No. 04-16201

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALBERT O. STEIN,

Plaintiff-Appellant,

v.

PACIFIC BELL TELEPHONE COMPANY, SBC COMMUNICATIONS INC., SBC TELECOMMUNICATIONS, INC., SBC TECHNOLOGY RESOURCES, INC., and SBC ADVANCED SOLUTIONS, INC.,

Defendants-Appellees.

On Appeal From the United States District Court
For the Northern District of California
The Honorable Susan Illston
Case No. C 00-2915 SI

BRIEF OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Appellee Pacific Bell Telephone Company is a California corporation and is a wholly owned subsidiary of Pacific Telesis Group, which is a wholly owned subsidiary of SBC Communications Inc.

Appellee SBC Communications Inc., is a Delaware corporation with no corporate parent. No publicly held corporation owns more than 10% of the stock of SBC Communications Inc.

Appellee SBC Telecommunications, LLC, is a Delaware limited liability company wholly owned by SBC Operations, Inc., which is a Delaware corporation wholly owned by SBC Communications Inc.

Appellee SBC Technology Resources, Inc., is a Delaware corporation. It has changed its name to SBC Laboratories, Inc., and is wholly owned by SBC Communications Inc.

Appellee SBC Advanced Solutions, Inc., is a Delaware corporation wholly owned by SBC Communications Inc., Pacific Telesis Group, and Southern New England Telecommunications Corporation. Southern New England Telecommunications Corporation is a Connecticut corporation and is wholly owned by SBC Communications Inc.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

INTRODUCTION 1

STATEMENT OF JURISDICTION 3

STATEMENT OF THE ISSUES 3

STATEMENT OF THE CASE... 3

A. Stein's Allegations. 3

B. Motion to Dismiss and Summary Judgment Proceedings. 7

C. The District Court's Ruling. 12

ARGUMENT 13

I. THE DISTRICT COURT CORRECTLY RULED THAT STEIN LACKS STANDING TO ASSERT CLAIMS FOR REGULATORY VIOLATIONS UNDER THE TELCO ACT. 13

A. Standard of Review. 13

B. No Underlying Violation of Section 251 Exists Upon Which to Predicate a Claim Under the Telco Act. 13

C. Even if Section 251 Had Been Violated, Stein Has No Right as a Consumer to Sue for that Violation. 16

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT STEIN'S ANTITRUST CLAIMS CANNOT SURVIVE *TRINKO*. 23

A. Standard of Review. 23

B. Stein Cannot Distinguish His Refusal-to-Deal Claim from the One Rejected in *Trinko*. 24

1. Trinko Establishes that Violations of the Telco Act's Sharing Obligations Cannot Form the Basis of a Refusal-to-Deal Claim. *24*

SFI-519499v1

2. *Stein's Effort to Salvage His One Claim Related to Loop Qualification Information is Meritless.* *27*

a. *SBC was required by the Telco Act to provide loop qualification information.* *28*

b. *Stein's alternative argument that the merger conditions turned the otherwise compulsory duty into a voluntary one is groundless.* *34*

c. *Stein's other fallback arguments also fail.* *38*

C. *Trinko* Also Precludes Stein's Essential Facilities Claim. 42

D. Stein's Monopoly Leveraging Claim Cannot Survive the Failure of His Other Antitrust Claims. 46

CONCLUSION 47

TABLE OF AUTHORITIES

Page(s)

Cases

Alaska Airlines, Inc. v. United Airlines, Inc.,
948 F.2d 536 (9th Cir. 1991)..46

Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,
472 U.S. 585 (1985) .... passim

Associated General Contractors of California, Inc. v. California State Council of Carpenters,
459 U.S. 519 (1983) 20, 21

Block v. Cmty. Nutrition Inst.,
467 U.S. 340 (1984) 21

Conboy v. AT&T Corp.,
241 F.3d 242 (2d Cir. 2001)..21

Covad Communications Co. v. BellSouth Corp.,
299 F.3d 1272 (11th Cir. 2002), *vacated sub nom. BellSouth Corp. v. Covad Communications Co.,*
124 S. Ct. 1143 (2004) 10

Covad Communications Co. v. BellSouth Corp.,
374 F.3d 1044 (11th Cir. 2004).. passim

Goldwasser v. Ameritech Corp.,
1998 WL 60878 (N.D. Ill. Feb. 4, 1998).. 16, 19

Goldwasser v. Ameritech Corp.,
222 F.3d 390 (7th Cir. 2000)..19

Greene v. Sprint Communications Co.,
340 F.3d 1047 (9th Cir. 2003),
cert. denied, 124 S.Ct. 2026 (2004) 16

Hewlett-Packard Co. v. Boston Scientific Corp.,
77 F. Supp. 2d 189 (D. Mass. 1999) 38

Holmes v. Sec. Investor Prot. Corp.,
503 U.S. 258 (1992) 20

Image Tech. Servs., Inc. v. Eastman Kodak Co.,
125 F.3d 1195 (9th Cir. 1997).....39

Law Offices of Curtis V. Trinko, LLP. v. Bell Atl. Corp.,
305 F.3d 89 (2d Cir. 2002),
rev'd on other grounds sub nom. Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP,
124 S. Ct. 872 (2004) 14, 15, 17

MetroNet Services Corp. v. U.S. West Communications,
329 F.3d 986 (9th Cir. 2003), *vacated sub nom. Qwest Corp. v. MetroNet Servs. Corp.,*
124 S. Ct. 1144 (2004) 10

MetroNet Servs. Corp. v. Qwest Corp.,
383 F.3d 1124 (9th Cir. 2004)..... passim

O'Brien v. Western Union Tel. Co.,
113 F.2d 539 (1st Cir. 1940) 22

San Jose Christian College v. City of Morgan Hill,
360 F.3d 1024 (9th Cir. 2004).....23

SmileCare Dental Group v. Delta Dental Plan,
88 F.3d 780 (9th Cir. 1996).....39

Southern Pacific Co. v. Darnell-Taenzer Lumber Co.,
245 U.S. 531 (1918) 21, 22

Stone v. Travelers Corp.,
58 F.3d 434 (9th Cir. 1995).....13

United States v. Colgate & Co.,
250 U.S. 300 (1919) 25

Valdes v. Quest Communications Int'l, Inc.,
147 F. Supp. 2d 116 (D. Conn. 2001) 22

Vandenberg v. Superior Court,
21 Cal. 4th 815 (1999).....9

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP,
124 S. Ct. 872 (2004) .... passim

Verizon New Jersey, Inc. v. Ntegrity Telecontent Servs., Inc.,
219 F. Supp. 2d 616 (D.N.J. 2002) 15

Statutes and Codes

Title 15, United States Code
Section 15 20

Title 47, United States Code
Section 153(29) 5, 29
Section 206 .... passim
Section 207 .... passim
Section 214(a) 34
Section 214(c) 34
Section 251 .... passim
Section 251(a) 4
Section 251(b) 4
Section 251(c)(1) 4, 17
Section 251(c)(2) 5, 17
Section 251(c)(3) .... passim
Section 251(c)(6) 6
Section 252(a) 17
Section 252(b) 17
Section 252(d) 5
Section 252(e)(1) 17
Section 252(e)(6) 17
Section 258 22
Section 271(c)(2)(B)(ii) 44
Section 310(d) 11, 34
Section 503(b)(1)(B) 44

Rules and Regulations

Federal Rules of Civil Procedure
Rule 12(b)(6) 13

Title 47, Code of Federal Regulations
Section 51.5 .... 4, 5

<u>Other Authorities</u>

IIIA P. Areeda & H. Hovenkamp, *Antitrust Law* (2d ed. 2002 & Supp. 2003) 39, 43

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15499 (1996) 29, 32

In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd. 3696 (1999) 30, 31

In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd. 24012 (1998) 30, 32

R. Bork, *The Antitrust Paradox* (1978) 35

INTRODUCTION

This is one of a number of antitrust lawsuits filed against incumbent telephone companies in recent years alleging that the defendant controls facilities necessary for competitors to operate and has wrongfully refused access to those facilities or granted access only at unattractive prices or on disadvantageous terms. Initially, the courts reached conflicting results on the viability of such claims, with some holding that the incumbent had an affirmative antitrust duty to share its facilities while others held that the antitrust laws impose no such duty. In January 2004, the Supreme Court resolved the conflict by squarely holding that this type of claim of "insufficient assistance in the provision of service to rivals is not a recognized antitrust claim." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 880 (2004).

The district court correctly concluded that *Trinko* governs this case and makes it "absolutely clear that all [Stein's] theories of liability fail." ER 2604. As did the plaintiff in *Trinko*, Stein alleged that defendants (collectively "SBC") had an antitrust duty to deal with competitors. But, as in *Trinko*, all SBC's dealings with its competitors were compelled by the Telecommunications Act of 1996 and were subject to an extensive statutory and regulatory enforcement scheme. *Trinko* held that such compelled dealings, even when inadequately performed, do not support an antitrust claim.

