No. 01-10224-JJ

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

INTERMEDIA COMMUNICATIONS, INC.,
Plaintiff-Appellant,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

# BRIEF FOR THE UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION AS AMICI CURIAE IN SUPPORT OF APPELLANTS


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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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| INTERMEDIA COMMUNICATIONS, INC.<br><br>*Plaintiff/Appellant,*<br><br>v.<br><br>BELLSOUTH TELECOMMUNICATIONS, INC.<br><br>*Defendants/Appellants.* | ) | CASE NO. 01-10224-JJ<br><br>**CERTIFICATE OF INTERESTED PERSONS** |

The undersigned, counsel for the United States, hereby certifies that the following is a complete list of persons and entities who have an interest in the outcome of this case:

BELLSOUTH TELECOMMUNICATIONS, INC.: appellee

INTERMEDIA COMMUNICATIONS, INC.: appellant

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NANCY C. GARRISON: U.S. Department of Justice; counsel for amici

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## INTEREST OF THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

The United States has primary responsibility for enforcing the federal antitrust laws. Accordingly, it has a strong interest in ensuring that the Sherman Act and the Communications Act of 1934, as amended by the Telecommunications Act of 1996, are interpreted in a manner that does not improperly impede antitrust enforcement.

The Federal Communications Commission has primary responsibility for enforcing the Communications Act of 1934, as amended by the Telecommunications Act of 1996. The FCC has an interest in ensuring that the Communications Act and the antitrust laws are properly interpreted so that regulated telecommunications carriers also remain subject to antitrust liability, as Congress provided in the Telecommunications Act of 1996.

## STATEMENT OF THE ISSUES

The United States and the FCC will address the following issues:

1. Whether Congress in enacting the Telecommunications Act of 1996 [1] intended to effect an implied repeal of Section 2 of the Sherman Act, 15 U.S.C. 2, with respect to allegations that an incumbent provider of telecommunications services has monopolized or attempted to monopolize a market for local exchange

[1]Pub. L. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. 151 et seq).

services through anticompetitive conduct involving the terms of access to the network.

2. Whether an incumbent provider of telecommunications services may in some circumstances violate the Sherman Act by refusing to permit a rival to interconnect on reasonable terms.

## STATEMENT OF THE CASE

***The complaint.*** Appellant Intermedia seeks to provide local telephone service in regions currently served by appellee BellSouth. In order to provide service effectively, Intermedia must interconnect with BellSouth's telephone network. Intermedia's complaint in this case alleges, *inter alia*, that although it and BellSouth entered into an interconnection agreement in June 1996, BellSouth failed to perform on that agreement to the extent necessary to allow Intermedia to provide competitive service. This failure, Intermedia alleges (Compl. ¶¶ 131-37), violated BellSouth's duty to interconnect its network and facilities with those of Intermedia under Sections 251(a), 251(c), 251(g), and 252(d) of the Telecommunications Act of 1996 ("TCA" or "the Act"), 47 U.S.C. 251(a), 251(c), 251(g), 252(d), and constituted an unjust and unreasonable practice under Section 201(b) of the Communications Act, 47 U.S.C. 201(b).

Intermedia also alleges that BellSouth's conduct constituted monopolization

(Compl. ¶¶ 166-80) and attempted monopolization (Compl. ¶¶ 181-87), in violation of Section 2 of the Sherman Act, 15 U.S.C. 2.[2] In particular, it alleges that BellSouth "possesses monopoly power within the relevant market" (Compl. ¶ 167) and that BellSouth has maintained that monopoly power by "intentionally engaging in . . . anti-competitive conduct . . . including, but not limited to: (1) willfully refusing to commit adequate resources and manpower to assure that Intermedia could interconnect with BellSouth's network and facilities; (2) refusing to make required reciprocal compensation payments to Intermedia for . . . calls [to Internet service providers]; and (3) fraudulently inducing Intermedia to . . . drastically reduce BellSouth's reciprocal compensation obligations to Intermedia." Compl. ¶ 171. Additionally, Intermedia claims that "BellSouth's cooperation is indispensable to effective competition," that it is "technically and economically feasible for BellSouth to provide access," and that "BellSouth's refusal to deal with Intermedia by denying it meaningful access" to "essential facilities and information, contrary to contract, statute, and federal regulations, is an anti-competitive act calculated by BellSouth to harm competition in the relevant markets and retain its monopoly." Compl. ¶ 177.

