Comments of CompTel/ALTS to the Antitrust Modernization Commission

July 15, 2005

Topic IX – Regulated Industries

The Commenter

CompTel/ALTS was formed in March 2005 by the merger of CompTel/ASCENT and the Association for Local Telecommunications Services (ALTS). With more than 300 members, CompTel/ALTS is the leading industry association representing competitive facilities-based telecommunications service providers, emerging VoIP providers, integrated communications companies, and their supplier partners. CompTel/ALTS members compete directly with incumbent monopolists in providing voice, data and video services in the U.S. and around the world. In order to serve their end users, CompTel/ALTS members also purchase essential inputs from these same incumbent monopolists

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Comments

1. What role, if any, should antitrust enforcement play in regulated industries, particularly industries in transition to deregulation? How should authority be allocated between antitrust enforcers and regulatory agencies to best promote consumer welfare in regulated industries?

In some cases, such as insurance, Congress has expressly provided an industry with immunity from the antitrust laws. Leaving those easy cases aside, the standard for implied

immunity set forth in a series of Supreme Court cases provides appropriate guidance with respect to the role that antitrust should play in regulated industries; if there is no immunity—express or implied—then antitrust law should be applied and cases should be permitted to proceed. In *Silver v. New York Stock Exchange, Inc.*, 373 U.S. 341, 357 (1963), the Court held that repeal of the antitrust laws by implication is "not favored," and is "to be implied only if necessary to make the [regulatory statute] work, and even then only to the minimum extent necessary." In *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1976), the Court reiterated that: "Repeal of the antitrust laws by implication is not favored and not casually to be allowed. Only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied." *Id.* at 682, *quoting United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963). In *Gordon*, the Court upheld the dismissal of an antitrust complaint because it found that "antitrust proceedings would conflict with the regulatory scheme authorized by Congress rather than supplement that scheme." *Id.* at 689. "Whenever claims of implied immunity are raised, they must be evaluated in terms of the particular regulatory provision involved, its legislative history, and the administrative authority exercised pursuant to it." *Northeastern Tel. Co. v. American tel. & Tel. Co.*, 651 F.2d 76, 83 (2d Cir. 1981).

Where industries are in transition to deregulation, antitrust enforcers and courts should be mindful of the fact that regulation is playing a reduced role in curbing anticompetitive conduct. Thus, an industry for which implied immunity has been found may lose that immunity as the result of deregulation. It is indeed ironic that in the Supreme Court's two most recent decisions with respect to the telecommunications industry—*Trinko* and *National Cable and Telecommunications Ass'n v. Brand X Internet Services*, 73 USLW 4659 (U.S., June 27, 2005)—one case relies upon heavy FCC regulation as the basis for declining to apply the antitrust laws,

while the other affirms an FCC decision to decline to regulate. And with the FCC's Chairman responding to the latter decision by suggesting further deregulatory moves,[1] it is exceptionally important that antitrust courts recognize that reduced regulation means an increased need for antitrust enforcement.[2]

CompTel/ALTS will address the question in the second sentence in Question 1 in the course of answering Question 2. If the premise of this sentence is that *either* antitrust enforcers *or* regulatory agencies, but not both, should have authority in a given area, CompTel/ALTS respectfully disagrees. As discussed in more depth in response to Question 2, in many cases, the same conduct will violate two statutes, and neither antitrust enforcers nor regulators should allow the fact that multiple statutes may have been violated to deter them from taking enforcement action within their jurisdiction.

2. How, if at all, should antitrust enforcement take into account regulatory systems affecting important competitive aspects of an industry?

The two sentences of question two pose distinct questions. With respect to the first sentence, the standard for immunity, discussed above in response to Question 1, is the

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[1] *See* Kevin J. Martin, "United States of Broadband," *Wall Street Journal* (July 7, 2005 at A12) (Promising that the FCC will "move forward and remove the legacy regulation that reduces telephone companies' incentives to provide broadband").