Stein tries to salvage his antitrust claims by recasting one of SBC's alleged violations of the Telco Act—failing to provide complete loop

qualification information—as the breach of a duty SBC allegedly voluntarily assumed wholly apart from the Telco Act or any statutory or regulatory compulsion. This argument is meritless.

As the district court correctly ruled, the Telco Act *required* SBC to provide loop qualification information. Indeed, the sole purpose of providing loop qualification information is to implement yet another duty imposed by the Telco Act—*i.e.,* leasing the loops themselves as an unbundled network element. Stein asserts that this statutory duty became a "voluntary" undertaking when it was also included in conditions the FCC imposed on SBC when the FCC approved the merger between SBC and Ameritech. But, as the district court also correctly ruled, SBC's acquiescence to this kind of regulatory demand is not the type of uncoerced, prior course of business dealing that can support refusal-to-deal liability under the antitrust laws.

Nor can Stein resuscitate his other two antitrust claims. His essential facilities claim fails for the same reason the same claim failed in *Trinko*: the "indispensable requirement" for imposing "a judicial doctrine of forced access" is lacking because access is required by the Telco Act and is subject to enforcement by state and federal regulators. *Trinko*, 124 S. Ct. at 880-81. Stein's monopoly leveraging claim cannot survive the failure of his other two antitrust claims. Because Stein's antitrust claims are indistinguishable from those the Supreme Court rejected in *Trinko*, the district court correctly granted summary judgment in favor of SBC.

The district court also correctly dismissed Stein's claims under the Telco Act. The duties imposed on incumbents under the Telco Act are owed to competing carriers, are triggered only by requests by competing carriers, and are implemented through interconnection agreements. A claim (such as the one in this case) that a carrier that has not fulfilled its obligations in its interconnection agreements with competing carriers does not state a claim for violation of the Telco Act. Nor is it a claim that consumers have standing to assert.

STATEMENT OF JURISDICTION

Appellees agree with Stein's statement of jurisdiction.

STATEMENT OF THE ISSUES

1. Did the district court correctly dismiss Stein's Telco Act claim because the act does not create a private right of action for consumers to enforce duties that incumbent telephone companies owe to competing carriers?

2. Did the district court correctly grant summary judgment for defendants on Stein's antitrust claims where they are indistinguishable from those the Supreme Court rejected in *Trinko*?

STATEMENT OF THE CASE

A. Stein's Allegations.

Although this action is based on SBC's alleged failures to share its facilities and network with competitors, Stein is not a competitor of SBC. Rather, he is a consumer of DSL services. ER 4. Stein brought this action on behalf of himself and other purchasers of Digital Subscriber Line ("DSL") service from SBC. DSL technology allows for high-speed internet access over

existing telephone lines without interfering with voice telephone service over the same line. ER 6. Stein alleged that SBC, the incumbent local exchange carrier ("ILEC") for most of California, was guilty of unlawful monopolization and other violations of law because it had not lived up to its obligations to facilitate the entry of competitors into the market. ER 2.

The Telco Act ushered in a new regime that required ILECs to help new companies (competitive local exchange carriers or "CLECs") compete against them in providing local telephone service and high-speed internet access to consumers. As the Supreme Court put it, the statute created "something brand new—the wholesale market for leasing network elements." *Trinko,* 124 S. Ct. at 880 (internal quotation marks and citation omitted). Under section 251 of the Telco Act, all telecommunications carriers must interconnect with other carriers for the mutual exchange of telecommunications traffic and must install only network features that comply with standards established in the Act. 47 U.S.C. § 251(a); *see also* 47 C.F.R. § 51.5 (definition of "interconnection"). Local exchange carriers must, among other things, permit resale of their services and provide competing local carriers with nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing. 47 U.S.C. § 251(b).

ILECs like SBC have still further obligations:

- They must negotiate in good faith interconnection agreements with CLECs that implement the duties prescribed in subsections 251(b) and (c). *Id.* § 251(c)(1).

- They must provide interconnection at any technically feasible point to their network that is at least equal in quality to that they provide to themselves and at cost-based rates. *Id*. §§ 251(c)(2), 252(d).
- They must rent pieces of their local networks ("unbundled network elements" or "UNEs") to new competitors at cost-based rates. *Id.* §§ 251(c)(3), 252(d). "Network element" is broadly defined as "a facility or equipment used in the provision of a telecommunications service." 47 U.S.C. § 153(29). Network elements include the copper wires, known as "local loops," that run from a phone company's central switching offices to a customer's premises and over which voice telephone service and DSL are provided. ER 8. Network elements also include "loop qualification information," which is data about the capability of the loop to support DSL service, including the composition of the loop (*e.g.,* copper, fiber optics), the existence and location of electronic equipment on the loop that may inhibit the line's ability to provide DSL service, the length of the loop, the wire gauge of the loop, and its electrical parameters. 47 C.F.R. § 51.5 (definition of "pre-ordering and ordering").
- ILECs must also make available space in their buildings ("collocation") for competitors to place equipment necessary for interconnection or access to UNEs, or where such physical collocation is not practical, must provide for "virtual collocation"

using the ILECs own equipment. 47 U.S.C. § 251(c)(6); 47 C.F.R. § 51.5 (definitions of "physical collocation" and "virtual collocation").

Stein's second amended complaint closely tracks the Telco Act. It begins by reciting the passage of the Telco Act, SBC's entry into interconnection agreements as required by the Act, and SBC's alleged conduct "[i]n contravention of [its] contractual obligations." ER 6-8. Each of Stein's key claims of wrongdoing relies specifically on alleged violations of obligations imposed by the Telco Act—denial of physical collocation, insistence on "cages" around collocated equipment in alleged contravention of an FCC directive, delays in providing unbundled network elements such as dedicated transport lines and local loops, discriminatory denials of access to unbundled network elements (including loop qualification information), and unreasonable imposition of spectrum management policies that required CLECs to conform to SBC's chosen DSL technology. ER 9-13.

Based on these alleged violations of Telco Act duties, as implemented through SBC's interconnection agreements with CLECs, Stein asserted antitrust claims under Section 2 of the Sherman Act, a claim for violation of the Telco Act, and state law claims under the California Unfair Competition Law and Cartwright Act. ER 17-21. Stein's theory was that SBC's alleged failures to adequately assist its competitors "in violation of [its] agreements" with those competitors had "increased the cost" to competitors of providing service to

consumers like Stein, resulting in "higher prices" and "inferior service." ER 20-21.

B. <u>Motion to Dismiss and Summary Judgment Proceedings</u>.

On SBC's motion to dismiss, the district court dismissed Stein's Telco Act claim. The court held that the Act does not create a private right of action for consumers to enforce sharing duties owed to CLECs. ER 193-94. The district court also dismissed Stein's Cartwright Act claim on the ground that the Cartwright Act does not provide a cause of action for alleged monopolization but only for conspiracies or combinations in restraint of trade (which Stein has not alleged). ER 194-95.

SBC then moved for summary judgment on three principal grounds. ER 290-332. First, SBC argued that, contrary to Stein's claim that the relevant market consists only of DSL service, the market also includes other types of high-speed internet access services available to consumers. Principal among these services is cable modem, which provides the same basic functionality as DSL service and whose providers compete aggressively against DSL for customers such as Stein. Cable modem service is not provided over telephone lines and thus does not depend on any assistance from phone companies such as SBC. When the relevant market is properly defined, SBC argued its share of that market is insufficient to support any claim for monopoly under Section 2. ER 308-17.

Second, SBC argued that summary judgment should be granted on the ground the Supreme Court subsequently adopted in *Trinko—i.e.,* that the

antitrust laws do not obligate companies (even those with alleged monopoly power) to provide assistance to competitors in the manner alleged by Stein, and that the limited exception to that rule recognized in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585 (1985), does not apply here because SBC had not unilaterally terminated a prior course of dealing that had voluntarily originated in commercial dealings in a competitive market apart from any regulatory compulsion. ER 317-28.[1]

Third, SBC argued that Stein had presented no evidence that any of SBC's alleged deficiencies in assisting its rivals had any effect on the prices that Stein or other consumers paid for DSL service in California during the alleged class period. Most of the conduct on which Stein relied (including the alleged delays in providing collocation to Covad Communications Company, which was the focus of the Covad/SBC arbitration to which Stein refers (Br. 5-8)) occurred in years well before the alleged class period, at a time when DSL service was first being rolled out and the procedures for accommodating interconnection and other requests under the recently enacted Telco Act were still being developed.[2]

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[1] Although it is ultimately irrelevant, Stein is thus incorrect in asserting, Br. 14, that SBC's summary judgment motion "was premised on factual questions unrelated to *Trinko*." Although *Trinko* had not yet been decided, SBC asserted from the beginning of this case that Stein's allegation of insufficient assistance to rivals failed to state an antitrust claim. *See also* SER 1-9.

[2] As Stein notes, Covad and SBC entered into a comprehensive settlement of their disputes while SBC's judicial challenge to the arbitration award was still pending. Although it has no bearing on any issue in this appeal, Stein is incorrect in asserting that SBC "misrepresented" to the California court of appeal that no third parties had an interest in the arbitration award in a

(continued . . .)