[2]Intermedia's complaint further alleges breach of contract, fraud, and tortious interference with prospective economic advantage.

As a result of BellSouth's conduct, Intermedia alleges, it has been "effectively denied participation in the relevant market." Compl. ¶¶ 173, 179, 186. Moreover, "consumers in the relevant market have been harmed because they have been deprived of the benefits of meaningful competition for the provision of telecommunications services, which would produce lower prices and improve service for those consumers." Compl. ¶¶ 174, 180, 187.

BellSouth moved to dismiss the complaint. Memorandum of Law in Support of BellSouth's Motion to Dismiss (August 15, 2000). Citing the Seventh Circuit's recent decision in *Goldwasser* v. *Ameritech*, 222 F.3d 390 (7th Cir. 2000), BellSouth argued that the antitrust claims were "inextricably tied to BellSouth's [alleged non-performance of its] obligations under the Telecommunications Act," and that "alleged violations of the Act cannot support a federal antitrust claim." *Id.* at 2, 7-9. BellSouth further argued that the *Goldwasser* analysis bars even antitrust claims which are not "strictly speaking, based solely on the alleged failure to comply with the Telecommunications Act," *id*. at 8, and that Intermedia's Sherman Act claims are foreclosed by an implied antitrust immunity arising from the pervasive regulatory scheme established by the TCA. *Id*. at 10-11. In response, Intermedia represented that its antitrust claims were independent of the TCA's interconnection requirements. Intermedia's Opposition to BellSouth's Motion to

Dismiss at 8-9 (September 18, 2000).

***The district court's order.*** The district court granted the motion to dismiss as to the antitrust claims. Order at 10 (December 15, 2000). The court's opinion focuses primarily on BellSouth's argument that violations of the Act do not provide a basis for an antitrust claim under the holding in *Goldwasser*. *Id*. at 5-6. The district court acknowledged this Court's holding in *AT&T Wireless PCS, Inc.* v. *City of Atlanta*, 210 F.3d 1322 (11th Cir. 2000), *vacated on other grounds*, 223 F.3d 1324 (11th Cir. 2000), that the general savings clause of the TCA establishes Congress' intent to permit recovery for TCA violations under 42 U.S.C. 1983, but it found that decision reconcilable with *Goldwasser*. Noting that the Seventh Circuit reasoned that the Act imposes on incumbent local exchange companies certain affirmative duties to cooperate with competitors that the antitrust laws do not, Order at 5, the district court concluded that *Goldwasser* stands for the proposition that "a violation of the TCA cannot automatically be the basis for an antitrust claim, since there would be no antitrust claim in the absence of the TCA (because without the TCA, there is no obligation to help one's competitors)." *Id*. at 6.

On the other hand, the district court concluded, "other behavior that could be the basis for an antitrust claim, regardless of whether the TCA existed, is not immune from antitrust liability even though it also violates the TCA." *Id*. This

conclusion, it observed, is consistent with *AT&T Wireless*, "which notes that nothing in the TCA modifies or impairs antitrust liability." *Id.* "Thus, any behavior that can be the basis for an antitrust claim before the creation of the TCA still can be the basis for an antitrust claim after the creation of the TCA." *Id.*

Turning to the allegations in Intermedia's complaint, the court opined that "most of the allegations that serve as a basis for the antitrust claims involve violations of the TCA, but as discussed above, violations of the TCA do not automatically serve as a basis for an antitrust claim." *Id.* at 6-7. Despite Intermedia's contention that its Sherman Act claims were not based on the theory that violations of the TCA automatically constitute antitrust violations, the court provided no further explanation for its dismissal of the antitrust claims, except with respect to Intermedia's allegation that BellSouth had "refuse[d] to make required reciprocal compensation payments to Intermedia for . . . calls [to Internet service providers]."[3]

[3]Compl. ¶171. The district court characterized this allegation as focusing on BellSouth's decision to appeal state public utility commission decisions directing BellSouth to make the disputed payments. It concluded that the appeals were not baseless and were therefore immune from antitrust scrutiny under the Supreme Court's decisions in *California Motor Transportation Co.* v. *Trucking Unlimited,* 404 U.S. 508, 510 (1972), and *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993). Order at 7-8.

