and that “[t]he merger will also lessen competition nationally for local telephone service” (§ 57) – do not constitute the “specificity in pleading” called for by the Supreme Court. See also *Pepsico*, 836 F.2d at 181 (a “naked conclusion” reciting a “bare-bones assertion” is insufficient to satisfy the pleading standard); *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1026 (10th Cir. 1992) (“antitrust ‘buzz words’” are insufficient).

A prime example is the Complaint’s vague and contradictory allegations concerning the relevant geographic market. As the Supreme Court has insisted, determination of the

relevant geographic (as well as product) market is “a necessary predicate” to a § 7 claim. *United States v. Marine Bancorp.*, 418 U.S. 602, 618 (1974). Like *Marine Bancorp.*, 418 U.S. at 623, this case involves a market extension merger (one between two firms delivering the same product in different geographical areas), and “the legality of a market extension merger must be determined against the backdrop of properly defined product and geographic markets.” *United States v. Connecticut Nat’l Bank*, 418 U.S. 656, 660 (1974). The reason for this requirement is manifest: whether a merger has a substantial effect on competition can be determined only if the market in which that competition occurs is delineated.<sup>27</sup>

The Complaint references so many inconsistent geographical markets that only guesswork can identify which, if any, is “relevant” for purposes of plaintiffs’ Section 7 claim. These include SBC’s and Ameritech’s “respective local area markets” (¶ 36), a “new geographic area that comprise[s] the former Ameritech and SBC service area” (¶ 37), a “Telephone Access Line Market in the United States” (¶ 39), a “National Market” with a market concentration (HHI) index for the entire country (¶¶ 48-52), “the St. Louis market” (¶¶ 59-60), “Chicago” (¶ 59), and “each other’s neighboring pre-merger markets” (¶ 61). Plaintiffs inconsistently allege that the nation is one gigantic local market (¶¶ 48-52), yet

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<sup>27</sup> Courts consistently have dismissed Clayton Act § 7 claims for failure to allege a proper relevant geographic market. *E.g.*, *Elliott v. United Center*, 126 F.3d 1003, 1005 (7th Cir. 1997); *Apani S.W., Inc. v. Coca-Cola Enters., Inc.*, 128 F. Supp. 2d 988, 1000 (N.D. Tex. 2001); *Morales Villalobos v. Garcia Llorens*, 137 F. Supp. 2d 44, 47 (D.P.R. 2001); *California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1132 (N.D. Cal. 2001); *FTC v. Freeman Hosp.*, 911 F. Supp. 1213, 1222 (W.D. Mo.), *aff’d*, 69 F.3d 260 (8th Cir. 1995). The same result is warranted here. Plaintiffs’ mishmash of nationwide HHI figures and newspaper snippets is no substitute for a careful demarcation of market boundaries.

claim that each defendant is a “monopolist” in its own separate territory (§ 36). Plaintiffs’ brief (at 32) admits that they pled “various descriptions of the likely relevant market” and adds that there are “other areas to be determined by discovery.” In other words, the relevant geographic market could be anywhere at all! But it is well established that a Section 7 claim “must be charted by careful selection” of the market where the acquired firm operates and where local consumers “can practicably turn for alternatives.” *Connecticut Nat’l Bank*, 418 U.S. at 668; *Marine Bancorp.*, 418 U.S. at 619.

In addition, as demonstrated at pp. 28-31 below, plaintiffs’ allegations do not support their conclusion that the merger reduced potential competition. They have not alleged that, but for the merger, SBC actually would have competed with Ameritech in the near future, that other potential competitors are incapable of competing with Ameritech, or that SBC’s entry is needed to deconcentrate the relevant market. Instead, they simply pronounce – “based upon information and belief” (Cmplt. pp. 2-3) – that the SBC-Ameritech merger threatens competition. Cmplt. ¶ 68.

The Complaint’s lack of specificity is compounded by its sloppiness. See *Heart Disease Research Found. v. General Motors Corp.*, 463 F.2d 98, 99-100 (2d Cir. 1972) (affirming dismissal of “sloppy” and “scattershot” antitrust complaint). For example, paragraph 40 in its entirety reads “Even the.” The Complaint states (at p. 2) that the merger “violates the Telecommunications Act of 1996,” but the only count in the Complaint is labeled “Federal Antitrust” (page 5), and the Complaint nowhere alleges any violation of the Telecommunications Act. The Complaint (§ 18) also references a nonexistent “Sherman Act,

Section 18” which plaintiffs apparently confuse with Section 7 of the Clayton Act, 15 U.S.C. § 18.

Plaintiffs’ failure to proofread their own complaint (there are many other instances), which they had months to prepare while this case ripened, indicates their lack of seriousness and reveals what this suit is really about. By hurriedly throwing together antitrust buzzwords and irrelevant allegations culled from newspaper editorials and Internet gossip, plaintiffs’ counsel count on “a small probability of an immense judgment in a class action” to create an “intense pressure to settle” and the opportunity for large fees. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). As the Eleventh Circuit recently explained, plaintiffs often file “shotgun complaints” to “extort the settlement of unmeritorious claims” and obtain “a windfall in the form of fees for the ‘prevailing’ lawyer.” Such “shotgun pleadings consume an inordinate amount of a court’s time,” so that “justice is delayed, if not denied, for litigants who are standing in the queue waiting to be heard.” *Byrne v. Nezhat*, 261 F.3d 1075, 1130 (11th Cir. 2001).

Plaintiffs attempt to amend the Complaint by stuffing their Appendix with post-Complaint newspaper commentary and citing it in their brief. See App. B9-B25; Pl. Br. 9-13. “It is a basic principle that the complaint may not be amended by the briefs in opposition to a motion to dismiss, nor can it be amended by the briefs on appeal.” *Thomason v. Nachtrieb*, 888 F.2d 1202, 1205 (7th Cir. 1989). These materials were not presented to the District Court, are outside the record, and should be stricken. See Cir. R. 30; *United States v. Raymond*, 228 F.3d 804, 809 n.5 (7th Cir. 2000); *In re Capital Cities/ABC, Inc.’s*

*Application for Access to Sealed Transcripts*, 913 F.2d 89, 96 (3d Cir. 1990) (newspaper articles not included in the district court record may not be included in appellate appendix); *United States v. One Parcel of Property*, 959 F.2d 101, 104 (8th Cir. 1992) (same). Plaintiffs argue (Br. 2, 8) that “[p]ost-acquisition evidence is properly considered” and “proves” their case. But on a Rule 12(b) motion, the issue is not proof but whether the Complaint properly alleges a cause of action, and it is not proper “to assume that the [plaintiff] can prove facts that it has not alleged.” *Associated General*, 459 U.S. at 526. In any event, those newspaper reports are refuted by recent public statements by ICC Commissioners praising Ameritech for its “extraordinary effort” to improve service and for “substantially enhanc[ing] retail performance in Illinois over the past year.” See Transcript, *In the Matter of Telecommunications Policy Committee Meeting*, at 38, 61 (ICC Aug. 14, 2001) (Supp. App. Tab 4).<sup>8/</sup>