The other conduct on which Stein relied consisted of various regulatory violations (such as the manner in which SBC reported certain information to the FCC pertaining to areas other than California) or similar alleged deficiencies that Stein failed to show had any effect on any competitor in California, let alone any effect on the prices consumers in California paid. ER 328-30, 2052-53, 2558.

In opposing SBC's motion, Stein argued with respect to SBC's second ground that he had proved a refusal-to-deal theory of monopolization based on evidence (1) that SBC had entered interconnection agreements with competing carriers as required by the Telco Act under which it was obligated to provide collocation, loops and loop qualification information, and (2) that SBC had thereafter allegedly failed to adequately perform those duties. ER 1043-44. Stein did not assert that SBC had voluntarily undertaken any of these duties apart from the requirements of the Telco Act or that any of the duties existed independently of the Telco Act. To the contrary, in his own contemporaneously filed summary judgment motion, he squarely placed the source of the duties in the Telco Act itself, asserting that "defendants' collocation, loop qualification,

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"deceptive attempt" to undo that award. Br. 7-8. SBC argued to the California court that there was no reasonable possibility that vacating the judgment confirming the award would adversely affect the interests of non-parties, because as a matter of California law nonparties had no cognizable interest in the award. ER 467-68 (citing *Vandenberg v. Superior Court*, 21 Cal. 4th 815 (1999)). The California court later disagreed with SBC's interpretation of the applicable law, but did not find that SBC had engaged in any misrepresentation. ER 1172-78.

and other DSL network-related practices violated the Telco Act." SER 19. Specifically with regard to loop qualification, he repeated that defendants' loop qualification system was "in violation of the Telco Act." SER 20.

Stein also argued that he had a valid claim under an essential facilities theory. ER 1042-43. Relying on an Eleventh Circuit decision, Stein argued that SBC had an antitrust duty to provide access to its facilities on fair and reasonable terms. That decision, however, was vacated by the Supreme Court following *Trinko* and the Eleventh Circuit on remand held that the essential facilities claim it had earlier approved was barred by *Trinko.*[3] Stein also relied for this proposition on this Court's original decision in *MetroNet Services Corp. v. U.S. West Communications*, 329 F.3d 986 (9th Cir. 2003). That decision, like the Eleventh Circuit's *Covad* decision, was vacated by the Supreme Court after *Trinko*. *Qwest Corp. v. MetroNet Servs. Corp.,* 124 S. Ct. 1144 (2004). In its decision on remand in *MetroNet*, this Court rejected the plaintiffs' essential facilities theory and affirmed summary judgment in the defendants' favor. *MetroNet Servs. Corp. v. Qwest Corp.,* 383 F.3d 1124 (9th Cir. 2004).

While SBC's summary judgment motion was pending, the Supreme Court decided *Trinko*. In supplemental briefing addressed to *Trinko*'s effect, Stein did not contest that *Trinko* barred essentially all of his prior theories of antitrust

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[3] *Covad Communications Co. v. BellSouth Corp.,* 299 F.3d 1272 (11th Cir. 2002), *vacated sub nom. BellSouth Corp. v. Covad Communications Co.,* 124 S. Ct. 1143 (2004), *on remand, Covad Communications Co. v. BellSouth Corp.,* 374 F.3d 1044 (11th Cir. 2004).

liability, including his claims based on SBC's alleged failures to provide collocation space or loops. ER 2604-05. He argued, however, that one narrow aspect of his claim survived: his claim that SBC had not provided adequate loop qualification information to its competitors. ER 2043-57, 2580-86.[4] Reversing his prior position that SBC's loop qualification system was "in violation of the Telco Act," SER 20, he now argued that "SBC was never compelled by statute (or otherwise) to offer loop qualification information to CLECs and ISPs." ER 2035. Instead, he argued, that duty arose only from allegedly voluntary conditions the FCC insisted on before it would grant the required regulatory approval for SBC's 1999 merger with Ameritech.[5] Those conditions ran for nearly seventy pages, addressing a wide variety of topics and imposing numerous requirements, many of which restated obligations already existing under the Telco Act and others of which established duties that went beyond anything imposed by the Telco Act standing on its own (*e.g.,* a requirement that SBC set up a separate affiliate to provide certain services, including DSL). ER 2352-2424.

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4 Stein did not claim that SBC refused to provide loop qualification information. Instead, he relied on evidence that, in certain circumstances and for a limited period of time, SBC's loop qualification system provided CLECs with electronic information about the first loop inventoried in the computer system rather than all the loops serving a particular address. ER 2050-52.

5 SBC merged with Ameritech, Inc. in 1999, more than three years after the Telco Act was enacted. As discussed below (at 34-36), the FCC's approval was required before Ameritech's licenses could be transferred to SBC. *See* 47 U.S.C. § 310(d); ER 2064-2314 (FCC merger order).

When SBC showed that the loop qualification information provisions contained in the merger conditions did not go beyond the requirements of the Telco Act but instead implemented duties that the Act has imposed from the beginning, *see infra,* pp. 28-30, Stein changed course again. His new position was that the merger conditions related to loop qualification information at least went beyond the Telco Act in one narrow respect related to providing electronic access. ER 2581. But that assertion proved meritless as well. *Infra,* pp. 31-33. That left Stein to argue the position he now advances on appeal—that although the Telco Act required that SBC provide loop qualification information to its competitors, that statutory duty became a "voluntary" undertaking for purposes of subjecting SBC to antitrust liability when it was restated in the merger conditions that provided additional regulatory enforcement tools.

C. <u>The District Court's Ruling</u>.

The district court granted summary judgment for SBC, concluding that the Supreme Court's decision in *Trinko* was controlling. ER 2596-610. Noting that Stein had narrowed his claim solely to SBC's alleged failure to adequately provide loop qualification information, the court ruled that this alleged failure did not support antitrust liability because the duty to provide loop qualification information was imposed by the Telco Act and the conditions in the SBC-Ameritech merger order did not go beyond those statutory requirements. The court further concluded that, even had the merger conditions imposed some duty beyond those found in the Telco Act, that would not support antitrust liability because the imposition of the merger conditions was not the kind of uncoerced

prior course of dealing that *Trinko* requires to state a refusal-to-deal antitrust claim. The court also noted that SBC was not otherwise offering the allegedly withheld service to the public at retail, and that SBC was subject to the same regulatory enforcement scheme under the Telco Act that was at issue in *Trinko* and on which the Supreme Court relied in finding antitrust liability improper in that case.[6]

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT STEIN LACKS STANDING TO ASSERT CLAIMS FOR REGULATORY VIOLATIONS UNDER THE TELCO ACT.

A. Standard of Review.

The Court reviews de novo a district court's grant of a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss. *Stone v. Travelers Corp.*, 58 F.3d 434, 436-37 (9th Cir. 1995).

B. No Underlying Violation of Section 251 Exists Upon Which to Predicate a Claim Under the Telco Act.

Stein argues that sections 206 and 207 of the Telco Act afford him the right to bring a claim under the Telco Act. Br. 21. But sections 206 and 207 do not by themselves create a right of action. They depend on the existence of an underlying violation of some other provision of the Telco Act. 47 U.S.C. § 206 ("common carrier shall be liable to the person or persons injured . . . for the full

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[6] Because *Trinko* barred Stein's antitrust claim, the district court did not reach SBC's alternative grounds for summary judgment (including those based on Stein's artificial market definition). ER 2604 n.6. The district court also declined to exercise jurisdiction over Stein's remaining state law claim and dismissed it without prejudice. ER 2609.

amount of damages sustained in consequence of any such *violation of the provisions of this chapter*") (emphasis added); § 207 (allowing "[a]ny person claiming to be damaged by any common carrier subject to the provisions of this chapter" to make a complaint to the FCC or bring a suit for damages in federal court). Thus, whether a plaintiff has a right to sue under these provisions turns initially on a proper allegation that the defendant has violated a substantive provision of the Telco Act.

Stein claims that section 251 is the substantive provision giving rise to his cause of action. Br. 21. And he relies on the Second Circuit's decision in *Trinko* for the proposition that consumers may assert a claim under section 206 and 207 for an ILEC's alleged failure to perform the sharing duties imposed by that section. *Law Offices of Curtis V. Trinko, LLP. v. Bell Atl. Corp.*, 305 F.3d 89, 103 (2d Cir. 2002), *rev'd on other grounds sub nom. Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872 (2004). But Stein ignores the Second Circuit's actual holding, which was that the consumers could *not* assert a claim based on alleged violations of section 251 and that the district court in that case had properly dismissed that claim.

The Second Circuit ruled that section 251 does not set forth "free-standing" obligations for which consumers may sue, but rather "envisions that these duties will be implemented through state approved contracts between the carrier requesting interconnection and the ILEC." 305 F.3d at 103. Thus, an ILEC may fulfill its duties under section 251 "by entering into interconnection agreements with telecommunications carriers seeking to enter the local market."