## SUMMARY OF ARGUMENT

In enacting the TCA, Congress sought to foster competition in local and long distance telecommunications. *AT&T Wireless*, 210 F.3d at 1324. The Act thus is designed to serve the same purpose as the federal antitrust laws, albeit by complementary and not identical means. Accordingly, there would be no reason to recognize an implied antitrust exemption for anticompetitive conduct in telecommunications markets even if Congress had not expressly addressed that question. In fact, however, Congress "took pains" to demonstrate its intent not to effect a repeal of the Sherman Act with respect to such conduct by including an express antitrust savings clause, in addition to a general savings clause. *Id*. at 1329. Nonetheless, dicta in the Seventh Circuit's *Goldwasser* decision have created some confusion about the relationship between the federal antitrust laws and the TCA. Those dicta have encouraged incumbent providers of local telecommunications services to argue, as BellSouth did below, that their conduct is not subject to Sherman Act scrutiny.

The United States and the FCC believe that it is essential that the developing case law reflect an appropriate reconciliation of the TCA and the Sherman Act, affording the public the benefits of all of the tools Congress has chosen to foster competition in this critical sector of the economy. The district court in this case

correctly stated the law: conduct that would have violated the Sherman Act before enactment of the TCA is still prohibited by the Sherman Act, whether or not it also violates the TCA. In so doing, the district court implicitly rejected BellSouth's argument that enactment of the TCA impliedly repealed Section 2 of the Sherman Act with respect to anticompetitive conduct involving competitors' access to local telecommunications networks. That implicit holding should be expressly affirmed by this Court.

The district court also appears to have rejected BellSouth's argument that antitrust remedies are incompatible with the procedures mandated by the TCA to promote competition in local telecommunications markets and that such incompatibility requires dismissal of the antitrust claims in this case. The speculative possibility that an antitrust injunction could interfere with the regulatory framework provides no basis for a general policy of dismissing on the pleadings antitrust cases seeking injunctive and damage relief, especially given the Act's explicit provision that the Sherman Act continues to apply.

It is not clear from the district court's order why it dismissed Intermedia's antitrust claims in their entirety, in light of Intermedia's representation that its claims do not rest on the proposition that a TCA violation automatically establishes a Sherman Act violation. The court's statement that "without the TCA, there is no

obligation to help one's competitors," Order at 6 (citing *Goldwasser*), suggests that the district court erroneously believed that an incumbent monopoly provider of local telecommunications services could never violate the Sherman Act by refusing to provide rivals access to its network on reasonable terms. To the contrary, under well established antitrust doctrine, a monopolist's refusal to deal with a rival without a legitimate business justification may, in certain circumstances, violate Section 2 of the Sherman Act. Although Intermedia's complaint could have been clearer, we believe that it suffices to state a claim.

## ARGUMENT

### I. CONGRESS HAS AFFIRMED THE AVAILABILITY OF ANTITRUST LAW TO ADDRESS EXCLUSIONARY CONDUCT BY AN INCUMBENT PROVIDER OF LOCAL TELECOMMUNICATIONS SERVICES

As the Seventh Circuit observed in *Goldwasser*, the TCA was intended to "bring the benefits of deregulation and competition to all aspects of the telecommunications market in the United States, including especially local markets." *Goldwasser*, 222 F.3d at 391. *See also AT&T Wireless*, 210 F.3d at 1324. The Act added a new Part II, entitled "Development of Competitive Markets," to Title II of the Communications Act of 1934. *See* 47 U.S.C. 251 et seq. Section 251 requires all telecommunications carriers to interconnect with other carriers, and specifically requires incumbent local exchange carriers to comply with a series of obligations

designed to facilitate entry by competing local exchange carriers. 47 U.S.C. 251. The Act also specifies procedures pursuant to which agreements relating to those obligations are to be formulated and approved, 47 U.S.C. 252, and makes provision for other aspects of local exchange service, including the removal of barriers to entry resulting from State or local regulation, 47 U.S.C. 253.

Despite the procompetitive congressional intent, and the absence of any express indication that Congress intended any repeal of the antitrust laws with respect to local exchange telecommunications, BellSouth argued below that the court should recognize a broad antitrust immunity for an incumbent local exchange carrier's allegedly exclusionary conduct because the TCA is "a pervasive regulatory scheme [that] would be disrupted by antitrust enforcement." Memorandum of Law in Support of BellSouth's Motion to Dismiss at 10. The district court properly did not adopt that position, holding instead that conduct that would have violated the Sherman Act prior to 1996 remains subject to challenge under the antitrust laws.