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<sup>8/</sup> If this Court were to consider extra-record news articles, they should be up-to-date articles, which confirm that complaints about Ameritech’s service are rapidly diminishing as the telephone industry gains more experience in wholesale provisioning under the new and evolving regulatory regime. See *Ameritech says it gets message*, Chi. Trib., Aug. 15, 2001, sec. 3, at 3 (quoting statements of ICC officials that Ameritech’s “numbers look good” and that its service “has improved”); *Rivals revving up home phone fight*, Chi. Trib., Aug. 21, 2001, sec. 3, at 1 (noting that “the number of rivals using Ameritech’s network is growing rapidly” and that Ameritech “is still developing systems to deal with them,” and quoting an MCI spokesperson as acknowledging that “[t]hings have gotten better as time passes”).

## II. PLAINTIFFS HAVE NOT ALLEGED A LEGALLY SUFFICIENT BASIS FOR THEIR SECTION 7 CLAIM.

### A. Plaintiffs' Legal Theories Do Not Support Their Section 7 Claim.

An antitrust plaintiff must “state the legal theories of its claim [in] comprehensible language.” 2 P. Areeda et al., *supra*, ¶ 307a, at 66. Apart from its other deficiencies, the Complaint fails to allege a coherent theory of how the SBC-Ameritech merger violates Section 7 of the Clayton Act. Such pleading is required so that courts may test the sufficiency of antitrust claims before plunging into discovery. See *Pepsico*, 836 F.2d at 182 (affirming dismissal of complaint that “offers only uncertain clues as to plaintiff’s theory of liability and the facts which would support a finding of Sherman Act liability”); *Banks v. NCAA*, 977 F.2d 1081, 1094 (7th Cir. 1992) (affirming dismissal for lack of “a cogent argument articulated even on appeal that the alleged restraints impose an anti-competitive effect”); *Car Carriers*, 745 F.2d at 1109 (rejecting antitrust claim as “inherently implausible”).

**“Big is bad” theory.** One “theory” offered by plaintiffs is that transforming two companies into a larger company is a bad thing. *E.g.*, Cmpl. ¶ 56-58. But that is the consequence of *every* merger and not the predicate of an antitrust violation. Plaintiffs condemn the merger as too big (see Cmpl. ¶¶ 29-32, 38) and the merged company as too profitable (Pl. Br. 11). But “sheer size” or profitability does not authorize a court “to invalidate an acquisition by a potential entrant.” 4 E. Kintner, FEDERAL ANTITRUST LAW § 36.28, at 316 (1984); *Continental T.V. v. GTE Sylvania*, 433 U.S. 36, 53 n.21 (1977) (“an

antitrust policy divorced from market considerations would lack any objective benchmarks”). In fact, large mergers often bring the benefits of efficiency to consumers, as three expert regulators found here. See F. Easterbrook, *Workable Antitrust Policy*, 84 Mich. L. Rev. 1696, 1697-1698 (1986).

**“Horizontal competition” theory.** Plaintiffs’ brief (at 4) asserts that the SBC-Ameritech merger eliminated “actual” – presumably horizontal – competition. But the Complaint does not assert a viable horizontal competition claim because it does not allege that SBC and Ameritech actually competed in the provision of local telephone service in any relevant market at the time of the merger. To the contrary, the Complaint alleges (¶ 36) that, prior to the merger, SBC and Ameritech each had “monopolies of local phone service within their respective local area markets.” The reviewing agencies all confirmed that the local operating companies of SBC and Ameritech operated in geographically distinct areas of the country and did not compete for the same customers. See FCC Order ¶ 65 (prior to the 1996 Act, SBC and Ameritech were “effectively precluded from competing in each other’s local markets”); ICC Order at 98 (“SBC and Ameritech do not currently compete in the relevant market”). See also *South Austin*, 191 F.3d at 843-844 (listing states in which Ameritech and SBC were the respective local service provider).<sup>2/</sup>

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<sup>2/</sup> Because the merging firms did not operate in the same market at the time of the merger, plaintiffs’ allegation of an increase in HHI (Cmplt. ¶ 52) is simply gibberish. Using the purported shares of all the regional Bell companies to measure HHI assumes that they all compete in the same nationwide market. But it is undeniable that an individual in Illinois cannot “practicably turn” to a carrier not operating in Illinois for local telephone service.

Where merging entities “never did compete,” their merger “maintain[s] the status quo” and does not result in “a lessening of competition.” *City of Pittsburgh v. West Penn. Power Corp.*, 147 F.3d 256, 266-267 (3d Cir. 1998) (affirming dismissal of antitrust challenge to merger). The SBC-Ameritech merger left the market structure “intact” with “the same characteristics” as before the merger. ICC Order at 99. Because the merger “extinguish[ed] no present competitive conduct or relationships,” plaintiffs have not stated a Section 7 claim under a horizontal competition theory. *United States v. Citizens & So. Nat’l Bank*, 422 U.S. 86, 121 (1975).

**“Perceived potential competition” theory.** The Complaint also is devoid of any allegations that would support a Section 7 claim under the “perceived potential competition” theory. See Pl. Br. 39. Under that theory, a perceived threat of market entry by an existing potential competitor constrains anticompetitive behavior on the part of existing participants, and entry by merger removes that constraint. See *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 531-537 (1973); H. Hovenkamp, FEDERAL ANTITRUST POLICY 559-561 (2d ed. 1999). The Complaint nowhere alleges that potential entry by SBC constrained Ameritech’s conduct in any manner. Moreover, the reviewing agencies found that there were numerous qualified potential entrants (see *infra* p. 32), and the Complaint does not allege that “a significant number of similar potential entrants” was lacking. P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 1123’, at 320 (2000 Supp.); see also *United States Dept. of Justice Merger Guidelines* § 4.133 (1984) (any constraint is “unlikely” where there are “more than a few” comparable potential entrants). Nor does plaintiffs’ brief attempt to explain how

potential entry prior to the merger affected Ameritech's prices, which are subject to "price cap" regulation and closely monitored by the state commissions. See ICC Order at 124-125. Accordingly, plaintiffs are precluded from proceeding under the "perceived potential competition" theory.