Id. at 102. Once an ILEC "fulfill[s] the duties" under section 251 by entering into an interconnection agreement, "it is then regulated directly by the interconnection agreement." *Id.* at 104. The Second Circuit found that any conduct that breaches an interconnection agreement thus cannot be considered a violation of section 251. *Id.* And, "[w]ithout an underlying violation of section 251, the plaintiff has no cause of action under sections 206 and 207, even if it were permitted to bring a suit for violations of section 251 pursuant to sections 206 and 207." *Id.* at 105. The court further observed that allowing a cause of action under sections 206 and 207 for violation of the "abstract duties described in section 251" when an interconnection agreement is in place would diminish carriers' incentive to enter into such agreements and would allow a requesting carrier to "end-run" the negotiated language in the agreement by bringing a lawsuit based on section 251's generic language. *Id.* at 104-05*; accord Verizon New Jersey, Inc. v. Ntegrity Telecontent Servs., Inc.*, 219 F. Supp. 2d 616, 632-33 (D.N.J. 2002) (finding no violation of section 251 cognizable under sections 206 and 207 where carrier complied with section 251 obligations by entering into interconnection agreement).

The same circumstance exists here. Just as in *Trinko,* SBC has complied with its duty under section 251 to enter interconnection agreements with other DSL providers, and any alleged breach of such agreements by SBC does not provide Stein or other non-parties to the agreement with a cause of action under sections 206 or 207 for violation of section 251. *See* ER 6 (interconnection agreements "address the obligations of ILECs such as Pacific"), ER 8 ("[i]n

contravention of the *contractual obligations* contained in Pacific's agreements with competitors" defendants "have engaged in the anticompetitive practices described herein.") (emphasis added), ER 7 ("[i]ncorporating the requirements of the Telecom Act, the interconnection agreements . . . allow a competitor . . . to access the ILECs' networks and facilities").[7]

C. **Even if Section 251 Had Been Violated, Stein Has No Right as a Consumer to Sue for that Violation.**

The district court's dismissal of Stein's section 251 claim was also proper because, as the district court properly ruled, "§§ 206 and 207 of the Telecommunications Act do not create a right of action in favor of consumers to enforce duties owed to competing local carriers." ER 193 (citing *Goldwasser v. Ameritech Corp.*, 1998 WL 60878 (N.D. Ill. Feb. 4, 1998)).

The "brand new" obligation imposed by section 251 to create a "wholesale market for leasing network elements," *Trinko*, 124 S. Ct. at 880, is peculiarly a matter between competing carriers, subject to a specific implementation and enforcement scheme set out in the statute. An ILEC's duty to provide the kinds of assistance to competitors Stein seeks to enforce here—

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[7] To the extent Stein relies on alleged violations of FCC regulations imposing requirements under the Telco Act that may go beyond those stated in section 251 and implemented in SBC's interconnection agreements, he lacks the right to assert that claim as well because sections 206 and 207 do not extend to such regulations. *See Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1050-52 (9th Cir. 2003), *cert. denied*, 124 S.Ct. 2026 (2004) (holding that payphone service providers have no private right of action under sections 206 and 207 where the alleged violation was of FCC's regulations rather than of duties imposed on the carrier by the statute itself).

e.g., collocation, loops, and loop qualification information—does not exist on its own. It is triggered only by a request from a competing carrier (*e.g.,* 47 U.S.C. § 251(c)(2), (3)), and is owed solely to that requesting carrier. Nowhere does section 251 impose any duties owed to consumers. Nor does the statute give consumers the right to trigger any of the duties specified in section 251 or otherwise insist that ILECs provide assistance to competing carriers. *Cf. Trinko,* 305 F.3d at 103 ("It is clear that the duties enumerated in section 251 regulate the relationships between telecommunications carriers . . . rather than the relationships between telecommunications carriers and consumers.").

As noted above, the mechanism for implementing section 251 duties is an interconnection agreement negotiated between the carriers. 47 U.S.C. §§ 251(c)(1), 252(a). The carriers may negotiate the terms of the agreement between themselves or either one of them may petition the relevant state public utilities commission to have the terms resolved by arbitration. *Id.* § 252(a), (b). Whether negotiated or arbitrated, the arbitration agreement must be approved by the state commission, and review of that decision may be had in federal court. *Id.* § 252(e)(1), (6). Again, consumers are given no right to demand that an interconnection agreement be negotiated or to insist upon an arbitration if negotiation fails. These issues are left to the carriers and to the state commission.

As the Covad claim and arbitration to which Stein refers, Br. 5-8, vividly illustrate, competing carriers who believe an ILEC has not lived up to its obligations under section 251 as embodied in an interconnection agreement have

both the incentive and the ability to enforce their rights under their interconnection agreements. Similarly, ILECs such as SBC are subject to regulatory enforcement for failures to live up to their section 251 obligations. *See Trinko,* 124 S. Ct. at 876-77, 882-83.

In these circumstances, the district court correctly ruled that the general language of sections 206 and 207 does not extend a right of action to consumers such as Stein to enforce duties under section 251. At best, Stein's claims of injury are remote and derivative of the claims of the requesting carriers. He asserts that he and other consumers have paid "higher prices" and suffered "inferior service" because of SBC's practices, "in violation of [its] agreements with competing providers and the Telecom Act, which have increased the cost to the industry players of providing DSL services to consumers like Plaintiff and the Class." ER 20-21. Permitting consumer claims such as this of alleged injury flowing from breaches of agreements with competing carriers that are said to have driven up those competing carriers' costs is the kind of indirect injury for which consumers do not have standing. Such consumer claims would embroil the courts and carriers in duplicative (and potentially inconsistent) litigation of the very issues the Telco Act reserves for direct enforcement by the competing carriers themselves and the relevant regulatory agencies. The requesting carriers whose rights are directly at issue under their own agreements are the parties properly situated to litigate such claims. Those carriers are the parties directly involved in the events at issue, with first-hand knowledge of the alleged

deficiencies, of whether their costs have increased, and of whether any increased costs have had any impact on their ability to compete.

By contrast, Stein's claim of injury is not direct but is dependent on whether competing carriers have in fact suffered any harm that has affected their ability to compete.[8] Litigation brought by consumers would be litigation by proxy, dependent on the consumers proving that the defendant breached its agreements with absent third parties and with each side relegated to inferior methods of third-party discovery and proof. Just as Congress sought to achieve its goals under the Telco Act by leaving it to competing carriers to request access in the first instance and imposing duties under section 251 only as to such carriers, any private right of action to enforce those duties is properly limited to the carriers to which they were owed. *See Goldwasser,* 1998 WL 60878 at *11 (ruling that consumers do not have a private right of action to enforce duties that exist "only within the framework of the negotiation/arbitration process" created by sections 251 and 252).[9]

Contrary to Stein's contention, Br. 23, this analysis does not improperly rely on "common law negligence" principles. Instead, it properly interprets the

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[8] Stein's argument that his injury is "distinct" from that of competing carriers, Br. 24, is irrelevant. No matter how "distinctive" it is, it is dependent on, and derivative of, harm to competing carriers.

[9] The Seventh Circuit affirmed the district court's dismissal of plaintiffs' Telco Act claims on the ground that these claims were barred by the filed rate doctrine. *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 402 (7th Cir. 2000). The court thus did not reach the district court's conclusions regarding plaintiffs' standing to assert those claims.

scope of the right of action Congress intended to create in enacting sections 206 and 207. When Congress has provided a right of action for "persons injured," the courts have recognized that that term is not self-defining because of the breadth of persons who may be able to fashion a claim of some kind of injury. Thus, the courts are called upon to determine the scope of the class of potentially injured persons who are entitled to sue, and have excluded from that class persons whose allegations of injury are too remote or indirect.

In *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519 (1983), for example, the Supreme Court construed the right of action contained in the antitrust laws—providing for suit by "[a]ny person who shall be injured . . . [by] anything in the antitrust laws" (15 U.S.C. § 15)—as not extending to "every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." 459 U.S. at 529. The Court concluded the "broad language" of the statute did not resolve the issue, *id.* at 535, and that the courts are required instead to "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Id.* at 536. Among other things, the Court noted that the "directness or indirectness of the asserted injury" is an important factor in identifying the parties entitled to sue. *Id.* at 540. Similarly, "[t]he existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest" weighs heavily against permitting more remotely injured parties to sue. *Id.* at 542; *see also Holmes v. Sec. Investor Prot. Corp.,* 503 U.S. 258, 269-70 (1992) (holding that provision in RICO granting

right to sue to "any person injured" was limited by considerations of remoteness and indirectness; "directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely"); *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 347-48 (1984) (holding that consumers did not have standing to sue where the statutory scheme "indicates that Congress intended only producers and handlers, and not consumers," should have standing, and "[a]llowing consumers to sue . . . would severely disrupt this complex and delicate administrative scheme").

There is no reason to believe that Congress intended any different meaning for sections 206 and 207. Those provisions were expressly modeled on the right of action provisions of the Interstate Commerce Act ("ICA"). *See Conboy v. AT&T Corp.,* 241 F.3d 242, 250 (2d Cir. 2001). As the Supreme Court noted in *Associated General Contractors,* 459 U.S. at 534, the ICA provisions were authoritatively construed in *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.,* 245 U.S. 531 (1918), as allowing suit "if proximately the plaintiff has suffered a loss" but as "not attribut[ing] remote consequences to a defendant." 245 U.S. at 533-34. As the Court observed, "[t]he general tendency of the law . . . is not to go beyond the first step." *Id.* at 533. Stein's argument that courts are to blind themselves to any consideration of the remote or derivative nature of a particular plaintiffs' claim, or the degree to which entertaining it would interfere with the scheme Congress created, is irreconcilable with these precedents.