### A. THE PLAIN LANGUAGE OF THE TELECOMMUNICATIONS ACT MAKES CLEAR THAT THE ACT DOES NOT CONFER ANTITRUST IMMUNITY

BellSouth's implied immunity arguments run directly into two provisions of the Telecommunications Act expressly stating Congress' intent that the Act not give rise to any antitrust immunity. Section 601(c)(1), the general savings clause,

provides that "[t]his Act . . . shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided." Pub. L. No. 104-104, Title VI, § 601(c)(1), 110 Stat. 143. Section 601(b)(1) specifically provides that "nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." Pub. L. No. 104-104, Title VI, § 601(b)(1), 110 Stat. 143.

As this Court emphasized in *AT&T Wireless*, 210 F.3d at 1327-28, the plain language of a statute is normally controlling, and Congress is "at liberty to leave other remedial avenues open," even when it provides a comprehensive remedial scheme through a statute such as the TCA. Thus, in holding that the TCA posed no obstacle to recovery under 42 U.S.C. 1983, this Court read the general savings clause to "forbid[ ] [it] from construing the TCA to 'modify, impair, or supersede' other laws," and declined to "second guess the plain meaning of this language." *Id.* at 1328. In light of Congress' decision to include an additional savings clause directed specifically to the antitrust laws, there is even less reason to second guess Congress' decision here. *See Goldwasser*, 222 F.3d at 390 (disclaiming any holding that the TCA "confers implied immunity on behavior that would otherwise violate the antitrust law" because such a conclusion "would be troublesome at best given the antitrust savings clause in the statute"); Order Regarding Issues for Trial at 2

(October 25, 2000), *Caltech Int'l Telecom Corp.* v. *Pacific Bell* (N.D. Cal.) (No. C-97-2105-CAL) ("The Telecommunications Act does not 'impair' application of the antitrust laws to the telecommunications industry.") (Attached as Addendum A).

The legislative history confirms the plain meaning of the savings clauses -- that Congress did not wish to effect an implied repeal of the antitrust laws. *See* H.R. CONF. REP. NO. 104-458, at 201 (1996) (an "underlying theme[]" of the 1996 Act is that the Federal Communications Commission "should be carrying out the policies of the Communications Act, and the DOJ should be carrying out the policies of the antitrust laws"). Moreover, this understanding that Congress intended the antitrust laws to apply to anticompetitive conduct impeding the development of competition in local telecommunications is widely shared. The FCC has consistently and expressly taken the position that the antitrust laws play a role complementary to the procompetitive deregulatory framework of the Act. *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 61 Fed. Reg. 45476, 45494 (1996) ("nothing in . . . our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws").

Indeed, even BellSouth has acknowledged that the Act does not repeal the federal antitrust laws. In seeking authority from the FCC to begin providing long

distance service in Louisiana pursuant to the TCA (which requires a Bell operating company seeking to provide long distance services to show that its local exchanges have been opened to competition (*see* 47 U.S.C. 271)), BellSouth argued that the FCC should take into account the fact that "[a]ll of the Act's and the Commission's specific statutory and regulatory protections are backed up by federal and state antitrust laws. The weighty corporate and personal penalties (including imprisonment) that may be levied against violators of the antitrust laws . . . make it most unlikely that Bell company managers would order unlawful practices." Brief in Support of Second Application by BellSouth For Provision of In-Region, InterLATA Services in Louisiana at 100 (July 9, 1998) (attached as Addendum B).[4]

In light of the clear language of the antitrust savings clause, there is no need for the Court to go any farther before rejecting BellSouth's plea for antitrust