**"Actual potential competition" theory.** That leaves plaintiffs with only the "actual potential competition" theory. Under that theory, a merger is unlawful if the acquiring company, but for the merger, would have entered the market on its own and thereby made the market more competitive. See *Marine Bancorp.*, 418 U.S. at 624. According to plaintiffs (Cmplt. ¶¶ 59-60), the SBC-Ameritech merger eliminated plans by Ameritech to offer local telephone service in St. Louis and by SBC to offer local telephone service in Chicago.

The Complaint does not indicate how plaintiffs could be injured by any impact of the merger on competition in St. Louis. Plaintiffs admit that they are all "Ameritech customers in Illinois" (Pl. Br. 1), and thus they are not consumers of local phone service in St. Louis. Accordingly, plaintiffs lack standing to raise a claim based on potential competition in St. Louis. See *Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1379 (7th Cir. 1987) (plaintiff did not have standing to bring antitrust claim where it was "not a participant in [the relevant] market"). Moreover, it is uncontested that the DOJ ensured the development of local telephone service competition in St. Louis by requiring that the purchaser of Ameritech's divested cellular assets in Missouri "have the capability of competing effectively" in the provision of *wireline* telephone services. See *supra* p. 3. Thus, plaintiffs must rest their actual potential competition claim on SBC's alleged plans to offer

local telephone service in Chicago. Even with respect to Chicago, however, plaintiffs have no legally sufficient claim.

Courts long have noted the “novelty” of the actual potential competition theory, its position at the “frontiers” of antitrust law, and the “understandable doubt” about its validity. *FTC v. ARCO*, 549 F.2d 289, 294 (4th Cir. 1977); *Mercantile Tex. Corp. v. Board of Governors*, 638 F.2d 1255, 1265 (5th Cir. 1981); *United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980). The Supreme Court has not “accepted” the theory (*Marine Bancorp.*, 418 U.S. at 625), this Court has not sanctioned it, and it has never been used to invalidate a merger in a suit brought by a private plaintiff.

Especially in the context of this case, involving extensive regulatory supervision designed to foster competition through the vehicle of the merger itself, actual potential competition is too speculative a theory to sustain a Section 7 claim. As the Second Circuit has observed, courts have been “reluctan[t] to embrace the doctrine” because it “rests on speculation about the future conduct and competitive impact of a firm currently outside the market and perhaps intending to remain so.” *Siemens*, 621 F.2d at 504. Of particular concern, adjudicating antitrust claims based on such a speculative inquiry would not be practicably administrable. As the Supreme Court has noted, “[u]nequivocal proof that an acquiring firm actually would have entered *de novo* but for a merger is rarely available.” *Marine Bancorp.*, 418 U.S. at 624. Moreover,

[t]here is no practical method of ranking, even crudely, the potential competitors in a market for the purpose of identifying a set of most likely or most feared entrants. And even if one could identify such a set

through the methods of litigation, one would not know how to evaluate the elimination of one of its members. There is no theory or evidence that tells us that if the number of equally potential competitors in a market falls from ten to nine or four to three or two to one the pricing decisions of the firms in the market will be affected.

R. Posner, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 122-123 (1976). See also Hovenkamp, *FEDERAL ANTITRUST POLICY*, *supra*, at 563 (courts have no means to “determine whether it was ‘certain,’ merely ‘probable,’ or ‘uncertain’ whether a firm would have entered a new market by another route had it not entered by merger”).

That skepticism is well founded because the “actual potential competition” theory rests on untenable economic foundations. Plaintiffs allege that Ameritech will charge higher prices for local telephone service as a subsidiary of SBC than it did when it was independent. Cmplt. ¶ 54. But “neither the government nor any other proponent of the potential-competition doctrine has been able to come up with either a theoretical or an empirical basis for believing that the elimination of a specific potential competitor has ever affected the price level of a market.” Posner, *ANTITRUST LAW*, *supra*, at 124; see also R. Posner, *ECONOMIC ANALYSIS OF LAW* 329 (5th ed. 1998). There is even less reason to give credence to a pricing impact in this case given the close supervision of Ameritech’s prices by State regulators.<sup>10/</sup> In such a regulated industry, and in view of the FCC’s willingness to subject mergers such as this one to “actual potential competition” scrutiny far more rigorous than could ever be

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<sup>10/</sup> Regulators keep prices for residential customers artificially low, a reflection of the political forces affecting utility regulation in all states. See P. Huber, M. Kellogg & J. Thorne, *FEDERAL TELECOMMUNICATIONS LAW* § 2.1.1, at 81 & n.4 (2d ed. 1999).

achieved in a judicial proceeding, this Court should accept the recommendation of a prominent commentator that the “actual potential competition doctrine” be relegated to the “scrap heap of defunct merger theories.” Hovenkamp, *FEDERAL ANTITRUST POLICY*, *supra*, at 563.

**B. The Complaint Does Not Allege The Essential Elements Of An Actual Potential Competition Claim.**

Even if “actual potential competition” were a viable theory in this regulatory context, the Complaint nevertheless fails to state a Section 7 claim. Because this case involves a market extension merger, which does not cut off any existing competition between SBC and Ameritech, plaintiffs’ burden is “more stringent” than if they were challenging a horizontal merger between competitors. *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 274 n.21 (7th Cir. 1981). But under any standard, plaintiffs’ Complaint fails because it does not allege the elements of an actual potential competition claim.

An antitrust complaint must allege “all of the material elements necessary for recovery under the relevant legal theory.” *Carl Sandburg Village Condo. Ass’n v. First Condo. Dev. Co.*, 758 F.2d 203, 207 (7th Cir. 1985). Two “essential preconditions” to application of the actual potential competition theory are “a substantial likelihood” that, absent the challenged merger, the acquiring company would have entered the market in the near future and that its entry is needed to “produc[e] deconcentration of that market.” *Marine Bancorp.*, 418 U.S. at 633; see also *Tenneco, Inc. v. FTC*, 689 F.2d 346, 352 (2d Cir. 1982). In *Marine Bancorp.*, the government failed to satisfy these preconditions, enabling the Court to avoid

ruling on the theory’s validity. 418 U.S. at 639. Subsequently, “[t]he difficulty of meeting these criteria has resulted in almost uniform rejection of potential competition theories in market extension cases.” *Lektro-Vend Corp. v. Vendo Corp.*, 500 F. Supp. 332, 362 (N.D. Ill. 1980) (citing cases), *aff’d*, 660 F.2d 255 (7th Cir. 1981); see also W. Alper, *Potential Competition: An Idea Whose Time Has Passed*, 50 Brook. L. Rev. 407, 408 (1984) (noting the virtually “universal rejection of potential competition claims”). In this case, the Complaint must be dismissed for failure to allege imminent entry by SBC or reasonable likelihood that SBC’s entry is necessary to deconcentrate the market.

