SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. IRA GAMMEMAN PART 27
Judicial Hearing Officer

NORTH COUNTY COMMUNICATIONS CORPORATION,

Plaintiff,

- v -

Defendants.

VERIZON NEW YORK, INC., ET. AL.,

INDEX NO. 401925/03
MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to_____were read on this motion to/for_____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
JAN 14 2004
NEW YORK
COUNTY CLERK'S OFFICE

Dated: JAN 12 2004

J.H.O. IRA GAMMERMAN

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE
DATED: J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 27

----------X

NORTH COUNTY COMMUNICATIONS CORPORATION,

Plaintiff,

-against-

Index No. 401925/03
P.C. No. 18455

VERIZON NEW YORK, INC. VERIZON SERVICES CORPORATION, and DOES 1 THROUGH 100,

Defendants.

----------X

GAMMERMAN, J.:

This action, seeking to hold defendants liable for claimed antitrust violations of New York's Donnelly Act and of New York's Public Service Law, was originally instituted in Supreme Court, Albany County. Defendants removed the action to the Federal Court in the Northern District of New York. That Court remanded the case to the Supreme Court, Albany County. Following remand, defendants' motion for a change of venue from Albany County to New York County was granted.

Defendants move to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a cause of action, pursuant to CPLR §§ 3211 (a) (2) and 3211 (a)(7). Alternatively, defendants move to dismiss the complaint under the primary jurisdiction doctrine and request that discovery be stayed pending ruling on their motion.

Plaintiff North County Communications Corporation (NCC) is a competitive provider of local telephone service. Defendant Verizon New York, Inc. (Verizon-NY) is a New York corporation authorized to provide telecommunications services in New York. Verizon Services Corporation (VSC) (together with Verizon-NY, Verizon) is a Delaware corporation. The complaint alleges that defendants Does 1 through 100 are defendants "whose identities are presently unknown to NCC, but whose actions in some manner render them legally responsible to NCC for the damages alleged."

Because of the high costs of constructing telecommunications facilities, small telephone companies are unable to compete with larger, dominant telecommunications providers. The Telecommunications Act of 1996 (Telecom Act) is designed to foster competition in local markets by reducing barriers to entry, so that smaller competitive local exchange carriers (CLECs) are able to compete with larger incumbent local exchange carriers (ILECs), whose network facilities are already built-out, and paid for over many years, by their predecessors and ratepayers. The Telecom Act requires ILECs, such as Verizon-NY, to permit CLECs, such as NCC, to interconnect with the ILEC's network. The operative agreement between the parties is called an interconnection agreement.

If the parties are unable to agree with respect to the terms of their interconnection agreement, they may petition the state Public Service Commission to set the terms by arbitratration, 47 USC § 252(b). Alternatively, a CLEC may adopt, or "opt into," one of the ILECs' previously approved interconnection agreements, *id.* at § 252(I). The interconnection agreement must be approved by the Public Service Commission, *id.* at § 252(e).

In May 2002, NCC opted into an interconnection agreement (Interconnection Agreement) that Verizon had with a Massachusetts company. That Interconnection Agreement was approved by the Public Service Commission (PSC) on November 7, 2002. Plaintiff started this action shortly after the parties signed the Interconnection Agreement, but before it was approved by the PSC.

The complaint alleges that, on March 14, 2001, NCC notified Verizon-NY that, because of the high costs of building facilities of its own, NCC intended to interconnect with Verizon's network. However, NCC claims that, during the following 16 months,

> [t]he defendants * * * deliberately dragged their feet and put up obstacles and roadblocks to keep the plaintiff out [of] the local telecommunications market in New York, all for the purpose of maintaining Verizon New York's grip on the local telephone market, depriving consumers of maximum choice with their telecommunications dollar and damaging NCC in the process.

The complaint alleges causes of action for antitrust violations of the Donnelly Act, and of the Public Service Law.

Specifically, the complaint alleges that, as a result of defendants' actions, telecommunications customers are denied access to an open and competitive marketplace, and NCC's ability to provide telecommunications services is hindered.

The complaint alleges that Dianne McKernan is the VSC account manager assigned to service NCC's needs. However, according to NCC, Ms. McKernan "stonewall[ed] the interconnection process by making unreasonable, onerous and unnecessary demands upon CLECs," which thwarted competition and permitted Verizon to perpetuate a monopoly over local telephone markets. One such alleged demand was that NCC build a dedicated, fiber-based entrance facility at two of Verizon's facilities before Verizon would permit NCC to interconnect, even though sufficient capacity allegedly already existed at both locations. NCC maintains that a dedicated facility "is not required due to any claimed technical infeasibility of interconnecting," but rather, is an "unnecessary and unjustified process" that causes "a substantial delay before a CLEC can begin servicing telecommunications clients in New York."