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[4]BellSouth argued below that "[t]he fact that the antitrust laws continue to apply does not mean that the Act reserves only antitrust liability but not antitrust defenses." BellSouth's Reply to Intermedia's Opposition to Motion to Dismiss at 7 (October 5, 2000). But, prior to the passage of the TCA, courts uniformly held that the Communications Act did not immunize regulated carriers from the antitrust laws for conduct involving a denial of access to the local network. *See MCI Communications* v. *AT&T*, 708 F.2d 1081, 1104-05 (7th Cir. 1983); *Phonetele* v. *AT&T*, 664 F.2d 716, 732-35 (9th Cir. 1981); *United States* v. *AT&T*, 461 F. Supp. 1314, 1326-27 (D.D.C. 1978). There was thus no pre-1996 implied immunity defense to "reserve." And the express savings clauses Congress chose to include in the Telecommunications Act cannot reasonably be interpreted to mean that courts should determine whether that Act impliedly repeals the antitrust laws without reference to the savings clauses.

immunity. But even if the Court is inclined to undertake the kind of analysis courts have employed where Congress has provided less clear guidance, that analysis leads inexorably to the same result.

### B. IMPLIED ANTITRUST IMMUNITIES ARE DISFAVORED, AND WHEN FOUND AT ALL ARE STRICTLY LIMITED

"[E]xemptions from the antitrust laws . . . are strongly disfavored," *Square D Co.* v. *Niagara Frontier Tariff Bureau*, 476 U.S. 409, 421 (1986). This well established principle reflects the status of the antitrust laws as a "'fundamental national economic policy.'" *Nat'l Gerimedical Hosp. & Gerontology Center* v. *Blue Cross*, 452 U.S. 378, 388 (1981), quoting *Carnation Co.* v. *Pac. Westbound Conference*, 383 U.S. 213, 218 (1966). It also reflects the cardinal rule of statutory construction that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). Accordingly, implied antitrust immunity "'can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.'" *Nat'l Gerimedical*, 452 U.S. at 388, quoting *United States* v. *Nat'l Assoc. of Sec. Dealers*, 422 U.S. 694, 719-20 (1975) ("*NASD*"). In particular, "'Repeal is to be regarded as implied only if necessary to make the [subsequent law] work, and even

then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.'" *Id.* at 389, quoting *Silver* v. *New York Stock Exch.*, 373 U.S. 341, 357 (1963).

In applying these principles, even in the context of heavily regulated industries, the Supreme Court has "refused . . . a blanket exemption, despite a clear congressional finding that some substitution of regulation for competition was necessary," *id.* at 392, citing *Carnation*, 383 U.S. at 217-19 (declining to find "an unstated legislative purpose to free the shipping industry from the antitrust laws"); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 373-74 (1973) (finding no legislative "purpose to insulate electric power companies from the operation of the antitrust laws" despite Federal Power Commission regulation). Instead, to justify immunity, a defendant must convincingly show a "clear repugnancy" between the applicable regulatory scheme and enforcement of the antitrust laws. *Gordon* v. *New York Stock Exch.*, 422 U.S. 659, 682 (1975).

### C. THERE IS NO CLEAR REPUGNANCY BETWEEN APPLICATION OF THE SHERMAN ACT AND THE REGULATORY FRAMEWORK OF THE TELECOMMUNICATIONS ACT OF 1996

As then-Judge Kennedy explained in rejecting a telecommunications provider's argument for implied antitrust immunity based on regulation of the standards for interconnection to the network, "[t]he rules for implying antitrust

immunity on the basis of regulatory statutes reflect two broad concerns: the agency must have sufficient freedom of action to carry out its regulatory mission, and the regulated entity should not be required to act with reference to inconsistent standards of conduct." *Phonetele*, 664 F.2d at 732-35, citing *NASD*, 422 U.S. at 722-25; *Gordon*, 422 U.S. at 689. Neither concern provides any justification for implied antitrust immunity in this case.

Because the TCA and the Sherman Act are both designed to foster competition, there is no "clear repugnancy" between enforcement of the regulatory statute and enforcement of the antitrust laws. In contrast to *NASD* and *Gordon*, this case does not involve a regulatory agency granted statutory authority to approve, in furtherance of other regulatory goals, anticompetitive conduct that would otherwise violate the antitrust laws. Rather, as the Seventh Circuit emphasized in *Goldwasser*, the TCA imposes specific obligations on incumbent local exchange carriers to assist competing carriers in ways that the antitrust laws would not necessarily require. Neither, on the other hand, would the antitrust laws prohibit such assistance. There is no reason to anticipate, therefore, that enforcement of the antitrust laws would pose an obstacle to the FCC or state authorities carrying out their regulatory missions under the TCA or subject incumbent local exchange carriers to inconsistent standards of conduct.