**1. The Complaint Does Not Allege Near-Term Entry By SBC.**

“[L]oss of competition ‘which is sufficiently probable and imminent’ is the concern of § 7.” *Marine Bancorp.*, 418 U.S. at 623 n.22 (citation omitted). The Complaint does not allege *any* time frame for SBC’s future entry into the Chicago local telephone market. Instead, it alleges merely that “SBC *had plans* to expand into Chicago where Ameritech is dominant” and that SBC “*had planned*” to offer wireline phone service to the wireless customers of SBC’s subsidiary. Cmplt. ¶¶ 59, 64 (emphasis added). These allegations are insufficient.

Section 7 “deals in probabilities, not ephemeral possibilities.” *Marine Bancorp.*, 418 U.S. at 622-23; accord *Lektro-Vend*, 660 F.2d at 274. Thus, the “decisive question” in adjudicating an actual potential competition claim is “whether the defendant would probably have entered” absent the merger. Areeda & Hovenkamp, *supra*, ¶ 1121a, at 316 (2000 Supp.). For that reason, allegations about a potential entrant’s “plans” for entry must relate

“to the near future” and not merely speculate about “eventual entry.” *BOC Int’l Ltd. v. FTC*, 557 F.2d 24, 29 (2d Cir. 1977). In *BOC*, the court rejected the FTC’s “eventual entry test” because it provided no indication of “how long a period of time might elapse” before entry. Such entry was “wholly speculative,” and “uncabined speculation cannot be the basis of a finding that Section 7 has been violated.” *Ibid.* Similarly, in *Tenneco*, 689 F.2d at 352, the court rejected an actual potential competition claim based on failure to show that the acquiring company would have entered the relevant market “in the near future.” And in *ARCO*, 549 F.2d at 297, the court held that the acquiring company’s “watchful waiting” for a future opportunity to enter the relevant market was insufficient to support an actual potential competition claim. This requirement of “near future” entry reflects the fact that a prediction becomes more uncertain the further it is projected into the future. See *BOC*, 557 F.2d at 29.

Plaintiffs’ vague and conclusory allegations about SBC’s “plans” (¶¶ 59, 64) are no improvement over the “eventual entry” and “watchful waiting” that the courts have found legally insufficient. Plaintiffs’ failure to be more specific is not surprising, because the FCC, after months of investigation and careful review of internal corporate data, expressly concluded that SBC “had *no existing plans* to enter out-of-region territories at the time of the merger,” but rather contemplated entry at an unknown future time “when the competitive landscape became clear.” FCC Order ¶ 83 (emphasis added). Similarly, the ICC concluded that there was no “reasonable probability” that “SBC ‘would’ have entered the small business or residential markets in the next two years.” ICC Order at 104. The *mere possibility* that

SBC might enter the Chicago local telephone market – at some unspecified time in the future when it might deem the competitive landscape favorable – is a far cry from the short and specific time frame that federal courts require.<sup>11/</sup>

**2. The Complaint Does Not Allege That Entry By SBC Is Needed To Deconcentrate The Market.**

A second required element of an actual potential competition claim is that the acquirer’s independent entry is necessary to deconcentrate the relevant market. The claimant must allege that there are “few other equivalent potential entrants, because otherwise elimination of the acquiring firm would not affect competition.” 1 ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 343 (4th ed. 1997) (citing cases); see also *Mercantile Tex. Corp.*, 638 F.2d at 1267 (elimination of one potential entrant would not be “significant” if others are “waiting in the wings”); R. Bork, THE ANTITRUST PARADOX 260 (1993) (potential competition doctrine is inapplicable where there are other “equally probable entrants”). Those allegations also must address the presence of entry barriers, without which entry by potential competitors is likely regardless of the challenged merger. Plaintiffs’ Complaint does not allege that SBC’s independent entry was required to deconcentrate the Chicago local telephone service market.

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<sup>11/</sup> Plaintiffs contend (Br. 6) that SBC had “sought and received authorization to conduct local service in Illinois.” They rely solely on an unsupported assertion (in a proposed order rejected by the ICC) that a cellular affiliate of SBC had obtained such authorization. See App. B4. True or not, that assertion is immaterial. Illinois does not require that a carrier plan to provide service in order to obtain a certificate of authorization. See 220 ILCS 5/13-405. Many certificates of authorization are never used at all. Thus, obtaining such authorization says nothing about when, if ever, a carrier intends actually to provide local telephone service.

Particularly in light of the agency findings, plaintiffs were obligated to allege the necessity of SBC’s independent entry. The ICC concluded that “more than a few potential entrants are equivalent to SBC,” including AT&T, MCI-WorldCom, Sprint, BellSouth, Bell Atlantic (now Verizon), and US West. ICC Order at 103. These firms have a head start on SBC in Illinois and are therefore better poised to compete. As the ICC explained, the “presence and visibility of these firms make them most likely to rapidly capture market share from Ameritech Illinois in the near future” (*id.* at 102), as opposed to SBC which “has no name recognition or visibility in our markets” (*id.* at 107). Similarly, the FCC found that “AT&T, MCI [and] Sprint are among the most significant participants in the mass market for local exchange and exchange access services,” each already having “the capabilities, incentives, and stated intentions to serve the mass market for local exchange services.” FCC Order ¶ 87. The DOJ did not challenge the SBC-Ameritech merger because, *inter alia*, “no company was found to be uniquely situated to enter its merger partner’s market.” I. Gotts, *Antitrust Review of Telecommunications Industry Mergers*, 14 *Antitrust* 58, 62 (Summer 2000).<sup>12/</sup>

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<sup>12/</sup> Plaintiffs argue (Br. 41) that the contiguity of defendants’ service territories made SBC a significant potential entrant. But that gave SBC no advantage as a potential competitor. BellSouth provides service in Kentucky and US West provides service in Iowa – both contiguous to Illinois. Thus, insofar as contiguity is a concern, the SBC-Ameritech merger did not eliminate the presence of substantial competitors in contiguous states. Of course, other rivals like AT&T, MCI, and Sprint are already present in Illinois and not merely “contiguous.”