Stein cites *O'Brien v. Western Union Tel. Co.,* 113 F.2d 539 (1st Cir. 1940), for the proposition that the right of action under sections 206 and 207 is governed by uniform federal rules rather than "common law." Br. 23-24. As *Darnell-Taenzer* makes clear, however, the relevant federal law precludes a literal reading of the statute that would confer standing based solely on an allegation of injury without regard to the indirect or derivative nature of that injury.

Stein's reliance on *Valdes v. Quest Communications Int'l, Inc.*, 147 F. Supp. 2d 116 (D. Conn. 2001), Br. 25, only shows the lack of merit in his position. The provision at issue there, 47 U.S.C. § 258, does not prescribe duties owed solely to competing carriers that are triggered only by a request from such a carrier. Instead, it prohibits carriers from engaging in "slamming"—*i.e.,* changing a subscriber's telephone long distance carrier without proper verification. The district court found that consumers could sue to enforce this prohibition because the "statute may be read as having been created to benefit a special class, i.e., consumers who have had their long distance carriers changed illegally." 147 F. Supp. 2d at 124. Nothing in such a claim is derivative of duties owed to others, or dependent on proof of harm to others. The duty imposed is owed directly to the consumer and its breach directly harms the consumer, without regard to any harm to others. Far from suggesting that a consumer may assert a claim for violation of any provision of the Telco Act under sections 206 and 207 without regard to the nature of the underlying alleged violation or theory of harm, *Valdes* makes clear that the underlying

provision must be analyzed to determine whether it gives rise to a claim in favor of the particular plaintiff. The underlying provision here does not provide Stein with a claim under the Telco Act.[10]

Because section 251 does not create duties owed to consumers and allowing consumers to sue for alleged violations of that provision would disrupt the complex regulatory scheme established by the Telco Act, Stein does not have standing to assert his Telco Act claims.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT STEIN'S ANTITRUST CLAIMS CANNOT SURVIVE *TRINKO*.

A. Standard of Review.

This Court reviews the district court's grant of summary judgment *de novo*. *See MetroNet Servs. Corp.*, 383 F.3d at 1128. Summary judgment may be affirmed on any ground supported by the record. *See San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1030 (9th Cir. 2004).

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[10] Contrary to Stein's argument, Br. 24-25, the Second Circuit in *Trinko* did not rule that sections 206 and 207 provide a right of action to any person claiming to have been injured by a violation of section 251. It expressly declined to reach that issue based on its conclusion that no violation of section 251 had been shown. 305 F.3d at 103. As discussed above (at 13-16), that conclusion is fully applicable here. But Stein's claim also fails for the independent reason that, even if a violation of section 251 had been shown, Stein lacks standing to bring an action based on that violation.

B. <u>Stein Cannot Distinguish His Refusal-to-Deal Claim from the One Rejected in *Trinko*</u>.

1. <u>*Trinko Establishes that Violations of the Telco Act's Sharing Obligations Cannot Form the Basis of a Refusal-to-Deal Claim*</u>.

Stein's antitrust allegations here mirror those the Supreme Court found insufficient to state an antitrust claim in *Trinko.* As here, the plaintiff in *Trinko* was a consumer who asserted antitrust claims based on an ILEC's failure to comply with the Telco Act's sharing obligations. *Compare* 124 S. Ct. at 877 *with* ER 2, 6-8. Like Stein, the plaintiff in *Trinko* alleged that the incumbent local exchange carrier "had filled rivals' orders on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or remaining customers of [CLECs]." *Compare* 124 S. Ct. at 877 *with* ER 9-13. As here, the plaintiff alleged that the ILEC's failure to allow proper access to its local loop deterred potential customers from switching to rivals. *Compare* 124 S. Ct. at 877 *with* ER 12-13. Finally, as here, the plaintiff in *Trinko* raised refusal-to-deal, essential facilities, and monopoly leveraging claims. *Compare* 124 S. Ct. at 879-81, 883 n.4 *with* ER 17-20. Indeed, the only difference between Trinko's and Stein's claims is an immaterial one: *Trinko* dealt with local telephone services over the lines of ILECs, whereas this case concerns DSL service over those same lines.[11]

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[11] Before the Supreme Court granted Verizon's petition for certiorari in *Trinko*, Stein himself admitted that his claims were "virtually identical" to those in *Trinko*. SER 12.

The Supreme Court held that allegations of this kind do not state a violation of antitrust duties and do not state a valid antitrust claim. In so holding, the Court first reaffirmed the general rule that even monopolists have no duty to do business with their competitors. *Trinko*, 124 S. Ct. at 879. The Court noted that "[f]irms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers." *Id.* Requiring such firms to "share the source of their advantage" is problematic for several reasons. *Id.* First, it is in "some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities." *Id.* Second, "[e]nforced sharing . . . requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited." *Id.* Finally, "compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion." *Id.* Thus, the Court concluded, "as a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'" *Id.* (quoting *United States v. Colgate & Co.,* 250 U.S. 300, 307 (1919)).

The Court noted that it has "been very cautious" in recognizing any exceptions to this general rule "because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm." *Id.* It then held that the rule's "limited exception" recognized in

Aspen Skiing was inapplicable. 124 S. Ct. at 880-81. Describing that case as "at or near the outer boundary of § 2 liability," the Court emphasized that the defendant in *Aspen Skiing* (operating in an unregulated industry) had voluntarily entered into a commercial course of dealing and "had cooperated for years" with its competitor, after which it had unilaterally terminated this voluntary relationship and refused to sell to the competitor even at full retail price. *Id.* at 879. By contrast, in *Trinko,* there was no allegation that "Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion." *Id.* at 880. Instead, Verizon was providing access to its facilities as mandated by the Telco Act. Moreover, there was no allegation that Verizon refused to sell to a competitor even at full retail price. *Id.* The Court also noted that the statutory sharing duties Verizon allegedly violated did not involve merely selling to a rival the same product already being sold to others. Instead, granting access meant that "[n]ew systems must be designed and implemented" at "considerable expense and effort." *Id.*

Finally, the Court observed that the comprehensive regulatory scheme governing ILECs' assistance to rivals weighed heavily against mandating such assistance under the antitrust laws. The Court found it of "particular importance" that the Telco Act imposes "a regulatory structure designed to deter and remedy anticompetitive harm." *Id.* at 881. It noted that ILECs such as Verizon are subject to "continuing oversight" both by the FCC and state regulatory commissions, which have the power to impose sanctions for noncompliance with the duties imposed by the Telco Act. *Id.* at 881-82.

Application of the antitrust laws would thus likely achieve only "slight benefits," against which must be weighed "a realistic assessment of its costs." *Id.* at 882. Among those costs are the difficulty courts will face in evaluating claims about "highly technical" sharing obligations, the "interminable litigation" likely to result from turning disputes over these obligations into treble-damage antitrust claims, and the problematic "continuing supervision of . . . highly detailed decree[s]" that judicial enforcement of these obligations would entail. *Id.* at 882-83.

2. ***Stein's Effort to Salvage His One Claim Related to Loop Qualification Information is Meritless.***

Trinko precludes Stein's refusal-to-deal claim. As discussed above (at 10-12), Stein admits as much for all but one narrow (and artificial) aspect of his original claims. The district court correctly ruled that this aspect of Stein's claim—the alleged failure to adequately provide loop qualification information—is barred by *Trinko* on the same basis as the rest.[12]

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[12] Stein cryptically asserts in this Court that "SBC's voluntary commitments to offer collocation to its rivals are also documented." Br. 30. To the extent this passing reference is meant to suggest that Stein may, despite *Trinko,* predicate a refusal-to-deal claim on a failure to provide collocation, it is meritless. First, Stein waived any such argument by failing to make it below. Second, the evidence Stein cites—one of the conditions imposed in connection with the SBC-Ameritech merger—does not show any voluntary commitment to offer collocation. It simply reaffirms the existing requirement to provide collocation and requires that SBC to conduct an independent audit of its compliance with that pre-existing requirement. ER 2323-24, ¶ 8; *see also* ER 2397-99.

Stein's theory as to loop qualification information is that it falls outside *Trinko* because SBC voluntarily undertook to provide that information to CLECs and thus the alleged deficiencies in the manner in which SBC provided it supports an antitrust claim under *Aspen Skiing*. In the district court, Stein's primary basis for this contention was that the Telco Act does not require ILECs to provide loop qualification information and that SBC undertook to do so solely as a result of its "voluntary" acquiescence to the conditions the FCC imposed in approving the Ameritech merger. ER 2043-49, 2580-86. In this Court, Stein changes his tune somewhat and argues that it is irrelevant whether the Telco Act required SBC to provide loop qualification information, because that statutory obligation became a voluntary one for *Aspen Skiing* purposes when SBC acquiesced to the merger conditions. Br. 39. Both theories are meritless.[13]

a. *SBC was required by the Telco Act to provide loop qualification information.*

Stein appears now mostly to concede that (as he consistently argued until *Trinko* was decided) SBC was obligated by the Telco Act to provide loop qualification information upon request to competing carriers. To the extent he still tries to suggest otherwise, that contention is groundless, as the district court correctly ruled.