[2] One example of reduced enforcement is the FCC's 1999 reduction in regulation of special access prices, predicated on the premise that this service was becoming competitive. *Access Charge Reform*, CC Docket No. 92-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999). Rather than become more competitive, this service has become less competitive, with many competitors exiting the market and with the largest local monopolists (Verizon and SBC) buying out their largest competitors (AT&T and MCI). Comments filed in an ongoing proceeding (*In the Matter of Special Access Rates for Price Cap Local Exchange* Carriers, WC Docket No. 05-25 (FCC), have provided evidence that the local monopolists have used their pricing freedom to charge prices that are well above cost, and then to offer large discounts to purchasers who agree to take all or nearly all of their special access service from them. Given that the FCC no longer reviews this type of exclusive dealing contract, it is increasingly imperative that these contracts be exposed to antitrust scrutiny.

appropriate one to guide antitrust enforcement where regulatory systems affect important competitive aspects of an industry. Part IV of *Trinko* (540 U.S. at 411-16), went wrong to the extent that it suggested that absent immunity, an antitrust court should dismiss an antitrust suit at the pleadings stage without a weighing of the need for antitrust enforcement, simply because of "the existence of a regulatory structure designed to deter and remedy anti-competitive harm." 540 U.S at 412. Such a suggestion is remarkable in light of the fact that the then-Chairman of the FCC had recently admitted that FCC authority is "insufficient to deter and punish violations in many instances," particularly given "the vast resources" of the incumbents.[3] By contrast, the Court in *Otter Tail* correctly applied the antitrust laws to an industry regulated by a statute that was intended to encourage competition in the industry, noting that the act in question embodied "an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373 (1973). Moreover, as observed by Professor Weiser, "antitrust remedies in the context of regulated industries provide courts with a unique opportunity to award pro-competitive relief without undertaking the responsibilities of superintending the remedy itself," citing *OtterTail.*[4]

In *Covad Comm'ns Co. v. BellSouth Corp.*, 374 F. 3d 1044, 1051-52 (11th Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 2247 (Mar. 7, 2005), the Eleventh Circuit quite properly declined

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[3] News Release, FCC, *FCC Chairman Powell Recommends Increased FCC Enforcement Powers for Local Telephone Competition* (May 7, 2001). The "proliferate[ion]" of class actions and antitrust suits by "disappointed competitors" of the incumbent monopoly local telephone companies that Verizon cited in its petition for certiorari in *Trinko* (at 28 and 28 n.22) is further evidence that the FCC was simply unable to police anticompetitive activities of the Bell companies.

[4] P. Weiser, "Goldwasser, the Telecom Act, and Reflections on Antitrust Remedies," 55 Admin. L. Rev. 1, 16 (2003). The existence of a regulatory scheme makes application of refusal to deal principles more feasible, not less. Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 853 (1989).

a defendant's invitation to dismiss a monopolization claim under the theory articulated in Part IV of *Trinko*, despite its recognition that "the same set of facts" alleged by plaintiff might also be actionable under the communications laws. *Id.* at 1052 n. 7. The Eleventh Circuit concluded that "Our responsibility under Trinko to harmonize the Sherman Act and the [communications laws] does not entail excluding facially valid claims at the pleadings stage." *Id.* at 1052. This approach to the issues considered in Part IV of *Trinko* is quite reasonable. A broader reading—that a court should dismiss at the pleadings stage any antitrust claim based on facts that could lead to a redress of the plaintiff's claims of anticompetitive conduct by a regulator—would reverse decades of law regarding immunity.

In contrast to the foregoing case, in *MetroNet Services Corp. v. Qwest Corp.*, 383 F. 3d 1124, 1135-36 (9th Cir. 2004), the Ninth Circuit dismissed an antitrust complaint because the regulatory body had "been attentive to" the precise conduct that formed the entirety of the antitrust complaint and had "taken corrective action when it found [defendant's] conduct to be in violation of the regulatory framework." In such a case, in which the regulator has actually scrutinized the precise conduct that forms the basis of the antitrust complaint under a regulatory framework that has the same procompetitive goals as the antitrust laws, and has taken corrective action where a violation of the regulatory framework is found present, CompTel/ALTS does not object to dismissal of an antitrust complaint. The critical difference between the *Covad* and *MetroNet* cases is that in the latter, the regulator had actually considered the precise conduct being challenged and had taken appropriate corrective action.