The mere fact of overlapping authority does not justify implied antitrust immunity. *See, e.g.*, *Otter Tail*, 410 U.S. at 373-74 (Federal Power Commission had regulatory authority over power company); *Phonetele*, 664 F.2d at 733-34 ("To permit a court additionally to hold [conduct that the FCC had held unreasonable under the public interest standard] unlawful under the Sherman Act does not jeopardize any policy adopted by the agency."). This is not to say that it is impossible for situations to arise in which questions of regulatory policy might become relevant to the antitrust analysis. But courts are capable of finding ways to avoid conflict with regulatory policy. The mere possibility of such situations arising cannot justify recognition of an implied antitrust exemption, in light of the clear congressional policy expressed in the antitrust savings clause and the utter lack of "clear repugnancy" between these "competition-friendly" statutes (*Goldwasser*, 222 F.3d at 391).

### D. THE SPECULATIVE POSSIBILITY OF CONFLICT BETWEEN AN ANTITRUST INJUNCTION AND THE REGULATORY FRAMEWORK OF THE TELECOMMUNICATIONS ACT PROVIDES NO BASIS FOR DISMISSING ANTITRUST CASES AT THE PLEADING STAGE

In pressing its implied immunity argument before the district court, BellSouth relied heavily on the following dicta from *Goldwasser*:

> [W]hen one reads the complaint as a whole [Goldwasser's] allegations appear to be inextricably linked to the claims under the [TCA]. Even if

> they were not, such a conclusion would then force us to confront the question whether the procedures established under the [TCA] for achieving competitive markets are compatible with the procedures that would be used to accomplish the same result under the antitrust laws. In our view, they are not. The elaborate system of negotiated agreements and enforcement established by the [TCA] could be brushed aside by any unsatisfied party with the simple act of filing an antitrust action. Court orders in those cases could easily conflict with the obligations the state commissions or the FCC imposes . . . . The [TCA] is, in short, more specific legislation that must take precedence over the general antitrust laws, where the two are covering precisely the same field.

222 F.3d at 401.

The meaning of this passage is unclear, particularly in view of the Seventh Circuit's express disclaimer of any holding "that the 1996 Act confers implied immunity on behavior that would otherwise violate the antitrust law," and its acknowledgment that "[s]uch a conclusion would be troublesome at best given the antitrust savings clause in the statute." *Id.* at 401. The court may have meant that while the TCA had no effect on the scope of antitrust *liability*, courts are nonetheless advised when considering antitrust *remedies* to avoid disruption to the statutory scheme. *See Essential Communications Sys., Inc.* v. *AT&T*, 610 F.2d 1114, 1120-21 (1979) (although Communications Act does not confer blanket antitrust immunity, "[w]e recognize . . . that a given antitrust remedy might in specific instances present an actual or potential conflict with a duty imposed by the

FCC"). *See also Otter Tail*, 410 U.S. at 381 (a court, in fashioning antitrust remedy, "should [not] be impervious to [regulated utility's] assertion that compulsory interconnection . . . will erode its integrated system and threaten its capacity to serve adequately the public"); *MCI*, 708 F.2d at 1105-06 (same).

We agree that courts should attempt to avoid conflict with regulatory policy in fashioning antitrust injunctions. The speculative possibility that an injunction could ultimately be entered in this case, however, scarcely justifies dismissing a complaint seeking damages and injunctive relief at the pleadings stage. To the extent that BellSouth seeks to use the *Goldwasser* dicta as support for a "back door" form of implied antitrust immunity, that argument should be decisively rejected by this Court. *Cf.* Order Dismissing Claims Under Telecommunications Act of 1996 at 2 n.1 (September 21, 2000), *Electronet Intermedia Consulting, Inc.* v. *Sprint-Florida, Inc.* (N.D. Fla.) (No. 4:00cvl176-RH) ("I cannot say, based solely on the complaint and with no factual record at all . . . that any conduct [plaintiff] proves that otherwise would constitute an antitrust violation should be deemed non-actionable because enforcing the antitrust laws would somehow be inconsistent with the Telecommunications Act.") (Attached as Addendum C).

