Focus

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# Local Carriers Charge Regional Bells With Antitrust Violations

By Matthew L. Cantor

A significant battle is currently taking place in the courts over a signature telecommunications issue: Do the antitrust laws require regional Bell operating companies to open their network facilities to competitors on fair and reasonable terms?

This battle is taking place even though Section 251 of the Telecommunications Act of 1996, in an effort to create real competition in local telephone markets, requires regional Bells to provide their competitors with access to a variety of network elements (e.g., local telephone lines) at wholesale rates and on an unbundled basis.

However, competitive local exchange carriers have alleged that the regional Bells have failed to live up to their Section 251 duties. Local exchange carriers have, therefore, attempted to coerce the regional Bells to open their networks through litigation. According to the local exchange carriers, the regional Bells' failure to live up to many of their Section 251 duties also violates antitrust law.

Local exchange carriers have sought to impose antitrust liability on the regional Bells for failure to open their networks because antitrust law, unlike the 1996 act, provides powerful remedy provisions to a plaintiff, including treble damages. In other words, if regional Bell refusal to open network elements to local exchange carriers is found to be illegal under the antitrust laws, then monetary damage sustained by the carriers as a result of this conduct likely will be tripled.

To the contrary, the 1996 act does not contain a treble damages provision. If, therefore, the violation of Section 251 duties is also an antitrust violation, regional Bells may think twice before hindering access to their facilities by competitors.

Local exchange carriers claim that regional Bells are monopolists that control an "essential facility" — namely, the network access elements to offering competitive local exchange service. Without access to these elements, according to the local exchange carriers, they would not be able to compete effectively against the regional Bells.


**Local exchange carriers claim that regional Bells control an 'essential facility' — the network facilities required to offer local exchange service.**

For almost one hundred years, antitrust law has made it clear that a monopolist that controls a facility that is essential to competition has a duty to open access to that facility to its competitors on fair and reasonable terms. However, it is generally difficult to prove that a particular monopolist has control over an essential facility.

To do so, one must prove that duplication of the facility would be economically infeasible and that denial of its use inflicts a severe handicap on potential market entrants. In this regard, if the merits of these claims are ever litigated, regional Bells will point out that local exchange services not only can be, but also have been, duplicated by advancements in wireless telephone technology.

Whether, however, wireless telephone service is a sufficient consumer substitute for wireline services is a fundamental question that would have to be answered in litigation. If evidence demonstrates that wireless services do substitute for wireline service by, for example, acting as a price constraint for wireline services, then it may be difficult to prove that the regional Bells control an "essential facility."

If regional Bells are deemed to have control over an essential facility, a court could construe a refusal to open regional Bell networks to local exchange carriers as improper monopoly maintenance, a violation of Section 2 of the Sherman Act. Such conduct could lead to a treble damages award. It also could lead to the imposition of an injunction in a private suit.

Moreover, if the courts find essential facility liability against the regional Bells in a civil context, it could lead federal and state antitrust authorities to bring criminal actions against regional Bells that fail to open their networks under Section 2.

The case law to date on this issue has mostly fallen the regional Bells' way — leading to the dismissal of local exchange carrier lawsuits brought under Section 2 of the Sherman Act — even though the 1996 act contains an antitrust savings clause. However, a recent opinion from the 2nd Circuit that fails to follow the seminal Circuit Court case on the issue, may have made the issue ripe for Supreme Court review.

Section 601(b)(1) of the 1996 act specifically states that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." However, even in light of this statute, federal courts have repeatedly dismissed antitrust lawsuits premised on an regional Bell's failure to open its network elements to local exchange carriers.

In *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), the court held that "the fundamental fallacy in the plaintiffs' theory is that the duties the 1996 Act imposes on [regional Bells] are coterminous with the duty of a monopolist to refrain from exclusionary practices. They are not." In other words, the 7th Circuit held that the mandatory interconnection duties contained in the 1996 act go farther than any duties placed upon the regional Bells by the antitrust laws.