In support of its claims that Verizon sought to exercise monopoly power in New York's telecommunications market, and violated the Public Service Law, NCC claims that Verizon employed the following alleged "delay tactics": repeatedly losing orders and signature pages provided by NCC; ignoring NCC's request to

opt into an existing interconnection agreement between Verizon-NY and another CLEC; insisting on the installation of equipment on unnecessary additional racks at locations where NCC subleased space without a technical justification for doing so; refusing to allow NCC to order interconnection trunks, thus preventing NCC from being able to order prefixes; refusing to hold meetings with NCC (which defendants themselves required) until NCC constructed a dedicated fiber entrance facility; refusing to build trunks in as timely a fashion as with other service offerings, or as if NCC were a retail customer; demanding that NCC provide defendants with information that was in the defendants' sole possession; demanding that information already submitted by NCC be resubmitted in a different format; failing to treat NCC as a retail customer or affiliate of defendants; and refusing to share a fiber multiplex for wholesale services, even though technically feasible.[1]

In seeking removal to Federal Court, defendant asked the District Court to apply federal law, namely, the Telecom Act. However, the Federal District Court ruled that the complaint "properly alleges state law claims," and that federal subject

[1] The complaint does not define, and the parties do not elaborate on, the meaning of terms such as "racks," "interconnection trunks," "prefixes," and "fiber multiplex for wholesale services." However, the precise meaning of these technical terms is not relevant to this decision.

matter jurisdiction did not exist, *North County Communications Corp. v Verizon N.Y., Inc.*, 233 F Supp 2d 381 (NDNY 2002).

Thereafter, defendants sought discretionary review by the Second Circuit Court of Appeals. That Court denied the application.

Subject Matter Jurisdiction

As indicated above defendants seek dismissal alleging lack of subject matter jurisdiction, arguing for the application of federal law. Plaintiff maintains that the Federal District Court has already ruled against defendants on this issue and I agree.

Further the Interconnection Agreement provides that it "shall be governed by and construed in accordance with the laws of the state in which [the] Agreement is to be performed".

Defendants' argument that NCC's right to opt into the Massachusetts interconnection agreement arose under federal law does not compel a different result. The complaint does not allege that Verizon denied NCC's request to opt into an interconnection agreement, but rather alleges causes of action under the Donnelly Act and Public Service Law, both of which are State claims that are independent of NCC's right to opt into, or any rights it may assert under, the Interconnection Agreement. NCC's complaint is not with respect to the interconnection agreement, but with Verizon's conduct.

Failure to State a Cause of Action

Defendants move to dismiss the Donnelly Act claim for failure to state a cause of action, arguing that the complaint does not allege "concerted action," or properly define the relevant product market. In opposition, NCC argues that the complaint alleges concerted action by two separate corporations, defendants Verizon-NY and VSC, and that its allegations support an "essential facilities" theory of antitrust liability.

Section 340 of the New York General Business Law, commonly known as the Donnelly Act, is New York's antitrust law. The Donnelly Act, which was modeled on the federal antitrust legislation, the Sherman Antitrust Act, *State of New York v Mobil Oil Corp.*, 38 NY2d 460 (1976), prohibits restraints on trade through the misuse of monopoly power, General Business Law § 340 (1). In order to state a cause of action under the Donnelly Act, plaintiff must allege "a conspiracy or reciprocal relationship between two or more entities," and "must identify the relevant product market, describe the nature and effects of the purported conspiracy and allege how the economic impact of that conspiracy is to restrain trade in the market in question", *Creative Trading Co. v Larkin-Pluznick-Larkin, Inc.*, 136 AD2d 461 (1st Dept 1988). By definition, a conspiracy requires "a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose * * * ", *Standard Engraving Co. v Volz*, 200 App