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[13] Stein notes that *Trinko* was decided on a motion to dismiss rather than on summary judgment. Br. 19. But this "procedural difference[] . . . make[s] it more difficult for [Stein's] claims to survive summary judgment because the Court's dismissal in [*Trinko*] implied that the plaintiff could prove no set of facts that would entitle it to relief." *MetroNet Servs. Corp.*, 383 F.3d at 1130 n.11.

From the outset, the FCC has consistently interpreted section 251(c)(3) of the Telco Act as requiring the sharing of loop qualification information. In its *First Report and Order* implementing section 251(c)(3) in August 1996, the FCC ruled that operations support systems such as loop qualification databases "fall squarely within the definition of 'network element' and must be unbundled upon request under section 251(c)(3)." *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15499, ¶ 516 (1996) (*"First Report and Order"*).[14] The FCC relied for this conclusion on the statutory definition of "network element" as including "databases" and "information sufficient for billing and collection or used in the transmission, routing, *or other provision* of a telecommunications service." *Id.* ¶ 516 (quoting 47 U.S.C. § 153(29) (emphasis in *First Report and Order*)).

Two years later, the FCC reiterated this statutory requirement and made explicit that it includes loop qualification information:

> Under our existing rules, incumbent LECs are also required to provide competing carriers with nondiscriminatory access to the operations support systems (OSS) functions for pre-ordering, ordering, and provisioning loops. If new entrants are to have a meaningful opportunity to compete, they must be able to determine during the pre-ordering process as quickly and efficiently as can the

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[14] Copies of 47 U.S.C. §§ 206-07, 251-52 and excerpts from the cited FCC orders are attached in an addendum to this brief. *See* Circuit Rule 28-2.7.

> incumbent, whether or not a loop is capable of supporting xDSL-based services.[15]

The FCC again confirmed the requirement in 1999:

> [P]ursuant to our existing rules, an incumbent LEC must provide the requesting carrier with nondiscriminatory access to the same detailed information about the loop that is available to the incumbent, so that the requesting carrier can make an independent judgment about whether the loop is capable of supporting the advanced services equipment the requesting carrier intends to install.[16]

The merger condition does not go beyond implementing this statutory requirement. It specifies that SBC must provide CLECs with access to information available to SBC's retail operations, information about loop design ("theoretical loop length"), and information about loop make-up. ER 2384-85. This is the same information the FCC's orders implementing the Act require.[17]

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[15] *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd. 24012, ¶ 56 (1998) ("*Memorandum Opinion and Order*").

[16] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd. 3696, ¶ 427 (1999) (*"UNE Remand Order"*).

[17] For example, the merger condition describes the required loop make-up information as including:

> "(1) the actual loop length; (2) the length by gauge; and (3) the presence of repeaters, load coils, or bridged taps; and may include, if noted on the individual loop record, (4) the approximate location and number of bridged taps, load coils, and repeaters; (5) the presence of pair-gain devices, digital loop carriers, or digital added main lines, and (6) the presence of disturbers in the same or adjacent binder groups.

(continued . . .)

After SBC pointed out this statutory compulsion, Stein narrowed his argument in the district court to asserting that the Telco Act at least did not require SBC to provide *electronic* access to loop qualification information. ER 2581. Stein has with good reason abandoned that argument as well, as both section 251(c)(3) of the Telco Act and the FCC's orders required SBC to provide CLECs electronic access to loop qualification information. *See UNE Remand Order*, ¶¶ 427, 430, 431 (stating that ILECs must provide "nondiscriminatory access to the same detailed information about the loop that is available to the [ILEC]" and CLECs must be permitted to access information "in the same manner as the [ILEC's] personnel" and "within the same time

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ER 2385. The FCC's *UNE Remand Order* spells out the required loop make-up information in essentially identical terms:

> [I]ncumbent LECs must provide requesting carriers the same underlying information that the incumbent LEC has in any of its own databases or other internal records. For example, the incumbent LEC must provide to requesting carriers the following: (1) the composition of the loop material, including, but not limited to, fiber optics, copper; (2) the existence, location and type of any electronic or other equipment on the loop, including but not limited to, digital loop carrier or other remote concentration devices, feeder/distribution interfaces, bridge taps, load coils, pair-gain devices, disturbers in the same or adjacent binder groups; (3) the loop length, including the length and location of each type of transmission media; (4) the wire gauge(s) of the loop; and (5) the electrical parameters of the loop, which may determine the suitability of the loop for various technologies. Consistent with our nondiscriminatory access obligations, the incumbent LEC must provide loop qualification information based, for example, on an individual address or zip code of the end users in a particular wire center, NXX code, or on any other basis that the incumbent provides such information to itself.

UNE Remand Order, ¶ 427.

intervals"); *Memorandum Opinion and Order*, ¶ 56 (emphasizing that an ILEC "does not meet the nondiscrimination requirement if it has the capability electronically to identify xDSL-capable loops . . . while competing providers are relegated to a slower and more cumbersome process to obtain that information"); *First Report and Order*, ¶ 523 (noting that "[o]bviously, an incumbent that provisions network resources electronically does not discharge its obligation under section 251(c)(3) by offering competing providers access that involves human intervention, such as facsimile-based ordering."); ER 2259 (FCC order noting that SBC already has loop qualification information in electronic form).

Without addressing (let alone refuting) any of the foregoing, Stein refers to an SBC letter stating that the SBC-Ameritech conditions went beyond the requirements of the Telco Act. Br. 34. The letter was referring, however, to the conditions as a whole, not to each individual condition. ER 2316-20. As noted above, the conditions run for seventy single-spaced pages and address a wide range of topics. ER 2352-2424. Some of the conditions impose requirements that the Telco Act by itself does not require, most notably the requirement that the merged company offer advanced services (such as DSL) only through a newly created separate affiliate. ER 2209-13. The presence of such conditions does nothing to establish that the condition related to loop qualification information imposes any obligation beyond what the statute requires.

Stein argued below that it was "illogical" that the merger order would have a condition related to loop qualification information if that condition did

not go beyond what the Telco Act already required. ER 2584. Even if that were true, however, it would hardly be a basis for ignoring the plain language of the statute and the FCC's rulings. But it is not true. Making these obligations an express condition of the merger approval (along with numerous other requirements) gave the FCC significant new enforcement mechanisms beyond those available under the statute by itself. *See* ER 2208-09 (describing FCC enforcement options arising from the merger conditions, including "revok[ing] relevant licenses, or requir[ing] the divestiture of SBC/Ameritech into the current SBC and Ameritech companies").

Thus, to the extent that Stein still contends in this Court that *Trinko* is inapplicable because SBC supposedly undertook to assist its rivals in ways not required by statute, that contention is groundless. Like the plaintiff in *Trinko*, Stein does not and cannot seriously dispute that the Telco Act required SBC to provide loop qualification information and physical collocation to its competitors. Just as in *Trinko,* the "services allegedly withheld . . . [were] brought out on compulsion of the 1996 Act." *Trinko*, 124 S. Ct. at 880.[18]

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[18] Even if the loop qualification provisions in the merger conditions had gone beyond the requirements of the Telco Act in certain respects, that would still not establish any basis for *Aspen Skiing* liability. As discussed in the following section, SBC's acquiescence to the FCC's regulatory demands in connection with the FCC's approval of the merger is not the kind of voluntarily entered course of dealing found sufficient in *Aspen Skiing,* whether the regulatory demands were implementing existing statutory requirements or imposing new ones.

b. *Stein's alternative argument that the merger conditions turned the otherwise compulsory duty into a voluntary one is groundless.*

Nor is there any merit to Stein's alternative argument that it does not matter whether the merger conditions went beyond the Telco Act because SBC's acquiescence to the FCC's demand for the merger conditions shows that SBC "voluntarily" undertook to provide loop qualification information and "would have" done so even absent the compulsion of the Telco Act. Br. 28, 35, 39. Stein's argument rests on a fundamental misunderstanding of *Trinko* and the kind of voluntary course of dealing necessary to support an *Aspen Skiing* claim.

As Stein's own exhibits make clear, the merger conditions were proposed and adopted as a result of the FCC's insistence that, without the conditions, it would not approve the transfer of Ameritech's licenses to SBC that was critical to completion of the merger. *E.g.*, ER 2316; ER 2084-92. The FCC's approval of the license transfers was required under sections 214(a) and 310(d) of the Telco Act. 47 U.S.C. §§ 214(a), 310(d). Exercising that statutory authority, the FCC ruled that the "public interest" standard of those provisions would not be satisfied absent the conditions, which it found it had the power to impose under 47 U.S.C. § 214(c). ER 2091-95.