It is not a defense to an antitrust violation that the challenged conduct also *violated* some other legislation. As the D.C. Circuit recently observed, "that Bell Atlantic's alleged conduct may violate the 1996 Act does not, of course, mean that same conduct cannot violate the

Sherman Act."[5] As noted by the Supreme Court in *United States v. Borden, Co.*, 308 U.S. 188, 198 (1939), it is a "cardinal principle" of statutory construction that "[W]hen there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal must be 'clear and manifest.'" Likewise, in *Otter Tail*, the Court repeatedly noted that Defendant had refused to interconnect with the requesting municipalities for the purpose of wheeling power, notwithstanding the Federal Power Commission's requirement that it do so. 410 U.S. at 371-72, 376-77, 380 n.10. Defendant's violation of a separate statute, far from insulating it from antitrust liability, clearly contributed to the Court's holding that Defendant had violated § 2. Thus, "where conduct contributes to establishing or maintaining monopoly power, a court will be especially likely to find that conduct predatory or anticompetitive if it is also improper for reasons extrinsic to the antitrust laws."[6]

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[5] *Covad Communications Corp. v. Bell Atlantic Corp.*, 398 F. 2d 666, 672 (D.C. Cir. 2005); *see also Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 173 (1965) (fraud on patent office); *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 264 (7th Cir. 1985) (same); *S.S.W v. Air Trans. Ass'n,* 191 F.2d 658, 664 ("the same set of facts may give rise to both a violation of [statute and] the antitrust laws. Although the second does not necessarily follow from the first, but is bottomed on its own statutory standards, the antitrust remedy of treble damages is not defeated by the fact that [another statute] is also violated") (Civil Aeronautics Act); *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("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") (Indian Reorganization Act and Equal Opportunities Act); *Strobl v. New York Mercantile Exchange,* 768 F.2d at 27 (no antitrust immunity for price manipulation prohibited by Commodity Exchange Act). *Ohio Bell Telephone Co. v. Corecomm Newco, Inc.*, 214 F.Supp. 2d 810, 816 (N.D. Ohio 2002) ("While not every violation of the Telecommunications Act . . . can be the basis for an antitrust claim, it is possible, that some actions . . . could violate both the Telecommunications Act . . . and the Federal Antitrust laws.")

[6] 1 ABA Section on Antitrust, *Antitrust Law Developments* 249 (5th ed. 2002); *see also Walker Process. Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1966) (defendant violated antitrust laws by enforcing fraudulently obtained patents); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (defendant violated antitrust laws by engaging in sham litigation that is a tortuous abuse of process).

There is a valid policy consideration underlying such an approach. Where the defendant has violated pro-competitive regulations, there should be far less concern that the court, in applying the antitrust laws, will erroneously condemn conduct that is pro-competitive. Because the expert regulator has already determined terms that protect both competition and the legitimate interests of the incumbent, it is not necessary for the antitrust court itself to determine the "optimal" terms for competitive access.[7] Thus, while the existence of a regulatory system should not affect the antitrust *standard* applied by an antitrust court, the regulatory system can significantly affect the *determination* reached by the court, for in applying the antitrust laws, the "impact of regulation must be assessed simply as another fact of market life," and "'the antitrust court must consider the peculiarities of an industry as recognized in a regulatory statute.'"[8]

With regard to the question posed in the second sentence of Question 2, regulatory agencies should not be less vigilant because of the existence of an antitrust remedy. Antitrust cases are costly for a plaintiff (which tends to be a small company) to bring, and may wreak havoc with the day-to-day business operations of such a company. Regulatory agencies should not assume that competitors injured by conduct that violates both the laws regulators are charged with enforcing and the antitrust laws will have available a suitable non-regulatory remedy that they can use to redress their injury, as well as the injury to competition, before they go out of

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[7] *See* Philip Areeda, *Essential Facilities*, 58 Antitrust L.J. 841, 853 (1990) (antitrust remedies are appropriate when "as in *Otter Tail*, a regulatory agency already exists to control the terms of dealing"); 3A P. Areeda & H. Hovencamp, *Antitrust Law* ¶ 773 at 197 (2d ed. 2002) ("argument for forcing access is therefore strongest in the case of a price-regulated monopolist whose denial of access aids it in evading rate regulation or undermines the regulator's plan to encourage rivalry . . .").

[8] *Phonotele, Inc. v. AT&T Co.*, 664 F.2d 716, 742 (1981), *quoting* 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 223d (1978).

business. Once a competitor is out of business, the benefits that it sought to bring to competition and to consumers are likely to be lost forever.