Moreover, SBC's independent entry was not required to deconcentrate the market. The steady influx of telecommunications carriers competing with Ameritech for local telephone service is a matter of public record. At the time of the ICC Order, which was issued two years ago, "more than twenty local exchange carriers" provided local exchange service in Ameritech Illinois' service territory. ICC Order 97; see *ARCO*, 549 F.2d at 300 (entry by seven firms over the past decade made it "unlikely" that loss of defendant's entry "would have a significant anticompetitive effect"). As the FCC Order (§ 25) noted, although competition in local telephone markets was slow to develop initially, "momentum is building," and that momentum has accelerated over the subsequent two years.

Plaintiffs rely on an outdated report from the FCC on the status of local telephone service competition. Pl. Br. 9; App. B8. The most recent such report demonstrates that local telephone competition is developing steadily. See FCC, *Local Telephone Competition: Status as of December 31, 2000* (May 2001), available at [www.fcc.gov/ccb/stats](http://www.fcc.gov/ccb/stats). According to the FCC's figures, the number of local telephone lines provided by CLECs nationwide grew 97% in the year 2000 (*id.*, Table 1); the number of local telephone lines provided by CLECs nationwide and serving residential and business customers grew 98% in the year 2000 (*id.*, Table 2); and in Illinois CLECs provided 10 percent of all local telephone lines at the end of the year 2000 (*id.*, Table 6) – double the number cited by plaintiffs from the FCC figures of a year earlier. Thus, plaintiffs' assertions

(Br. 5 & n.8) that the merged company “controls all local phone service in the areas that it services” and that CLECs “control less than 1% of local telephone lines” are plainly wrong.<sup>13/</sup>

Moreover, the Complaint contains no concrete allegations addressing entry barriers. The presence and magnitude of barriers to entry are critical to a claim that a particular company’s entry would deconcentrate the relevant market. If entry barriers are high, it is unlikely that a potential entrant would prefer entry on its own to entry by merger. *Marine Bancorp.*, 418 U.S. at 630. On the other hand, “if there are few barriers to entry, the elimination of one potential entrant will not have any effect on prices in the market, since there would still be entrants if prices were increased.” Comment, *Toehold Acquisitions and the Potential Competition Doctrine*, 40 U. Chi. L. Rev. 156, 159 (1972). See also 5 P. Areeda & D. Turner, *ANTITRUST LAW* ¶ 1119f, at 85 (1980); F. Easterbrook, *Information and Antitrust*, 2000 U. Chi. Legal F. 1, 5 (“with easy entry, big mergers don’t cause problems

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<sup>13/</sup> Ameritech’s rivals are advertising and soliciting business aggressively. As a recent news article recognized, “competition for residential phone service” has “arrived in the Chicago region.” The article identified AT&T Broadband, MCI WorldCom, McLeod USA, One Point Communications, RCN, TDS Telecom, and Z-Tel Technologies as among the companies currently “competing with Ameritech to provide local phone service to Chicago-area residents,” and it noted that MCI is “aggressively” marketing local residential service in Illinois. The article attributed recent advances in competition to the 1996 Act and to the “requirements imposed by Illinois regulators as part of approving the [SBC-Ameritech merger],” which together enable Ameritech’s rivals to “target customers throughout the region using Ameritech’s lines, switches and other network pieces, while paying Ameritech only about half its retail price to use these network elements.” *Rivals revving up home phone fight*, Chi. Trib., Aug. 21, 2001, sec. 3, at 1.

even if demand is inelastic”). Simply alleging that entry barriers are “tremendous” (Cmplt. ¶ 47) does not come to grips with the deconcentration requirement.

Plaintiffs’ conclusory entry barrier allegation is particularly untenable in light of the requirements of the 1996 Act, which imposes on incumbent carriers “a host of special duties” to help competitors that “do not exist under the unadorned antitrust laws.” *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 399-400 (7th Cir. 2000); see also *Association of Communications Enters.*, 235 F.3d at 664 (“ILECs are subject to stringent market-opening duties”). Those duties include the provisioning of interconnection and unbundled network elements at cost and the provisioning of wholesale services at substantial discounts. See 47 U.S.C. §§ 251, 252. Compliance with those requirements is monitored and enforced by the FCC and the state PSCs. Thus, Congress has removed all regulatory entry barriers to local telephone service markets and provided new entrants with a strong helping hand – an unprecedented kind of competitive affirmative action. Plaintiffs’ Complaint does not allege how the SBC-Ameritech merger threatens competition in light of these statutory safeguards. See *South Austin*, 191 F.3d at 845 (“regulatory barriers” must be assessed when evaluating § 7 claim).

Nor do plaintiffs come to grips with the impact of the merger conditions on entry. This Court correctly anticipated that the FCC would “condition its approval on changes that facilitate rivals’ entry.” *South Austin*, 191 F.3d at 845. The FCC’s conditions (see *supra* pp. 4-5) include detailed technical, structural, and pricing requirements that, according to the FCC, “lower the entry barriers in the SBC and Ameritech regions, especially for residential

competition.” FCC Order ¶ 422. The Complaint’s failure to address any of these entry-facilitating conditions is telling in light of the obvious fact that “the loss of potential competition may be more than offset by the contribution of a merger to actual competition.” 5 P. Areeda & D. Turner, ANTITRUST LAW ¶ 1116, at 69. As a matter of sound antitrust policy, courts should not sacrifice these procompetitive benefits based on a grossly speculative theory of harm.

Finally, plaintiffs ignore the impact of rapidly proliferating technology on independent entry. As commentators explain:

[V]oice telephony today can be achieved through a variety of technologies, including fiber optics telephony networks, cellular phone service, and wireless service networks using other frequencies and technologies (*e.g.*, PCS and multichannel multipoint distribution systems (MMDS)). \* \* \* As a result of these technological advances, multiple alternative infrastructures can be used to provide data and voice telephony[,] thereby creating new competition for these traditional services.

Gotts, *supra* p.32, at 58-59; see also Easterbrook, *Information and Antitrust*, *supra* p. 36, at 4-5 (in Chicago “three sets of satellites whirl overhead, each capable of transmitting calls from handheld units to anywhere in the world, bypassing the local service providers”; customers may also “bypass the Baby Bells” via packet-switching networks and “fiber optic connections,” “broadband home-to-satellite links,” and “local multipoint distribution service”). In these circumstances, any suggestion that vigorous local telephone competition in Chicago requires independent entry by SBC would be indefensible.