SBC's acquiescence to this kind of regulatory demand is not the type of "voluntary" course of dealing that supports liability under *Aspen Skiing*. The course of dealing in *Aspen Skiing* was a commercial joint marketing agreement the defendant had entered into directly with a competitor without regard to any

statutory or regulatory compulsion. 472 U.S. at 589 & n.7. The significance of the agreement was that it supported a presumption that the marketing arrangement was profitable to the defendant and that the defendant's later unilateral termination of that arrangement suggested an unlawful exclusion rather than a permissible refusal to deal. The fact that the venture had "originated in a competitive market and had persisted for several years," *id.* at 603, was evidence that the practice was an efficient pattern of distribution that produced "short-run benefits" to the defendant in the form of "daily ticket sales" and consumer goodwill. *Id.* at 604 n.31, 608, 610-11. Thus, the defendant's later refusal to deal—even at full retail price—suggested that the defendant was engaging in exclusionary conduct by "sacrific[ing] short-run benefits and consumer goodwill" to harm a competitor. *Id.* at 610-11.

As the Court in *Trinko* explained, "[t]he unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing [in *Aspen*] suggested a willingness to forsake short-term profits to achieve an anticompetitive end." 124 S. Ct. at 880 (emphasis in original). Such voluntarily entered dealings that persist over time may be considered "optimal distribution patterns" that are "more efficient than alternative patterns of distribution that do not develop." *Aspen Skiing*, 472 U.S. at 604 n.31 (quoting R. Bork, *The Antitrust Paradox* 156 (1978)). The basis for requiring the defendant to justify its unilateral and complete termination of that distribution pattern was thus that the defendant had made "an important change in the character of the market" that had actually developed. *Id.* at 604. It was solely in this circumstance that

the Court found a "limited exception," *Trinko*, 124 S. Ct. at 880, to the general rule that firms have no duty to deal with their competitors or to deal on any particular terms.[19]

No such circumstances exist here. SBC's provision of loop qualification information was not an optimal pattern of distribution that had developed over time in the marketplace apart from any regulatory requirements. It was instead one of many "concessions SBC offered to win approval of its planned merger with Ameritech." Br. 29. The fact that SBC was willing to proceed with the merger in the face of a seventy-page package of conditions on topics ranging from setting up a separate affiliate to discounting prices does not mean that the loop qualification condition—or any other particular condition in isolation—was deemed profitable. Nor would the alleged insufficient performance of the loop qualification condition show that SBC was forsaking any short-term profits. The most that can be said is that SBC expected that the merger with Ameritech, overall, would be a profitable arrangement. But that does not help Stein, because his claim is that SBC failed to provide complete loop qualification information, not that it abandoned the Ameritech merger.[20]

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[19] In *MetroNet*, this Court affirmed summary judgment for the defendant on a refusal-to-deal claim even where a prior voluntary course of dealing had existed. The Court concluded that *Aspen Skiing* did not apply even in that circumstance because the defendant's termination did not involve any sacrifice of short-term profits. 383 F.3d at 1134. Here, the threshold requirement that a prior voluntary course of dealing have existed is itself lacking and defeats Stein's claim.

[20] Stein argues that "SBC was willing to voluntarily undertake dealings with its rivals only as long as the cost of such dealing was outweighed by the benefit

(continued . . .)

Moreover, this case (like *Trinko*) is different from *Aspen Skiing* in the "more fundamental way" that the allegedly withheld service is not something that SBC was providing at retail to other customers but withheld only from CLECs. *See Trinko*, 124 S. Ct. at 880. Loop qualification information is not a retail product. The only reason SBC provided loop qualification information to any third party (whether pursuant to statutory requirement or to the merger condition) was that SBC is required by the Telco Act to lease its loops on an unbundled basis to CLECs. 47 U.S.C. § 251(c)(3). There is no evidence that SBC either was or would have been providing loop qualification information to competitors absent the statutory compulsion to provide the loops themselves. Thus, it is a non-sequitur to ask whether SBC would have agreed to provide loop qualification information "if the Telco Act did not exist." Br. 39. If the Telco Act did not exist, SBC would not have been under any obligation to provide loops (or other network elements) to its competitors and there would have been no basis for imposing any demand that it provide loop qualification information. Under no scenario can the provision of loop qualification information be considered anything other than a product of the statutory requirements of the Telco Act.

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that SBC would obtain from approval of its merger with Ameritech." Br. 36. This is backwards. The inquiry is not whether SBC refused to continue an *unprofitable* course of dealing but rather whether SBC was willing to forsake a *profitable* course of dealing for an anticompetitive end. *Trinko*, 124 S. Ct. at 880.

Finally, this case differs from *Aspen Skiing* because there is no evidence that SBC terminated its dealings with CLECs—whether those dealings were "voluntary" or not. The evidence instead is that SBC has continuously dealt with CLECs by providing loop qualification information but for a period of about a year its automated system provided information only on the first loop inventoried in the system while its manual system provided complete information. ER 1803-04, 2050-52. That is a far cry from the complete termination of a profitable venture—and refusal to deal even at full retail—that Aspen Skiing found supported liability "at or near the outer boundary of § 2." *Trinko*, 124 S. Ct. at 879.[21]

c. *Stein's other fallback arguments also fail.*

Stein suggests that the district court read *Trinko* too broadly, and that a defendant's breach of a voluntarily undertaken duty is not a prerequisite to an *Aspen Skiing* claim. Br. 39-40. The district court's reading was correct. Even before *Trinko*, courts had recognized that the linchpin of refusal-to-deal liability under *Aspen Skiing* is that the defendant have terminated a prior, voluntary course of dealing. *See Image Tech. Servs., Inc. v. Eastman Kodak Co.,* 125 F.3d

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[21] *Hewlett-Packard Co. v. Boston Scientific Corp.*, 77 F. Supp. 2d 189 (D. Mass. 1999), on which Stein relies, Br. 36-37, is inapposite. The basis for the antitrust claim there was the defendant's acquisition of 90% of the relevant market through a merger with its principal competitor, the effects of which the defendant allegedly failed to ameliorate through compliance with a consent decree. *Id.* at 197. The court did not hold that noncompliance with the decree standing alone could be the basis for finding unlawful monopolization. *Id.* at 198. Such a holding would in any event be inconsistent with *Trinko*.

1195, 1211 (9th Cir. 1997) ("Like the Supreme Court in *Aspen Skiing,* we are faced with a situation in which a monopolist made a conscious choice to change an established pattern of distribution . . . .");[22] *SmileCare Dental Group v. Delta Dental Plan,* 88 F.3d 780, 786 (9th Cir. 1996) ("Unlike the defendant skiing company in *Aspen,* Delta Dental did not discontinue a marketing arrangement with SmileCare."). The leading antitrust treatise, relied upon extensively in *Trinko,* similarly has recognized that the critical fact in *Aspen Skiing* was the "defendant's abandonment of a joint venture initially entered voluntarily. The Court did not impose a prospective duty to deal where no such dealing had occurred previously, and there is no reason for thinking that it would have done so." IIIA P. Areeda & H. Hovenkamp, *Antitrust Law,* ¶ 772c3, p. 190 (2d ed. 2002). Decisions following *Trinko* have similarly recognized what *Trinko* confirmed—that *Aspen Skiing* liability cannot exist absent the defendant's termination of a prior, voluntarily entered course of dealing. *See Covad Communications Co. v. BellSouth Corp.*, 374 F.3d 1044, 1049 (11th Cir. 2004) (holding that "*Trinko* now effectively makes the unilateral termination of a voluntary course of dealing a requirement for a valid refusal-to-deal claim under *Aspen*.").

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[22] *Image Tech.* found *Aspen Skiing* applicable even though Kodak's policy of dealing with independent service organizations had not developed in a "competitive market" (because the service market had always been dominated by Kodak, which repaired 80% of Kodak machines). 125 F.3d at 1201, 1211. Just as in *Aspen Skiing,* however, Kodak's course of dealing with ISOs had been entirely voluntary, and not the product of statutory compulsion.

In addition to providing a basis for finding a defendant's conduct to be exclusionary, the existence of a prior voluntary course of dealing addresses other objections *Trinko* noted to imposing refusal-to-deal liability. Because the defendant has shown by its own uncoerced business decision that it considers selling to rivals to be desirable, there is less danger that imposing liability (or demanding that the defendant justify its refusal to deal) will result in diminished incentives to innovate or invest in beneficial facilities. *Trinko*, 124 S. Ct. at 879. A prior voluntary course of dealing also reduces or eliminates the difficulty courts face in "identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited." *Id.*; *see also id.* at 883 ("An antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations."). Whereas in *Aspen Skiing* the prior voluntary course of dealing itself established the efficient terms of dealing in an unregulated industry, the same cannot be said when the only course of dealing has been compelled by law. In that circumstance, there is no basis upon which to conclude that the compelled dealing represents the optimal market outcome (let alone that dealing on the new terms demanded by the plaintiff would be efficient or compatible with the regulatory scheme at issue).