Moreover, in some respects, a regulatory agency may have authority to provide for public interest relief that goes beyond the authority of antitrust courts. As the FCC has recognized, "unlike the role of antitrust enforcement agencies, the Commission's public interest authority enables it to rely upon its extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the merger will yield overall public interest benefits."[9]

Regulatory agencies should be especially vigilant to ensure that a monopolist does not induce the regulators and the Courts to engage in an "Alphonse and Gaston" routine in which each defers to the other. Notably, before Verizon succeeded in persuading the Supreme Court in *Trinko* that it should not allow the application of the antitrust laws to its allegedly anticompetitive conduct because of the existence of a regulatory remedy, it successfully argued just the opposite to the regulator, advising the FCC that it should not apply more stringent regulatory safeguards because if Verizon were "to engage in anticompetitive conduct, carriers would of course be able to resort to private remedies under . . . the treble-damages remedy of the federal antitrust laws.[10]

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[9] Memorandum Opinion and Order, *In Re Application of GTE Corp. and Bell Atlantic Corp. for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032 (2000) at ¶ 24. While this statement was made in the context of a merger, similar considerations apply with respect to other types of anticompetitive activity, where the FCC may have broader discretion than a court in the context of its "public interest" authority. *See, e.g.* 47 USC § 201.

[10] *Application by Bell Atlantic-New York for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Services in the State of New York*, FCC Docket No. 99-295, filed Sept. 29, 1999, at 71. The FCC was in fact persuaded by this

4. How should courts treat antitrust claims where the relevant conduct is subject to regulation, but the regulatory legislation contains a "savings clause" providing that the antitrust laws continue to apply to the conduct?

Where there is a savings clause, courts should scrupulously respect the judgment of Congress that the antitrust laws were intended to apply. Courts should not decline to apply the antitrust laws on the basis, articulated in Part IV of *Trinko*, that "the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny." 540 U.S. at 412.[11] Such a *per se* conclusion that regulation sufficiently minimizes all risk to competition and applying the antitrust laws somehow threatens a regulatory regime that is consistent with the antitrust laws is inconsistent with the expressly stated intent of the Congress in inserting a savings clause. The existence of a savings clause proves that Congress intended that there should be two legal frameworks simultaneously promoting competition: antitrust and regulatory. If Congress had intended to allow courts to decline to apply the antitrust laws, it would not have included the savings clause.

Rather, following *Gordon* and *Philadelphia National Bank*, Courts should consider whether the application of the antitrust laws is "plainly repugnant" to a federal regulatory scheme. In the case of a state regulatory scheme, they should follow *Parker v. Brown*, 317 U.S.

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argument, finding that Verizon "risks liability through antitrust and other private causes of action if it performs in an unlawfully discriminatory manner." *In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, 4165 (1999).

[11] Not surprisingly, other courts have followed *Trinko's* misguided approach, and have dismissed antitrust claims in reliance on considerations such as "pervasive FCC oversight and regulation" despite the legislation's explicit savings clause. *E.g.*, *Greco v. Verizon Communications, Inc.*, 2005 U.S. Dist. Lexis 4434 at [*16], 2005 Trade Cas. (CCH) ¶ 74,738 (S.D.N.Y. 2005). Such an approach is simply inconsistent with the explicitly articulated Congressional intent in including a savings clause in its legislation, and should not be followed.

341 (1943) and *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. (1980), and examine whether the application of the antitrust laws would be *inconsistent* with a clearly articulated policy of a regulatory agency that is actively supervised.[12] *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 370 (1991) (stating that *Parker* relied on "principles of federalism and state sovereignty" to hold that "the Sherman Act did not apply to anticompetitive restraints imposed by the States 'as an act of government.'") In any event, even if a regulatory scheme exists that could curb the alleged harm to competition without the need for antitrust enforcement, the defendant will have the opportunity at trial or in a summary judgment motion to show that regulation adequately protected competition and that there was therefore no need to impose antitrust liability.

Respectfully submitted,

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[12]One court following *Trinko* concluded that where the regulatory agency has "already actively examined and affirmatively rejected the claimed *competitive* benefits of imposing, as a regulatory duty, the obligation that Plaintiff seeks to impose under the antitrust laws, no further antitrust scrutiny is warranted—the regulatory structure 'was an effective steward of the antitrust function.'" *Levine v. BellSouth Corp.*, 302 F.Supp.2d 1358, 1371 (S.D. Fla. 2004) (quoting *Trinko*) (emphasis in original). In cases in which the regulator has expressly determined that the proposed competitive benefits of imposing a duty to deal are inconsistent with the regulatory scheme, CompTel/ALTS has no problem with such an approach. In *Levine*, however, that was simply not the case.