DONALD I. BAKER

3/25

MARGARET,

HERE IS THE MILDLY MARKED UP TRANSCRIPT. (IT WAS FUN REVISITING IT.)

I HAVE ATTACHED TO THE BACK THE HAND-OUT THAT I HAD CREATED FOR THE SESSION. YOU MIGHT WANT TO INCLUDE IT BECAUSE (1) IT IS SHORT AND (2) THERE ARE A NUMBER OF REFERENCES TO IT IN THE TRANSCRIPT.

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Tom Whitehead: We're all ready to have our guest speaker. You've all seen Don's resume. It really doesn't do him justice. He's one of the renaissance men of regulation, and much more articulate in speaking about it than most attorneys are. I first met Don when I went into the White House and discovered that the Department of Justice had not only a huge interest in telecommunications issues, but had a large body of expertise. And, I further found that Don was a wonderful resource in scrounging talent from other agencies. So, I was -- I learned from him. I was with another agency task force and pulled people from the FCC, Commerce Department, Defense --

Don Baker: -- Well, you got the Army to draft my key players and then you had -- assigned them White House. He would have done a lot better in the White House than in the infantry. You could tell then that he was [unintelligible].

Male Voice: That's true.

Female Voice: Who's that?

Male Voice: Ken Robinson.

Don Baker: Ken Robinson.

Female Voice: Oh. Oh.

Male Voice: So, --

Don Baker: He was the most unsoldierly soldier in the infantry.

Tom Whitehead:

~~Male Voice:~~ Yeah, he was not cut out to be an infantry officer. So, I've asked Don to come and talk to us about the way antitrust and the Department of Justice have co-existed with the FCC and communications regulation over the course of the 20th century, which it really has been. Justice has been, from the very early days of telephones and telegraphy and then going forward into television and radio and so forth, very actively involved in the policy and process. So, Don, I think the primary area of focus is going to be the era of the '70s when the antitrust laws began to be seen as maybe a blunt instrument, but maybe a better instrument in dealing with some competitive issues that complicated regulation, and certainly better at promoting competition in some ways. And, also, if you can, a little perspective on U.S. versus international [unintelligible]. With that being said, with Don, I know the best thing to do is just to turn him loose and let him talk. So, it's all yours.

Don Baker: But, also, particularly in a group this size, we might as well stop and say, "Wait, I don't understand" or "Do you really mean what you just said?" or whatever. You don't have to do it like the Supreme Court where they'll barely give you a chance to get three sentences in a row, but it's -- but, otherwise, it's really fine. And, for me, the interaction is part of the fun. Although, I must say, Tom, that being forced to go back and revisit what was an exciting time in both of our lives, has been an interesting exercise. And, what I've done here in these handout materials is try to give you a flavor of a number of things that I will point out. But, the handout materials are virtually all just selections out of FCC opinions, government -- other government documents, occasional Don Baker things, where I couldn't find someone else who would say what I wanted them to say, although it was [unintelligible].

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Anyway, this was an amazing period because, as Justice Stevens says in the second quote on the thing, in the 1960's, we seemed to be headed for

more regulation rather than less. The world was becoming more complicated, so the answer was more regulation and more complexity. And, yet, we came out of it with a very much deregulated system that turned out to be a model for the world. I want to make a couple of basic points starting and, then, we'll work our way through.

First of all, history is deceiving, particularly when you like the outcome. The world is flatter than it was at the time, and it seems like this result was going to happen. Think about the Battle of Britain and how close that came to going the other way. Think about the first day at Gettysburg, when the troops from Alabama and Texas came within an ace of taking the roundtop and commanding the battlefield with their artillery. If those things had gone different ways, what would, you know…the history of our time would have been quite different. And, this is somewhat the situation we have here.

At the time, let's call it 1966 or 7 or 8, which is about the time I started in the Justice Department, we had a very dominant telephone monopoly manned by people who really believed it. And, I was in the Justice Department long enough to be able to distinguish between people who really believed in what they were doing and those who were making the best of it in the circumstance. These people really believed -- they were arrogant, but they were good. There was this television program -- it's way too old for you folks -- called "Laugh-In" in which Lily Tomlin played a telephone operator. And, she rolled off various lines like, "We're the telephone company. We don't have to care." And, if there was ever a post-World War II equivalent of Henry Ford's famous thing, "Call it whatever you want, as long as it's black," it was the telephone company and the world was organized.

