

# CRS Report for Congress

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## **Verizon Communications, Inc. v. Trinko: Telecommunications Consumers Cannot Use Antitrust Laws to Remedy Access Violations of Telecommunications Act**

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### **Summary**

In *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko* (540 U.S. 398 2004), the Supreme Court denied the antitrust claim advanced by a consumer of telecommunications services against a local exchange carrier that had previously been subject to regulatory discipline by both the Federal Communications Commission and the New York Public Service Commission. According to the Court, the fact that Verizon had been found to have breached its duty under the Telecommunications Act of 1996 to adequately share its network with telecommunications companies — including AT&T, which provided service to Trinko — wishing to provide competitive local exchange services did not provide sufficient basis for finding a violation of the antitrust laws.

Although Congress included “an antitrust-specific savings clause” to emphasize that neither the act nor any amendment to it should “be construed to modify, impair, or supersede the applicability of any of the antitrust laws,” “the act does not create new claims that go beyond existing antitrust standards.” The three Justices who concurred separately in the judgment would not even have reached the merits of the case, finding instead that Trinko’s derivative injury did not afford him the “first step,” standing to bring the case. The decision was received unfavorably by both the chairman and ranking minority member of the House Judiciary Committee, who introduced legislation in the 108<sup>th</sup> Congress to remedy the antitrust defect noted by the Court; and with approval by the chairman of the House Energy and Commerce Committee. This report will be updated to reflect further, significant congressional action.

## Background

In order to promote competition among telecommunications providers at the local level, Section 101(a) of the Telecommunications Act of 1996<sup>1</sup> imposes upon a local exchange carrier (LEC) the duty to provide interconnection with its network “that is at least equal to that provided by the local exchange carrier to itself ...” to any requesting telecommunications carrier (47 U.S.C. § 251(c)(2)(C)). The 1996 Act also requires that before a LEC can enter the market for the provision of long-distance telecommunications service, it certify, by means of a “competitive checklist,” that it has complied with the interconnection mandate, which includes a requirement that it provide access to operations support systems (OSS).<sup>2</sup> State regulators (in this case, the New York Public Service Commission (PSC)) approve § 251 interconnection agreements, and the § 271 application to provide long-distance services is made to the FCC. After the PSC and the FCC investigated complaints from Verizon’s competitors that Verizon was not meeting its OSS obligations and that their orders were not being fulfilled, the FCC entered a consent decree pursuant to which Verizon paid a \$3 million fine; the PSC issued orders requiring Verizon to pay \$10 million to its competitors. Both regulatory bodies imposed heightened reporting requirements on Verizon.<sup>3</sup> Trinko’s complaint was filed as a class action the day after the FCC’s consent order was entered.

## The Case

The complaint alleged that Verizon “continues to resist competitive entry by carriers seeking to compete entirely with their own facilities,” and consequently, that customers of Verizon’s competitors have been injured in their business or property by reason of “Verizon’s “exclusionary and anticompetitive behavior.” Trinko further characterized Verizon’s actions as attempts to “exclude or reduce the market share of rivals in the [provision of] Local Phone Service on a basis other than efficiency.”<sup>4</sup> He charged that “[n]otwithstanding the FCC’s recognition of the problem, regulatory agencies have been unable to ensure that incumbents provide reasonable access to the facilities competitors need in the local market. FCC enforcement is sporadic, with complaints languishing, and

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<sup>1</sup> P.L. 104-104; the 1996 Act constituted an amendment to the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*

<sup>2</sup> OSS is described by the Court as “a set of systems used by incumbent LECs to provide services to customers and ensure quality”) (*see* 47 U.S.C. § 271(c)(2)(B)).

<sup>3</sup> In re Bell Atlantic- New York Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service In the State of New York, 15 FCC Rcd. 5413 (2000) (Order), 15 FCC Rcd. 5415 (Consent Decree); MCI Worldcom, Inc. v. Bell Atlantic-New York: Order Directing Improvements To Wholesale Service Performance, Nos. 00-C-0008, 00-C-0009, 2000 WL 363378 (N.Y.P.S.C., Feb. 11, 2000); Order Directing Market Adjustments and Amending Performance Assurance Plan, Nos. 00-C-0008, 00-C-0009, 99-C-0949, 2000 WL 517633 (N.Y.P.S.C., Mar. 23, 2000); Order Addressing OSS Issues, Nos. 00-C-0008, 00-C-0009, 99-C-0949, 2000 WL 1531916 (N.Y.P.S.C., July 27, 2000).