In further explaining its logic, the 7th Circuit stated: "Our principal holding is thus not that the 1996 Act confers implied immunity on behavior that would otherwise violate the antitrust law. Such a conclusion would be troublesome at best given the antitrust savings clause in the statute. It is that the 1996 Act imposes duties on the [regional Bells] that are not found in the antitrust laws. Those duties do not conflict with the antitrust laws either; they are simply more specific and far-reaching obligations that Congress believed would accelerate the development of competitive markets ...."

Other courts, such as the District Court for the District of Columbia, recently have followed *Goldwasser* and dismissed local exchange carrier suits against regional Bells under the antitrust laws. See *Covad Communications Co. v Bell Atlantic Corp.*, 2002 WL 850140 (D. D.C. May 3, 2002) (holding that "consideration of existing regulatory mechanisms [such as the 1996 act] and the degree to which they already address the alleged threat to competition is necessary" in evaluating an essential-facility claim).

The local exchange carriers, however, have not given up. The 11th Circuit currently is entertaining an appeal dealing with precisely the same issue in a suit entitled *Covad Communications v. BellSouth Corp.*, 01-16064. In this suit, the Antitrust Division of the Department of Justice and the Federal Communications Commission submitted a brief that was critical of the District Court's decision dismissing this Section 2 suit on *Goldwasser* grounds.

Specifically, the Department of Justice and the Federal Communications Commission stated: "Incumbent providers of local telecommunications services have argued, as BellSouth did below, that if their alleged conduct is subject to the 1996 Act, or related to obligations under that Act, it cannot also be subject to Sherman Act scrutiny. This position is inconsistent with the 1996 Act's express terms ...."

Moreover, and even more importantly, in an opinion issued on June 20 in a class action entitled *Law Offices of Curtis V. Trinko v. Bell Atlantic Corp.*, 2002 WL 1339131 (2nd Cir. June 20, 2002), the 2nd Circuit failed to follow and criticized *Goldwasser*. The 2nd Circuit, noting the presence of the antitrust savings clause in the 1996 act, held that "there is no requirement that an allegation that otherwise states an antitrust claim must not rely on allegations that might also state a claim under another statute." Further, that court held that "[w]hile ideally, the regulatory process alone would be enough to bring competition to the local phone service markets, it is possible that the antitrust laws will be needed to supplement the regulatory scheme."

Accordingly, a split among the circuits now exists with respect to whether an antitrust "essential facilities" claim mandating interconnection can be asserted by a plaintiff in light of Section 251's similar mandate for interconnection. This split in legal interpretation only can be resolved by Supreme Court review.

Of course, should the 11th Circuit disagree with the 7th Circuit's interpretation and agree with the executive branch's interpretation, this case, which would deal with a federal question and a split among Circuit Court interpretation, would be ripe for Supreme Court review.

The 1996 act, to date, has been a resounding failure. While it promised greater competition in wireline local exchange markets, such competition has not appeared. Regional Bell monopolies continue to raise rates for their local exchange services, while, at the same time, the Federal Communications Commission and various state public service commissions give them approval to enter the in-region long distance business (the offering of long distance services from within their dominated local exchange territories).

It appears that Congress added an antitrust savings clause to the 1996 act for one purpose: to ensure that the regional Bells live up to all, if not some, of their Section 251 duties. It is thus hard to reconcile the dismissal of various local exchange carrier lawsuits for failure to state a cognizable claim.

Of course, should the local exchange carriers at the end of the day prevail and reverse the *Goldwasser* decision, they will still have the burden of proving that the regional Bells control an essential facility, that the regional Bells improperly denied access to this facility and that the regional Bells' conduct harmed the local exchange carrier and competition as whole.

From the regional Bells' perspective, if they can prove on the merits that they are not essential facilities or that they have lived up to their interconnection duties, then such a lawsuit would not succeed.

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