The next thing you had was risk-adverse regulators. As long as they made the system more or less work, they were fine. And, as with regulators, you know … generally, very often, the people who are appointed to the commission don't have any huge background in the field in which their -- the staff may. And, one of the -- I gather you've assigned my Charles River Bridge thing, which we'll talk a little bit more about, but I selected and described these regulators, these [unintelligible] of all your friends of the president and so forth as -- with an eye to the real regulators that were in front of us at the time. And, some of them aren't quite recognizable as even members of the Federal Communications Commission. And, so, you end up with people who have been pulled in from the outside, confirmed by the Senate, and are now responsible for overseeing the best telephone system in the world.

The next piece of this puzzle is you had what I think we all called Robin Hood regulation, which was the idea that part of purpose of regulation was to serve the poor at the expense of the rich. And, serving the poor really meant subsidizing local telephone service, local residential telephone service, so that you could have unlimited local calling at a relatively low fixed cost. And, they did this by -- the subsidies came out of various things including long distance rates that were way higher than cost, business calling systems that were way higher than cost, and of course the telephone company loved it, probably sponsored it. But, loved it because once you have Robin Hood regulation in place, you didn't want any competition or disruption because the competition and disruption was going to go after the very services that were overpriced and subsidizing the local residential rates. And, this was particular -- the Robin Hood regulation was particularly a state factor and the state commissions were responsible for it.

But, so, I remember in this -- and, so, they -- part of the Robin Hood scheme was also that the intrastate toll rates were very high. I remember opening a telephone book in San Diego in this period, and looking and finding I could call New York any hour of the day or night for less than I could call San Francisco, and -- because the intrastate tolls were so high.

Tom Whitehead: I once, just out of [unintelligible], tried to place a call through an operator. I lived in Los Angeles, and I wanted to call San Francisco, and it cost like $2.00 a minute to call San Francisco. But, it only cost, like, 20 cents a minute to call Reno, and 20 cents from Reno to San Francisco. So, I called and I said, "Operator, would you connect me with an operator in Reno who will connect me with an operator in San Francisco?" And, of course, the answer was Lily Tomlin's, "We don't do that kind of thing here." But, it does point to the incongruity.

Don Baker: But, most of the things that we're going to talk about roll out of this collection of issues. Now, the next and final, you know…factor for stability was a Department of Defense that believed monopoly was important and necessary to national defense, and was a vigorous advocate of monopolistic solutions. And, remember, that we're talking about a period that's only four or five years after the Cuban Missile Crisis, which meant that the Defense Department had a bigger voice in the world than it probably has had after the Cold War, and probably so after it's bombed out in Iraq. But, anyway -- so, here you have all these factors --

Tom Whitehead: -- Can I just enlarge on that?

Don Baker: Yeah.

Tom Whitehead: The -- AT&T was tremendously dedicated in World War I and in World War II to developing capabilities for the military. And, those two wars

changed AT&T, but AT&T also changed the wars in very tangible ways. So, they were a huge ally to the military, not just in the Cuban Missile Crisis.

Don Baker: Oh, no, no, no.

Tom Whitehead: Going back decades. And, that was primarily done *sub rosa*. It was not talked about in public. It was just a web of dedicated people, dedicated national security people, and government dedicated people in AT&T, and Bell Labs, and Western Electric. And, they worked and collaborated together to do some unbelievable things, much of which was classified and some of which is still classified. But, the *quid pro quo* was that the guy at the Defense Department who was in charge of overseeing AT&T was also AT&T's very best lobbyist in town. He was diligent. He was smart. He was there at every meeting, whether he was invited or not. And, the military-industrial complex really was there.

Don Baker: Yeah, and what got -- we didn't -- you know…if -- one, we're talking about another variation on Robin Hood regulation, it was Bell Labs.

Tom Whitehead: Yeah.

Don Baker: I mean, part of the thing was that some of the monopoly profits or -- went to subsidize this absolutely wonderful operation. And, as Tom says, it was very much dedicated to the military. Well, I can't resist telling one war story with -- which concerned your agency after you arrived there, but you weren't at the meeting. We were -- Walt Hinchman was chairing this meeting. And, we were there on a meeting over whether the administration was going to send a uniform recommendation. We weren't going to have all these different agency rep -- a uniform recommendation to the Federal Communications Commission that -- over whether the next

transatlantic crossing was going to be a satellite rather than cable. Well, DOD thought that this was a lousy idea and, in fact, they may have sent over a couple of letters to the Chairman of the FCC -- not an analytical letter, just a little short things from [Defense] Secretary [Melvin R.] Laird saying that we needed cable. Their case was a little bit weakened by the fact that a trawler had just taken up the Lex cable, presumably inadvertently.