<sup>4</sup> Respondent’s Brief at 13, 16 (2003 WL 21767982).

the prospect that the FCC would actually withdraw Section 271 long distance authority is far too speculative to provide any meaningful deterrence.”<sup>5</sup>

The six Justices of the Supreme Court who reached the merits of the case looked initially to the effect of the 1996 Act on traditional antitrust principles. The opinion noted first that, as Trinko had asserted, the act does create certain affirmative duties on the parts of LECs; nevertheless, they found, Trinko’s antitrust claim was not necessarily viable. “That Congress created these duties, however, does not automatically lead to the conclusions that they can be enforced by the antitrust laws.”<sup>6</sup> Refusing to end its inquiry by observing that regulatory regimes often preclude antitrust enforcement, however, the Court also noted that the act contains an “antitrust-specific savings clause providing that ‘nothing in this act or the amendments made by [it] shall be construed to modify, impair, or supersede the applicability of the antitrust laws.’”<sup>7</sup> Examining Trinko’s claims pursuant to § 2 of the Sherman Act, which prohibits monopolization or attempted monopolization,<sup>8</sup> therefore, the Court emphasized that although the savings clause in the 1996 Act “preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond [them].”<sup>9</sup>

Monopolization is not necessarily *per se* unlawful, the Court pointed out, if the monopoly has been achieved by means of some superior skill or product, or some “historic accident.”<sup>10</sup> The opinion then proceeded to examine the exception to the general rule that, barring collusion, the Sherman Act “does not restrict the long-recognized right of [a] trade or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal.”<sup>11</sup> The exception to the foregoing principles that encompasses the antitrust “rule” that a monopolist *may* have a duty to deal with competitors was stated by the Court in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). There, the Court found that “under certain circumstances a refusal to cooperate with rivals can constitute anticompetitive conduct and violate §2.”<sup>12</sup> In *Aspen Skiing*, the Court was dealing with a situation in which a monopolist who owned three of the four mountains in the skiing area, and who *had* been dealing with a competitor who owned the fourth mountain, had withdrawn that cooperation. The monopolist 3-mountain owner had even refused to deal when the competitor offered to pay him the retail price of the ski lift tickets to the three mountains so that he, the competitor, could offer his guests tickets to all four mountains. *Aspen Skiing*, in which the defendant’s pricing behavior thus plausibly “revealed a distinctly

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<sup>5</sup> *Id.* at 13, 14.

<sup>6</sup> 540 U.S. 398, 406 (2004).

<sup>7</sup> *Id.*, quoting 47 U.S.C. § 152 note.

<sup>8</sup> 15 U.S.C. § 2.

<sup>9</sup> 540 U.S. at 407.

<sup>10</sup> *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

<sup>11</sup> 540 U.S. at 408, quoting from *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); see also, (name redacted), “Duty of a Monopolist to Deal,” Congressional Distribution Memorandum, Congressional Research Service, March 10, 2003.

<sup>12</sup> 540 U.S. at 408.

anticompetitive bent,” is, as this opinion notes, “at or near the outer boundary of §2 liability.”<sup>13</sup>

In the instant case, the Court was looking not at a monopolist which had withdrawn its cooperation from a competitor, but, rather, at a monopolist which had imposed upon it by the 1996 Act the duty to cooperate with would-be competitors:

The refusal to deal alleged in the present case does not fit within the limited exception recognized in *Aspen Skiing*. The complaint does not allege that Verizon voluntarily engaged in a course of dealing with its rivals, or would even have done so absent statutory compulsion. Here, therefore, the defendant’s prior conduct sheds no light upon the motivation of its refusal to deal — upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice. The contrast between the cases is heightened by the difference in pricing behavior. In *Aspen Skiing*, the defendant turned down a proposal to sell at its own retail price, suggesting a calculation that its future monopoly retail price would be higher. Verizon’s reluctance to interconnect at the cost-based rate of compensation available under §251(c)(3) tells us nothing about dreams of monopoly.

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... we do not believe that traditional antitrust principles justify adding the present case to the few exceptions from the proposition that there is no duty to aid competitors.<sup>14</sup>

The “essential facilities” doctrine<sup>15</sup> is similarly unavailing. Quoting from generally recognized, authoritative antitrust commentators, the Court observed that it has been stated that “essential facility claims should ... be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms.”<sup>16</sup>

[Trinko] believes that the existence of sharing duties under the 1996 Act supports [his] case. We think the opposite: The 1996 Act’s extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access. To the extent [Trinko’s] ‘essential facilities’ argument is distinct from its general §2 argument, we reject it.<sup>17</sup>

The Justices who concurred in the judgment (Stevens, Souter, Thomas) relied on the fact that they saw only an “indirect relationship between the defendant’s alleged misconduct and the plaintiff’s asserted injury.” Therefore, they would not have decided this “complex case,” finding at the outset that Trinko had no standing to maintain the

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<sup>13</sup> *Id.* at 409.