Div 758, (1st Dept 1922), *quoting Duplex Printing Press Co. v Deering*, 254 US 443 (1921). "A relevant market must include all products that are reasonably interchangeable and all geographic areas in which such reasonable interchangeability occurs", *Pyramid Co. of Rockland v Mautner*, 153 Misc 2d 458 (Supreme Court, Rockland County 1992), *citing Brown Shoe Co. v United States*, 370 US 294 (1962). "Plaintiff must explain why the market it alleges is in fact the relevant, economically significant product market", *Re-Alco Indus., Inc. v National Ctr. for Health Educ.*, 812 F Supp 387 (SDNY 1993). "Absent an adequate market definition, it is impossible for a court to assess the anticompetitive effect of challenged practices", *id.*

Here, the complaint does not allege concerted action in support of a conspiracy, or a reciprocal relationship between two or more entities. Rather, NCC's allegations are directed toward Verizon's alleged unilateral actions and delay tactics. The failure to identify a coconspirator cannot be remedied "by asserting, in conclusory fashion, the existence of a generalized conspiracy arising out of defendants' various contracts and arrangements or by referring to unilateral business actions taken by them", *Creative Trading Company, Inc.*, v Larkin-Pluznick-Larkin, Inc., *supra*. Such conclusory allegations are insufficient to make out a violation of the Donnelly Act, *Sands v Ticketmaster-New York, Inc.*, 207 AD2d 687 (1st Dept 1994). Thus,

NCC's failure "to allege that the defendant engaged in concerted activity with another entity requires dismissal", *Bello v Cablevision Sys. Corp.*, 185 AD2d 262 (2d Dept 1992).

With respect to NCC's argument that the Verizon defendants worked together to put up barriers to market entry, "sister subsidiary corporations which are wholly-owned by the same parent corporation are legally incapable of conspiring with each other", *North Atlantic Utilities, Inc. v Keyspan Corp.*, 307 AD2d 342 (2d Dept 2003). NCC does not dispute that Verizon-NY and VSC are wholly owned by the same company.

NCC also names as conspirators numerous Doe defendants." However, NCC's failure to identify those defendants also requires dismissal of its Donnelly Act claim, Creative Trading Company, Larkin-Pluznick-Larkin, Inc., supra. "In particular, plaintiff must allege facts that name the alleged conspirators", *Great Atlantic & Pacific Tea Co. v Town of East Hampton*, 997 F Supp 340 (EDNY 1998) (finding plaintiff's failure "to identify alleged co-conspirators except as the 'owners and operators of existing retail stores'" is insufficient to establish conspiracy, "even for pleading purposes").

The complaint also fails to define the relevant product market. Plaintiff alleges that, as a result of defendants' actions, "New York City telecommunications customers were denied access to a truly open and competitive marketplace by limiting

their available options for local exchange services, forcing them to pay more for fewer services, and impairing competition in a significant way." The complaint does not specify which "options for local exchange services" it seeks to offer that were denied to New York's telecommunications customers. Nor does it allege "facts regarding substitute products, * * * distinguish among apparently comparable products, or * * * allege other pertinent facts relating to cross-elasticity of demand," in support of NCC's argument that its local exchange services are the relevant product market, *Re-Alco Indus., Inc.*, 812 F Supp at 391. Thus, NCC has failed to identify the products that define its relevant market.

NCC offers no response to defendants' argument that the complaint fails to define the relevant market. Instead, it argues that it has sufficiently pleaded a Donnelly Act claim under the "essential facilities" theory of antitrust liability. Essential facilities, also known as "bottleneck" facilities, *Yankees Entertainment and Sports Network, LLC v Cablevision Sys. Corp.*, 224 F Supp 2d 657 [SDNY 2002]), are facilities "for which there is no feasible alternative", *Kramer v Pollock-Krasner Found.*, 890 F Supp 250 (SDNY 1995). "[E]ssential facilities include: facilities that are a natural monopoly, facilities whose duplication is forbidden by law, and perhaps those that are publicly subsidized and thus could not practicably be built

privately", *Yankees Entertainment and Sports Network, LLC* v Cablevision Sys. Corp., supra (citations and internal quotation marks omitted). "A refusal to grant access to an essential facility violates the antitrust laws because of the danger that a monopolist in one market might use its market power to extend its monopoly into another", *id.*

> Under the essential facilities doctrine, a refusal to deal with a competitor is violative of antitrust laws if there is (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

Matter of Energy Assn. of New York State v *Public Serv. Commn. of the State of New York*, 169 Misc 2d 924 (Sup Ct, Albany County 1996). However, "[t]he 'essential facilities' doctrine is not an independent cause of action, but rather a type of monopolization claim" that typically arises under the Sherman Act, *Kramer* v Pollock-Krasner Found., supra; *see e.g. Yankees Entertainment and Sports Network, LLC* v *Cable*vision Sys. Corp., supra. Thus, while alleged unilateral action by a monopolist may properly state an element of a federal antitrust action under the Sherman Act in support of an argument for the application of the essential facilities doctrine, a claim under the Donnelly Act requires allegations of concerted, not unilateral, action, *Creative Trading Company*, Inc. v Larkin-Pluznick-Larkin, Inc., supra.