**III. SECTION 7 EXPRESSLY EXEMPTS A MERGER THAT EXTENDS THE SERVICE AREA OF A COMMON CARRIER WHERE THE PARTIES TO THE ACQUISITION DID NOT SUBSTANTIALLY COMPETE.**

Congress has prohibited use of Section 7 to challenge a merger that extends the lines of a common carrier where “there is no substantial competition” between the firms at the time of the merger. Specifically, Section 7 provides:

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from \* \* \* extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

15 U.S.C. § 18.

That express exemption applies here. Plaintiffs challenge a merger of common carriers. See Cmplt. p. 2 (challenge is to merger of “two telephone service companies”); FCC Order ¶ 53 & n.135 (“Both SBC and Ameritech are common carriers”). The Complaint does not allege that there was *any* (let alone “substantial”) competition between SBC and Ameritech in the provision of local telephone service at the time of the merger. To the contrary, the Complaint (¶ 36) says that Ameritech and SBC had “monopolies” in their respective local markets. In fact, it is beyond dispute that at the time of the merger neither firm provided local telephone service in the other’s region. See *supra* p. 23; ICC Order at 98 (“SBC and Ameritech do not currently compete in the relevant market”); FCC Order ¶ 65 (same).

In the only judicial decision applying the Section 7 common carrier exemption, this Court rejected a narrow construction and found the transaction at issue exempt from antitrust challenge. In *Navajo Terminals, Inc. v. United States*, 620 F.2d 594 (7th Cir. 1979), this Court set aside a ruling of the Interstate Commerce Commission that a trucking firm’s acquisition of a 26 percent stock interest in another common carrier violated Section 7. The Commission argued that because the two firms each operated over four common routes – between Denver/Las Vegas, San Francisco/Las Vegas, Los Angeles/Denver, and San Francisco/Denver – there was substantial competition between them and the common carrier exemption did not apply. *Id.* at 596-597. This Court rejected that argument, holding that the substantiality of competition between common carriers for purposes of the Section 7 exemption depends on its “proportion to their total operations.” *Id.* at 601.

This Court reasoned that, despite the overlap between some of their routes, the carriers each served a large territory not served by the other, and a combination of the two could be deemed an extension of the acquiring company’s lines. In addition, by enacting the common carrier exemption, Congress “must have contemplated a public benefit from line extensions, through gains in efficiency or the like, sufficient to outweigh the destruction of minor instances of competition between the carriers.” Furthermore, the Court explained, the “no substantial competition” language in the common carrier provision must mean something greater in the way of competition than the “substantially to lessen competition” language in the principal paragraph of Section 7; otherwise, the common carrier exemption would be unnecessary and meaningless. 620 F.2d at 601.

This Court concluded that, to give effect to the common carrier exemption, Section 7 must be construed as follows: “a first carrier serving geographic markets so much distinct from those served by a second carrier that it can be said there is no substantial competition between them can acquire the second carrier even though the resulting common control can substantially lessen competition in some specific markets where both are doing business.” 620 F.2d at 601. Since the Commission had not applied the common carrier exemption properly, this Court set aside the Commission’s order.

Application of the Section 7 common carrier exemption in this case follows *a fortiori* from *Navajo Terminals*. In that case, the carriers competed over four significant routes prior to the challenged acquisition. In this case, SBC and Ameritech did not compete at all in the provision of local telephone service at the time of the merger. The fact that Congress worded the exemption in the present tense – where there “*is* no substantial competition” – demonstrates that only *actual*, as opposed to *potential*, competition may be considered in applying Section 7 to a line-extension merger of common carriers. But even if that language were stretched to encompass the alleged potential competition between SBC and Ameritech in Chicago, such competition would be far from “substantial” in “proportion to their total operations” and thus insufficient to nullify the statutory exemption. 15 U.S.C. § 18; 620 F.2d at 601. As in *Navajo Terminals*, SBC and Ameritech clearly served “geographic markets so much distinct [that] it can be said there is no substantial competition between them.” See

*supra*, p. 23. Accordingly, based on the language of the statute and *Navajo Terminals*, plaintiffs' Section 7 claim is barred.<sup>14/</sup>

Plaintiffs offer only one reason why the common carrier exemption in Section 7 does not bar their claim, contending that it is "inappropriate" to extend *Navajo Terminals* "from the railway industry to telecommunications." Pl. Br. 40 n.24. They do not explain why it would be inappropriate (and in any event *Navajo Terminals* concerned the trucking not the railway industry). Moreover, plaintiffs' argument is defeated not only by the plain language of the statute but by its legislative history.

The legislative history of the common carrier exemption confirms that it applies to local telephone companies. The original House bill limited this exemption to railroads, but the Conference Committee accepted the Senate's substitution of "common carrier" for "railroad." The Senate Report stated that the provision as amended would "apply to any common carrier, thus including *telephone* and pipe lines, the committee believing that all common carriers should be given the same rights in this respect and that the extension of the rights to *telephone* and pipe lines would inure to the benefit of the public." See S. Rep. No. 63-698, at 47 (1914); H.R. Conf. Rep. No. 63-1168, at 13 (1914), in E. Kintner, *supra* note 14, at 1748, 2466 (emphasis added).

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<sup>14/</sup> The legislative history confirms that competition between the firms must be "substantial" to preclude application of the exemption. The Senate initially struck the word "substantial" from the original House version and then restored it. See H.R. Conf. Rep. No. 63-1168, at 14 (1914), in E. Kintner, LEG. HIST. FED. ANTITRUST LAWS AND RELATED STATUTES, Part 1, at 2466 (1978).

In sum, Congress expressly barred a Section 7 challenge to the very type of merger at issue in this lawsuit. That alone is ground for dismissal.

#### **IV. PLAINTIFFS MAY NOT RELITIGATE THE FINDINGS OF THE FCC IN THE DISTRICT COURT.**

In affirming dismissal of plaintiffs' initial law suit, this Court explained that it would be "impossible" to engage in meaningful antitrust analysis "[u]ntil the agencies have had their say." *South Austin*, 191 F.3d at 845. The agencies not only have had their say but also have imposed a host of conditions designed to ensure that the merger will result in lower entry barriers and enhanced competition. See *supra* pp. 3-8. The Complaint does not indicate how the merger threatens competition in light of these pro-competitive conditions. Plaintiffs proceed as if the decisions of the expert agencies mean nothing.<sup>15/</sup>

Plaintiffs' failure to address the merger conditions is particularly glaring in light of the expert regulators' searching inquiry into every aspect of the merging companies' businesses, the impact of the merger on relevant markets, and the conditions needed to ensure healthy competition. This is not a case where discovery is necessary to obtain the facts; every detail concerning the merger has been disclosed in the regulatory proceedings, in which these very plaintiffs participated. See *2 Areeda et al., supra*, ¶ 307c, at 68 (discovery

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<sup>15/</sup> The Complaint's only criticism of the conditions (¶ 65) is that they are of "limited duration." But plaintiffs offer no challenge to the FCC's conclusion that, given "the fast-changing world of telecommunications industries," the 36-month term of the conditions "will last for a sufficient period to have real impact, but not so long as to threaten imposing obsolete responses to future issues." FCC Order ¶ 438. In addition, the 1996 Act and the FCC's voluminous regulations impose a host of pro-competitive requirements of unlimited duration.

is unnecessary and dismissal appropriate when the critical facts are “available to the party opposing the motion”). As the FCC concluded, “[t]he voluminous record before us in this proceeding, including the numerous comments and ex parte filings we have received, and the public forums we have conducted, has provided sufficient evidence to conclude no substantial and material question of fact has been raised.” FCC Order ¶ 581.