## II. MAINTENANCE OF A LOCAL EXCHANGE MONOPOLY THROUGH EXCLUSIONARY AND ANTICOMPETITIVE CONDUCT COULD VIOLATE SECTION 2 OF THE SHERMAN ACT

The district court correctly held that "any behavior that can be the basis for an antitrust claim before the creation of the TCA still can be the basis of an antitrust claim after the creation of the TCA." Order at 6. Nevertheless, the court dismissed the complaint for failure to state a claim under the Sherman Act. The court's rationale is unclear. It described *Goldwasser* as holding that "a violation of the TCA cannot automatically be the basis for an antitrust claim, since there would be no antitrust claim in the absence of the TCA (because without the TCA, there is no obligation to help one's competitors)." *Id.* at 6. However, it offered no explanation for its conclusion that Intermedia's allegations concerning the terms on which BellSouth granted it access to the network failed to state a claim under the Sherman Act, save the statement that "most of the allegations that serve as a basis for the antitrust claims involve violations of the TCA, but as discussed above, violations of the TCA do not automatically serve as a basis for an antitrust claim." *Id.* at 6-7.

Although it is true that a firm is generally free to refuse to deal with its competitors, *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); *Olympia Equip. Leasing* v. *W. Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986), that freedom is not without limits. In some circumstances, a monopolist's refusal to

deal with a rival on reasonable terms does violate Section 2 of the Sherman Act. *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 483 n.32 (1992); *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985).

Section 2 of the Sherman Act prohibits (1) the willful acquisition or maintenance of monopoly power (2) by the use of exclusionary or predatory conduct "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Eastman Kodak*, 504 U.S. at 482-83, quoting *United States* v. *Griffith*, 334 U.S. 100, 107 (1948). Exclusionary conduct is conduct that "'not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.'" *Aspen*, 472 U.S. at 605 n.32, quoting 3 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 626b, at 78 (1978). If "valid business reasons" do not justify conduct that tends to impair the opportunities of a monopolist's rivals, that conduct is exclusionary. *See Eastman Kodak*, 504 U.S. at 483; *Aspen*, 472 U.S. at 605.

In *Aspen*, the Supreme Court upheld a jury verdict finding an antitrust violation when a firm that controlled three of the four downhill skiing mountains in Aspen, Colorado, terminated its participation in an all-Aspen skiing pass with the company that controlled the fourth mountain and took other actions designed to

prevent its rival from marketing its own all-Aspen pass. The Court upheld liability based on the jury's reasonable finding that the monopolist's refusal to deal was not "justified by any normal business purpose," *Aspen*, 472 U.S. at 608, but could be explained only as an anticompetitive strategy involving a "sacrifice [of] short-run benefits and consumer goodwill" in the interest of excluding a rival and reducing competition, *id.* at 610-11. *See also Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951) (approving the entry of an injunction ordering a monopolist newspaper to print the advertisements of customers who also dealt with a small local radio station); *Otter Tail*, 410 U.S. at 377 (monopolist power utility's refusal to provide wholesale power to municipally owned distribution systems in order "to destroy threatened competition" violated Sherman Act); *MCI*, 708 F.2d at 1133 (AT&T violated the antitrust laws by failing to afford a competing long-distance telephone service provider interconnection to local exchanges, contrary to federal regulatory policy and without legitimate business or technical reason for denying the requested interconnection).[5] Under the case law, then, it is not necessarily true that "without

[5]*See also* Order Regarding Issues for Trial at 2-3 (October 25, 2000), *Caltech Int'l Telecom Corp.* v. *Pacific Bell* (N.D. Cal.) (No. C-97-2105-CAL) (refusing to dismiss Sherman Act claims based on interconnection dispute: "[T]he Telecommunications Act gives plaintiffs the *right* to compete using defendant's facilities and services. But plaintiff here has alleged, and must prove, that in violating plaintiff's right, defendant has violated the antitrust laws.") (attached as Addendum A).

the TCA, there is no obligation to help one's competitors." Order at 6.

*Goldwasser* is not to the contrary. In that case, the court of appeals affirmed dismissal of Sherman Act claims that were, "as a whole . . . inextricably linked to . . . claims under the 1996 Act." *Goldwasser*, 222 F.3d at 401. The court noted that "the duties the 1996 Act imposes on [incumbent local exchange providers] are [not] coterminous with the duty of a monopolist to refrain from exclusionary practices." *Id.* at 399. The court also acknowledged that a monopolist's decision not to deal with a competitor "for the sole purpose of driving its rival out of the market amounted to a violation of Section 2," *id.* at 398 (citing *Aspen*, 472 U.S. at 600).