Stated differently, while the Donnelly Act prohibits restraints on trade through the misuse of monopoly power it does not prohibit unilateral monopolization or attempted monopolization, which are actionable under the Sherman Act, *Hall Heating Co. v New York State Elec. and Gas Corp.*, 180 AD2d 957 (3d Dept 1992) ("[u]nilateral action is insufficient to support a claimed violation of General Business Law § 340"). Therefore, NCC's essential facilities argument does not obviate the need to allege concerted action, which, as discussed above, is required under the Donnelly Act in support of a conspiracy or a reciprocal relationship. Thus, defendants' motion to dismiss plaintiff's first cause of action for a Donnelly Act violation is granted without prejudice to plaintiff seeking relief before the Public Service Commission.

With respect to the motion to dismiss NCC's Public Service Law claim for failure to state a cause of action, defendants argue that plaintiff fails to allege that Verizon violated any positive command or injunction. NCC argues that sections 91 and 93 of the Public Service Law should be interpreted broadly, and that NCC can allege a violation of a Commission order or command. I disagree.

§ 93 of the statute provides that,

> [i]n case any * * * telephone corporation shall do or cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or

> shall omit to do any act, matter or other thing required to be done, either by law of the state of New York by this chapter or by any order of the commission, such * * * telephone corporation shall be liable to the person or corporation affected thereby for all loss, damage or injury caused thereby or resulting therefrom * * *,

and § 91 provides, in pertinent part, that

> 1. Every * * * telephone corporation shall furnish and provide with respect to its business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable. * * *
>
> 3. No * * * telephone corporation shall make or give any undue or unreasonable preference or advantage to any person, corporation or locality, or subject any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

However, § 91 does not confer a private right of action, and the liability imposed by § 93 is limited to a violation of a positive command or injunction, *Discon Inc. v NYNEX Corp.*, 1992 WL 193683, *13 (WDNY); *Meyerson v New York Tel. Co.*, 65 Misc 2d 693 (Sup Ct, Kings County 1971); *Leighton v New York Tel. Co.*, 187 Misc 132 (Sup Ct, NY County 1946); *Abraham v New York Tel. Co.*, 85 Misc 2d 677, 680 (Civil Ct, NY County 1976).

Here, the complaint does not allege that defendants failed to comply with any determination made by the Public Service Commission, or to do any act specifically required to be done by it. Rather, the complaint alleges only that defendants violated

§ 91, which does not confer a private right of action, and is not a sufficient basis for establishing liability under § 93.

Nevertheless, in its opposition brief, NCC identifies 16 NYCRR § 605.2 (a) as an alleged order or command that defendants violated. 16 NYCRR § 605.2 (a) provides, in pertinent part, that

> [t]elephone corporations operating as common carriers must provide publicly offered conduit services on demand to any similarly situated user on substantially similar terms, subject to the availability of facilities and capacity. Such services shall be provided by a telephone corporation on a first-come, first-served basis unless a party is able to show in a timely fashion that such provision would be unreasonable or unless otherwise ordered by the commission. Additionally:
>
> * * *
>
> (2) interconnection into the networks of telephone corporations shall be provided for other public or private networks; * * * .

However, while 16 NYCRR § 605.2 (a) appears to create a right to interconnection, the complaint does not allege that defendants refused to permit NCC to interconnect. Rather, in essence, NCC alleges that it was given "the royal run-around" by Verizon and NCC claims "delay tactics" and barriers to market entry. NCC offers no NYPSC order or injunction that interprets 16 NYCRR § 605 (a) to impose a duty on the manner in which Verizon provides interconnection. Therefore, even if 16 NYCRR § 605.2 (a) is construed as an order or command, NCC has not stated a cause of action for a violation of the Public Service Law. Thus,

defendants' motion to dismiss plaintiff's second cause of action is granted without prejudice to plaintiff seeking relief before the Public Service Commission.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted and the complaint is dismissed, without prejudice as indicated, with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 12, 2004

ENTER:

J.H.O.

IRA GAMMERMAN