Stein asserts that the district court's "error" in requiring evidence of a voluntary course of dealing was "particularly significant" in light of an arbitration award from SBC's dispute with Covad finding that SBC had breached its duties of good faith and fair dealing. Br. 40. Even if this hearsay judgment were admissible, a bad-faith breach of the Telco Act does not amount

to an actionable refusal to deal. Although the plaintiff in *Trinko* alleged that Verizon had breached its duties "as part of an anticompetitive scheme" and "in order to limit entry" by competitors, the Court held that the "complaint fails to state a claim under the Sherman Act." 124 S. Ct. at 877-78, 883.

Stein's parting assertion that, even absent a voluntary course of dealing, SBC showed anticompetitive malice by "relinquish[ing] short-term profits they would realize by providing collocation space and loop qualification information to their competitors," Br. 40, is completely unsupported. The record is devoid of evidence that SBC profited from the provision of loop qualification information. This is not surprising, as the Telco Act requires ILECs to unbundle network elements "at considerable expense and effort" and to lease them at low, cost-based rates. *Trinko*, 124 S. Ct. at 878, 880. Stein's assertion also conflicts with his own argument that SBC agreed to provide loop qualification information as a "concession" in order to win FCC approval of its merger with Ameritech. *See, e.g.*, Br. 35-36.[23]

Trinko emphasized that *Aspen Skiing* recognized a narrow exception to the general "no duty to deal" rule, an exception that is "at or near the outer

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[23] Nor in any event would alleged profitability be sufficient to support a refusal-to-deal claim. The basis for imposing liability in *Aspen Skiing* was not simply that a court or jury might conclude that dealing with rivals would have been profitable to the defendant. Rather, it was that the defendant had actually entered a voluntary course of dealing with its rival, which supported an inference that the defendant itself viewed the dealing not only as profitable but as an "optimal distribution pattern" and one that was "more efficient than alternative patterns." *Aspen Skiing,* 472 U.S. at 603, 604 n.31.

boundary of § 2 liability." *Trinko*, 124 S. Ct. at 879-80. Stein's argument that he can establish an *Aspen Skiing* claim without showing that SBC ceased a voluntary course of dealing, that it ever sacrificed short-term profits by doing so, or that it ever sold loop qualification information to the public goes far beyond that boundary. *See id.*; *MetroNet Servs. Corp.*, 383 F.3d at 1133-34 (affirming summary judgment for defendant on an *Aspen Skiing* claim where defendant *did* cease a voluntary course of dealing and *did* sell the product to the public, but did not sacrifice short-term profits or deal with competitors on different terms than the general public); *Covad Communications Co.*, 374 F.3d at 1049 (upholding dismissal of refusal-to-deal claim brought by DSL service provider who alleged that ILEC had engaged in exclusionary conduct by violating interconnection agreements).

C. ***Trinko* Also Precludes Stein's Essential Facilities Claim.**

Trinko also rejected the plaintiff's reliance on an essential facilities theory, which the Court described as "crafted by some lower courts" but never recognized by the Supreme Court. 124 S. Ct. at 880-81. Declining "either to recognize it or to repudiate it here," the Court ruled that the theory could not be applied in any event to claims such as Trinko's because "[t]he 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access." *Id.* at 881. The Court noted that the "indispensable requirement" for invoking the essential facilities doctrine is the unavailability of access to the facilities; "where access exists, the doctrine serves no purpose." *Id*.

Thus, "'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.'" *Id.* (quoting P. Areeda & H. Hovenkamp, *Antitrust Law,* p. 150, ¶ 773e (2003 Supp.) (alteration in *Trinko*)); *MetroNet Servs. Corp.*, 383 F.3d at 1129. The Telco Act's extensive compelled sharing provisions foreclose essential facilities claims like Stein's, which are based on the failure to share networks with competitors. *See Trinko*, 124 S. Ct. at 881. As noted above, following *Trinko,* this Court changed its earlier decision and rejected an essential facilities claim similar to Stein's in *MetroNet Servs. Corp.*, 383 F.3d at 1129-30. The Eleventh Circuit similarly concluded that *Trinko* required that it withdraw its earlier decision finding in the plaintiffs' favor and instead dismiss the plaintiffs' essential facilities claim in a case alleging the same kind of denial of access by an ILEC to a CLEC that Stein alleges here. *Covad Communications Co.*, 374 F.3d at 1049-50. Stein relied on both of these vacated decisions below in arguing in favor of his essential facilities claim. ER 1042-43. This Court's and the Eleventh Circuit's recognition that *Trinko* foreclosed the essential facilities claims in those cases applies equally here.

Stein nevertheless contends that the district court erred in granting summary judgment on his essential facilities claim, because he supposedly presented evidence that the FCC may not be able to enforce SBC's "voluntary" obligation to provide loop qualification information. This argument fails because, as discussed above (at 28-33), the Telco Act requires SBC to provide loop qualification information. Indeed, this statutory requirement is subject to

the same enforcement scheme that *Trinko* found defeated the essential facilities claim there.[24] *Trinko*, 124 S. Ct. at 881-82; *see also MetroNet Servs. Corp.*, 383 F.3d at 1130 (rejecting essential facilities claim where "[t]he . . . statutory authority to compel sharing stems from the same 1996 Act provisions that the Court relied upon in [*Trinko*] to reject the plaintiff's essential facilities argument"); *Covad Communications Co.*, 374 F.3d at 1050 (same).

Even if the duty to provide loop qualification information flowed solely from the FCC merger order, Stein is incorrect that violations of that order are unenforceable. The FCC merger order explicitly provides that the FCC has the authority to take

> enforcement action against SBC/Ameritech for failing to comply with any provision of this Order, including extending the sunset provisions, imposing fines and forfeitures, issuing cease-and-desist orders, modifying the conditions, awarding damages, or requiring appropriate remedial action.

ER 2236. The merger order emphasized that if SBC/Ameritech did not comply with the merger conditions, the FCC would "utilize every available enforcement mechanism," including revocation of the merged firm's authority to operate as a telecommunications carrier. ER 2208-09. The FCC reiterated that, in the event of systematic noncompliance, it "can and will revoke relevant licenses, or

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[24] Under section 503 of the Telco Act, the FCC may impose a forfeiture penalty for violations of "any of the provisions of this chapter [the Telco Act] or of any rule, regulation, or order issued by the Commission under this chapter." 47 U.S.C. § 503(b)(1)(B). Compliance with section 251 obligations is also required as one of the conditions under section 271 for authorization to enter the long-distance market. 47 U.S.C. § 271(c)(2)(B)(ii).

require the divestiture of SBC/Ameritech into the current SBC and Ameritech companies." ER 2209.

Stein points to the comments of a dissenting FCC commissioner as evidence that the conditions were "voluntary" and "potentially unenforceable," Br. 42, but these comments do not support Stein's claim. The commissioner's objection was to the FCC's description of mandatory conditions as "voluntary" to insulate them from judicial review. *See* ER 2341 (quoting his own previous statement that "[i]t is no coincidence that the commitments extracted from regulated entities in the guise of voluntary standards tend to be things that the agency lacks statutory authority straightforwardly to require."). Thus, the commissioner expressed concern about the enforceability of conditions that may go beyond or conflict with the Telco Act, such as placing caps on carrier-to-carrier promotions, requiring a separate affiliate for the offering of advanced services, and the setting of rates for interconnection agreements. ER 2332-33. He could not and did not, however, question the FCC's authority to impose conditions that *enforce* the Telco Act, ER 2332, such as the one requiring the sharing of loop qualification information.

Because the Telco Act provides for forced access to SBC's facilities and loop qualification information, and the FCC merger order provides an additional enforcement mechanism to ensure that access, Stein's essential facilities claim fails as a matter of law. *See MetroNet Servs. Corp.*, 383 F.3d at 1129-30.

D. **Stein's Monopoly Leveraging Claim Cannot Survive the Failure of His Other Antitrust Claims.**

Stein asserts that his monopoly leveraging claim should be reinstated. Br. 41. He is incorrect. Asserting "monopoly leveraging" does not relieve antitrust plaintiffs of the duty to prove the required elements of a Section 2 claim—anticompetitive conduct and either monopolization or attempted monopolization of a relevant market. *See Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542, 547 (9th Cir. 1991) (noting that both monopolization and attempted monopolization require a showing of "illegitimate 'predatory' practices" and rejecting monopoly leveraging as an independent theory of liability under Section 2). As the Supreme Court explained in *Trinko*, "leveraging presupposes anticompetitive conduct, which in this case could only be the refusal-to-deal claim we have rejected." 124 S. Ct. at 883 n.4. Here too, the only anticompetitive conduct at issue is SBC's alleged refusal to deal with its rivals. As statutory duties to aid rivals are not antitrust duties and their alleged violation does not create an antitrust claim, *see id.* at 880-81, and as SBC does not control an essential facility, *see MetroNet Servs. Corp.*, 383 F.3d at 1129-30, the district court correctly granted summary judgment to SBC on Stein's monopoly leveraging claim.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

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STATEMENT OF RELATED CASES

Appellees are not aware of any related cases pending in this Court.

No. 04-16201

CERTIFICATE OF COMPLIANCE PURSUANT TO
CIRCUIT RULE 32-1

I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 12,347 words.

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