Most disputes over the terms on which potential rivals may obtain access to an incumbent's network will not provide a basis for a finding of antitrust liability. As the Supreme Court made clear in *Aspen*, it is not sufficient to make out a violation of the Sherman Act that a monopolist's conduct adversely affected a particular rival. 472 U.S. at 605. The antitrust laws protect competition, not competitors, *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), and so a plaintiff alleging unlawful monopoly maintenance must establish that the allegedly exclusionary conduct reasonably appeared capable of making a significant contribution to the maintenance of the defendant's monopoly power. 3 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 651c, at 78 (1996).

This would, of course, require consideration both of the conduct's impact on the plaintiff's ability to compete and the prospects of competition from other sources. Moreover, as we have noted, conduct is not deemed exclusionary for purposes of Section 2 of the Sherman Act unless it lacks a valid business purpose; i.e., it makes no business sense apart from its tendency to exclude and thereby create or maintain market power.

Intermedia's lengthy complaint could have been clearer with respect to its antitrust claims. Nonetheless, if read with the liberality appropriate when deciding a motion under Rule 12(b)(6),[6] the complaint includes all of the factual allegations required to state a claim under Section 2. Intermedia alleges that BellSouth "possesses monopoly power within the relevant market" (Compl. ¶ 167), and that BellSouth has maintained that monopoly power by virtue of a "premeditated and concerted course of conduct to eliminate its competitors." Compl. ¶¶ 2, 171. Intermedia further alleges that it cannot compete without access to BellSouth's network, and that "BellSouth's cooperation is indispensable to effective competition." Compl. ¶ 177. With respect to the possible business justifications for

[6]Antitrust complaints are to be given a liberal construction at the pleading stage, and "should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 811 (1993) (internal quotation marks omitted).

BellSouth's alleged failure to provide reasonable interconnection, Intermedia claims that it is "technically and economically feasible for BellSouth to provide access," and that "BellSouth's refusal to deal with Intermedia by denying it meaningful access" to "essential facilities and information, contrary to contract, statute, and federal regulations, is an anti-competitive act calculated by BellSouth to harm competition in the relevant markets and retain its monopoly." *Id*.

As a result of BellSouth's conduct, Intermedia alleges, it has been "effectively denied participation in the relevant market." Compl. ¶¶ 173, 179, 186. In particular, Intermedia alleges that BellSouth's failure to provide reasonable interconnection has prevented Intermedia from "expand[ing] [its] customer base" and "has continually eroded [its] existing customer base." Compl. ¶ 47. The complaint further alleges, although not with great specificity, that BellSouth's conduct has harmed competition as well as Intermedia itself. It states that BellSouth has used its monopoly power "to preclude direct, competitive, and meaningful dealings by Intermedia *and other would-be competitors* with BellSouth's customers in the relevant market," Compl. ¶ 168 (emphasis added), and that "consumers in the relevant market have been harmed because they have been deprived of the benefits of meaningful competition for the provision of telecommunications services, which would produce lower prices and improve service for those consumers." Compl. ¶¶

174, 180, 187. *See also* Compl. ¶ 50 ("BellSouth's actions have harmed both Intermedia and the public.").

In sum, the complaint alleges exclusionary conduct by a firm with monopoly power that lacks business justification and that harms competition. It will, of course, be Intermedia's burden to flesh out the allegations in further proceedings, but we believe that it has provided enough detail to state a claim under Section 2.

## CONCLUSION

The Court should reject any argument that the Telecommunications Act of 1996 creates implied antitrust immunity. For the reasons outlined in Part II of this brief, the Court should vacate the district court's order dismissing Intermedia's complaint, and remand for further proceedings.

Respectfully submitted.

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## CERTIFICATION OF COMPLIANCE

I hereby certify that this brief complies with Fed. R. App. P. 32(a)(7)(B)(i). It has 5805 words printed in 14 point proportionally spaced serif type.

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Christopher Sprigman

## CERTIFICATE OF SERVICE

I, Christopher Sprigman, hereby certify that on this 28th day of March 2001, I caused to be served a copy of BRIEF FOR UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION AS AMICI CURIAE IN SUPPORT OF APPELLANT by first-class mail on the following:

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