An agency’s resolution of issues within its jurisdiction enables the antitrust court “to determine whether the antitrust action should go forward.” *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 306 (1973). In *Ricci*, the Supreme Court squarely held that regulatory proceedings subject to judicial review, like those in the case at bar, “obviate any necessity for the antitrust court to relitigate the issues actually disposed of by the agency decision.” *Ibid.*

As both the majority and dissent in *Ricci* agreed, “when a court stays its hand to allow agency proceedings, the result of those proceedings may not be collaterally attacked when the case returns to the court.” 409 U.S. at 312 (Marshall, J., dissenting). Justice Marshall relied for that proposition on *Port of Boston Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970). In *Port of Boston*, the Court held that a private party could not collaterally attack an agency decision in federal district court. As the Court noted, the plaintiff “chose” not to seek review of the agency decision by the court of appeals (which had exclusive jurisdiction to review the agency’s decisions). Accordingly, the Court unanimously concluded, it would be “inappropriate” to allow the plaintiff to “force collateral redetermination of the same issue” by the district court. *Id.* at 72. See also *Korach v.*

*Chicago Mercantile Exch.*, 747 F.2d 414, 416 (7th Cir. 1984) (challenge to agency decision “should properly have been pursued by means of direct judicial review”).

This is an even stronger case than *Ricci* for rejecting an attempt to relitigate issues actually resolved by the agency. In *Ricci*, the plaintiff lacked any right to participate in the agency proceeding at issue. See 409 U.S. at 312. Here plaintiffs actively participated in the FCC merger proceeding, filing a lengthy brief with numerous attachments. Supp. App. Tab 1. That brief, filed by the same counsel representing plaintiffs in this case, contained allegations virtually identical to those in the Complaint here. Among other things, plaintiffs told the FCC that the merger would violate the Clayton Act by causing a loss of actual and potential competition (*id.* at 7) and that entry barriers are “tremendous” (*id.* at 12); they even included the same market share statistics and HHI chart presented in this appeal (*id.* at 11-13). The FCC took plaintiffs’ comments into account, specifically citing them in its Order. See FCC Order nn.149 & 1115. Moreover, the FCC proceeding was extraordinarily detailed. Interested government officials and consumer groups participated to protect the public, and the FCC applied standards more stringent than those of the Clayton Act. See *supra* p. 4. Plaintiffs had a full opportunity to examine the investigative record compiled by the FCC, which consisted of many thousands of documents. FCC Order ¶ 40. Plaintiffs could have appealed the FCC’s decision pursuant to 47 U.S.C. § 402(b) but chose not to. Instead, they demand that the district court relitigate the very issues fully addressed and actually disposed of by the FCC.

Unlike many primary jurisdiction cases where the plaintiffs seek a treble damages remedy not obtainable from the agency, here the FCC had authority to award the very remedy sought by plaintiffs in this lawsuit. In fact, plaintiffs requested the same remedy in both proceedings. They asked the FCC to “reject the application of merger” (Supp. App. Tab 1, at 18) and asked the district court to issue “an injunction unwinding the merger” (Cmplt. p. 20). The fact that plaintiffs could have obtained the same relief from the FCC – or from the court of appeals on judicial review of the FCC’s decision – highlights the impropriety of their demand for an end run in the district court. See *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 313 & n.19 (1963) (antitrust suit “should have been dismissed” where the “remedy in this civil antitrust suit” was “available” from the agency). In these circumstances, relitigating the same issues that were presented to the agency would simply waste the time and resources of the parties, agency, and court.

This Court has held that, where an antitrust plaintiff previously participated in regulatory proceedings, the agency approved the conduct challenged by the plaintiff, the plaintiff failed to appeal the agency decision, and the same remedy was available from the agency as from the antitrust court, permitting the antitrust suit to proceed in the district court “would be repugnant to the operation of the regulatory scheme.” *In re Wheat Rail Freight Rate Antitrust Litig.*, 759 F.2d 1305, 1314 (7th Cir. 1985); see also *Gordon v. New York Stock Exch.*, 422 U.S. 659, 682 (1975). Such repugnance is particularly evident in this case because of the unusual character of the FCC Order. This case does not present the typical “antitrust immunity” situation where the “public interest” adjudged by the agency requires

that competition be limited. Here, the opposite is true – the FCC’s “public interest” test required that the merger affirmatively *promote* competition. See *supra* p. 4.

As the Supreme Court has noted, “[i]t would be strange indeed” if transactions “which met the requirements of the ‘public interest’ \* \* \* were held to be antitrust violations.” *Pan Am. World Airways*, 371 U.S. at 309. It would be stranger still to find the Ameritech/SBC merger unlawful in the face of the FCC’s actions to shape it so as to positively promote competition. See *Gordon*, 422 U.S. at 685 (applicability of repugnance doctrine is strengthened where the agency had the authority both to approve challenged practices and to require their “alteration or supplementation” to protect the public); *Hughes Tool Co. v. TWA*, 409 U.S. 363, 387 (1973).

In these circumstances, a judicial inquiry into plaintiffs’ allegations “would add nothing to the oversight already available under the [Communications Act]” and “could easily conflict with the obligations the state commissions or the FCC imposes.” *Goldwasser*, 222 F.3d at 400-401. Plaintiffs’ allegations squarely conflict with the FCC’s expert judgments that the merger as approved will promote competition and facilitate competitive entry. Thus, “[i]f the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide.” *Pan Am. World Airways*, 371 U.S. at 310. The FCC’s comprehensive merger review adequately protects consumers and requires dismissal of this divestiture litigation, which threatens serious harm to consumer welfare.