<sup>14</sup> *Id.* at 409, 411.

<sup>15</sup> The doctrine has been briefly described as the existence of a necessary component of a potential competitor’s business which is both unavailable from any source other than the defendant/competitor *and* cannot be duplicated by the plaintiff — either at all, or other than at great expense and/or time.

<sup>16</sup> Phillip Areeda & Herbert Hovenkamp, *ANTITRUST LAW*, ¶ 773e at 150 (2003 Supp.).

<sup>17</sup> 540 U.S. at 411.

action. They acknowledged that a “literal reading” of the damages provision of the antitrust laws (15 U.S.C. § 15) would seem to include Trinko as a “person who has been injured in his business or property” by an asserted violation of the antitrust laws, but they “eschewed” such a literal reading because Trinko’s asserted injury was purely derivative of that suffered by AT&T. They feared either the possibility of duplicative recovery of antitrust damages, or “the danger of complex apportionment of [antitrust] damages.”<sup>18</sup>

## **Congressional Reaction; Response in the 108<sup>th</sup> Congress; Possible Future Response**

*Congressional Daily* reported that the decision was received unfavorably by both the chairman and ranking minority member of the House Judiciary Committee; Chairman Sensenbrenner feared that the ruling would “be perceived as giving a green light to all manner of anticompetitive behavior by the regional Bell telephone companies.” Representative Conyers characterized the decision as a “horrible blunder” that dealt a “serious blow” to competition in the telecommunications industry. Both indicated that Congressional action to redress the possible negative impact of the judgment might be forthcoming.<sup>19</sup> In May 2004, Representatives Sensenbrenner and Conyers introduced H.R. 4412, which would have added a section to the Clayton Act<sup>20</sup> to make unlawful actions such as those taken by Verizon.<sup>21</sup> The effect of the proposed provision would have allowed a successful, judicial challenge to Verizon’s actions, inasmuch as the antitrust damage authorization is for suit to recover treble damages for injury attributable to “anything forbidden in the antitrust laws.”<sup>22</sup>

On the other hand, Representative Tauzin, Chairman of the House Energy and Commerce Committee, expressed his approval that the Supreme Court had “decisively reiterated ... that the regulation of the telecommunications industry should be the purview of the FCC and the state [public utility commissions], rather than judges all across the country.”<sup>23</sup>

It may be that when Congress inserted the “antitrust savings” clause in the 1996 Act many Members believed that the clause was preserving an unlimited private right of action on the part of other-than-directly affected parties to sue under the antitrust laws. But, as this case indicates, the “savings” clause may be of little effect in instances such as this in which it is found that traditional antitrust principles/standards are not implicated. Given the *Verizon* decision, and the possibility that the 109<sup>th</sup> Congress may address

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<sup>18</sup> *Id.* at 416, 417 (concurrence).

<sup>19</sup> See “Sensenbrenner: Verizon Ruling May Require Legislation,” CONGRESS DAILY (January 14, 2004).

<sup>20</sup> The Clayton Act is codified at 15 U.S.C. §§ 12-27; H.R. 4412 would have added section 3A, presumably to be codified as 15 U.S.C. § 14A.

<sup>21</sup> H.R. 4412 was referred to the House Judiciary Committee.

<sup>22</sup> 15 U.S.C. § 15.

<sup>23</sup> See CONGRESS DAILY article, *supra*, note 19.

comprehensive reform of the Communications Act of 1934,<sup>24</sup> there are several congressional options that might have the effect of providing the breadth of private action some members of Congress apparently thought they had assured. First, Congress could amend the savings clause to clarify that the phrase, “the antitrust laws,” means the literal words of the statutory provisions, but excludes any judicial interpretation of them. Second, Congress could include specific language, as H.R. 4412 in the 108<sup>th</sup> Congress would have done, to the effect that actions such as the allegedly monopolistic ones challenged in *Verizon* do, in fact, violate the antitrust laws. Third, Congress could amend the “enforcement” provisions of the 1996 Act so that even if there had already been regulatory action, certain provisions of the act would remain enforceable by private individuals who are not competitors of LECS, but, rather, their customers or customers of would-be or actual competitors. Fourth, Congress could characterize a violation of any (or some) mandatory, competitive obligation(s) of the act as prima facie evidence of violation of the antimonopoly provision of the antitrust laws (15 U.S.C. § 2). Congress could also, of course, choose to allow the current law to remain unchanged with respect to the antitrust character of the LECs’ actions.

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<sup>24</sup> For a survey of telecommunications issues that might be examined, see CRS Report RL32949, “Communications Act Revisions: Selected Issues for Consideration,” coordinated by Angele Gilroy, Resources, Science, and Industry Division, with input from various CRS analysts.

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