Plaintiffs’ justification for their collateral attack relies on cases that are not on point. In *United States v. RCA*, 358 U.S. 334 (1959) (Pl. Br. 31), the government alleged that RCA

and NBC “forced” a third party to exchange its Philadelphia station for NBC’s Cleveland station to further their conspiracy to acquire high frequency television stations in a majority of the nation’s largest markets. *Id.* at 335-336. In denying that the FCC’s approval of the exchange precluded antitrust enforcement, the Court specifically limited its analysis to the radio and television industry and stated that it did not apply to “common carriers,” including “telephone and telegraph companies.” *Id.* at 348-349. As the Court explained, radio and television broadcasting was not then subject to a “pervasive regulatory scheme” and involved “no rate structures to throw out of balance.” *Id.* at 350. The FCC did not even hold hearings (*id.* at 337), much less develop detailed merger conditions as it did here. For these reasons, in *RCA* there was no inherent conflict between the FCC’s approval of the station exchange and the government’s antitrust conspiracy suit. That situation contrasts sharply with the situation in today’s telecommunications industry, where mergers are subject to extensive agency review (under standards more stringent than those imposed by the Clayton Act) and where regulators pervasively monitor the rate structures and operations of companies like SBC and Ameritech.

Moreover, it was the federal government that brought the antitrust suit in *RCA*. Here, private plaintiffs seek an order of divestiture that would overthrow the regulatory policy of the federal agency charged with oversight of the telecommunications industry. And they seek that drastic remedy through the very kind of “collateral attack” forbidden by the Supreme Court’s subsequent decision in *Ricci*. As the Court held in *Port of Boston*, “an Article III court, acting on a single, isolated case-and-controversy record in a private suit in

which neither the Commission nor the Government was a party, would lack the requisite capacity” to overturn agency policy. 400 U.S. at 69. Although private parties are not excluded from seeking divestiture in appropriate circumstances, see *California v. American Stores Co.*, 495 U.S. 271 (1990), “[p]otentially disruptive remedies such as divestiture of completed transactions involving integration of ongoing business activities have never been granted in private suits under Section 7.” *Glendora v. Gannett Co.*, 858 F. Supp. 369, 372 (S.D.N.Y.), aff’d, 40 F.3d 1238 (2d Cir. 1994). In this case, an order of divestiture would deprive the general public of the benefits of the merger conditions imposed by the FCC, Ohio, and Illinois. For all these reasons, plaintiffs’ claim for divestiture is not a tenable one, and reinstating it would unjustifiably waste public and private resources.

Plaintiffs’ reliance on *MCI v. AT&T*, 708 F.2d 1081 (7th Cir. 1983) (Pl. Br. 27), is also unavailing. In *MCI*, this Court held that an antitrust challenge to AT&T’s conduct could go forward because “the FCC did not control or approve of AT&T’s actions.” 708 F.2d at 1103; see also *Wheat Rail*, 759 F.2d at 1313 (distinguishing *AT&T* on the ground that the FCC had “neither dictated nor approved of” AT&T’s conduct). In this case, by contrast, the FCC both approved the merger and specified its terms and conditions to achieve important public policy objectives. See *American Agric. Movement, Inc. v. Board of Trade*, 977 F.2d 1147, 1167 (7th Cir. 1992) (antitrust law does not apply where “the relevant agency’s scrutiny and approval of the challenged practice [was] active, intrusive and appropriately deliberative” and where “judicial review” of the agency’s decision was available).

Plaintiffs also rely (Br. 24) on Congress’s rescission of the FCC’s authority to immunize a telephone company transaction from antitrust liability. 1996 Act § 601(b)(2), 110 Stat. 56, 143. But termination of the *agency’s* blanket immunity power did not affect the established authority of *federal courts* to determine whether a specific transaction is protected from antitrust challenge based on a plain repugnance between administrative determinations and a particular antitrust claim. Nor did it purport to overturn the established principle, set forth in *Ricci, Port of Boston*, and *Korach*, forbidding collateral challenges in the district court by parties that neglect to take an appeal from administrative rulings. Moreover, as the Conference Report on the 1996 Act explains, Congress repealed Section 221(a) to ensure that the DOJ would engage in “review of mergers in a competitive industry,” specifically mergers between cable companies providing local telephone service and Bell operating companies, so that such mergers between companies competing in the same market would receive “a thorough antitrust review under the normal Hart-Scott-Rodino process.” H.R. Conf. Rep. 104-458, at 201 (1996). Thus, the repeal of Section 221(a) was not directed to mergers between *non-competing carriers* like SBC and Ameritech, which are governed by the Clayton Act exemption for common carrier acquisitions (discussed in Part III, *supra*).

Finally, plaintiffs (Br. 24) rely on the fact that the 1996 Act does not “modify, impair, or supersede the applicability of any of the antitrust laws.” It is well settled, however, that such a general savings clause must not be construed to undermine the regulatory scheme or supersede established antitrust doctrines. On that basis, the Supreme Court in *Pan Am.*

*World Airways* found that regulatory oversight precluded an antitrust claim notwithstanding the existence of a broadly worded savings clause. 371 U.S. at 310; *id.* at 321 (Brennan, J., dissenting); see also *Geier v. American Honda Motor Co.*, 529 U.S. 861, 870 (2000) (refusing to “give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law”); *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 228 (1998); *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998) (rejecting “interpretations of savings clauses in common carrier statutes [that would] gut the federal regulatory scheme or would place the carrier under inconsistent obligations”). More fundamentally, general antitrust savings clauses, which declare that Congress did not wish to “modify” existing legal doctrine, save *all* antitrust defenses, including the repugnance doctrine and the rule announced in *Ricci* limiting collateral challenges in the district court to administrative determinations. See *Yeager’s Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1266 (3d Cir. 1994).

\* \* \* \* \*

Despite the many inadequacies of the Complaint, including those noted by the district court (App. A3, at 25-26), plaintiffs elected not to seek amendment but to stand on the Complaint and file an appeal. Accordingly, they have forfeited any opportunity to amend if the judgment of the district court is affirmed. See *Estate of Johnson by Castle v. Village of Libertyville*, 819 F.2d 174, 178 (7th Cir. 1987) (“Having chosen to stand by their complaint and appeal, the Castles cannot now for the first time raise the prospect of an

amended complaint”); *National Van Lines, Inc. v. United States*, 326 F.2d 362, 366 (7th Cir. 1964).

### **CONCLUSION**

The judgment of the district court should be affirmed.

Respectfully submitted.

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**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that the brief of Defendants-Appellees contains 13,581 words and complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B).

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**CERTIFICATE OF SERVICE**

The undersigned, an attorney, hereby certifies that on October 17, 2001 he caused two copies of the foregoing Brief for Defendants-Appellees, one copy of the Supplemental Appendix, and one copy of a digital media disk containing a copy of the aforesaid brief, to be hand delivered to each of the following:

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