Female Voice: Do you think it would have been done by AT&T?

Don Baker: Oh, of course.

Female Voice: Yeah.

Don Baker: And, they didn't do the satellites.

Female Voice: Right.

Male Voice: Who else?

Don Baker: But, I mean that's an important fact. Anyway -- so, finally, it's agreed around this table that we will, in fact, recommend the satellite. And, then, the guy from AT&T, who's a tough-looking -- this was Dave ~~Sullivan~~ Solomon [cannot CQ this name] I [unintelligible] were talking about -- a tough-looking guy. He goes, "Well, are you going to send over our dissenting views?"

Tom Whitehead: He's not [unintelligible] the usual defense.

Don Baker: -- the usual defense.

Tom Whitehead: Yeah.

Don Baker: You didn't send over our dissenting views. And, the OTP guy, who's chairing the meeting says, "Well, I suppose so, unless someone over on Pennsylvania Avenue thinks otherwise." The DOD guy looks at him very hard and says, "Look, young man, I want you to understand something. My boss is a son of a bitch, and he doesn't like his well-considered views set aside by "someone on Pennsylvania Avenue." He wants to know exactly who -- name, rank, and serial number, or potential serial number."

Female Voice: Not that he was intimidating or anything.

Don Baker: And, with -- the other part of the story, which relates to the antitrust division, was I didn't particularly like the White House telling all of us what we could file with the Federal Communication Commission, so I sided with this DOD guy on his right to send his communication. And, the rest of the room looked around at me as if I'd gone over and joined the Borgia Pope. But, anyway, that -- but, the advocacy role is part of what we'll talk about.

Anyway, the -- so, we have this scene, and the forces for change are the FCC Common Carrier Bureau, which had some smart and dedicated and courageous people. And, they were willing to try to move balls along, open up markets, and do competition. It was always -- it was, sometimes, a little touch and go with the commissioners, but they did. The second one was, of course, the antitrust division, which had decided -- in about, in this late '60's period -- that one of the good uses of the division's resources was advocating competitive issues before federal regulatory agencies where you could make an argument that antitrust policy really stood, and this was not well-received in many quarters. And, the same [unintelligible] that were doing AT&T were doing another one of the

great monopolies of the day, which was the New York Stock Exchange, which had many of the same things. It had a central thing and it was trying to do everything to prevent people from competing with it.

And, when President Nixon ran for office, at a meeting in New York, he said that he was going to stop this kind of thing. But, then, of course, nothing happened. I remember, you know … Attorney General [John] Mitchell was just perfectly fine with this kind of thing. But, Nixon was going to stop these sort of theory people sort of interfering with major American businesses.

Then, the next thing that happened was Tom arrived at the White House and we had, for the first time in my experience, people that sounded like allies over there. And, the next thing that happened, which would take us to the 1970's -- Tom, you arrived in what -- in the spring of '69 -- kind of in…But, in the '70's, was the oil price shock and the inflation that resulted in it created a political tidal wave to do about things that were monopolistic. And, they -- the Congress, without us asking for it, doubled our budget in the antitrust division, turned the Sherman Act [unintelligible] from a misdemeanor into a felony with the [unintelligible] fund, the corporate fine from $50 to a $1 million which seemed like a lot of money in those days. And, it created a political climate in which it was possible for people to talk about ideas, antitrust kind of ideas, that wouldn't have been thought of in the earlier period.

So, with that background -- and the last thing is, the fellow who was appointed head of the antitrust division in the '70's, a fellow named Tom ~~[Quaker] [cannot CQ this name]~~ Kauper, a University of Michigan law professor, very -- you know…very smart, but very cautious. And, so, he was the kind of person, very analytical, who I think the political masters would trust. He just -- and he kept after things, and he was willing to take heat

and stand up for all this trouble we were causing the telephone company, and the stock exchange, and everybody else. So, with that background, let's just -- I'll give you a quick run through on -- to a larger extent, we'll just follow these materials. On the second page, I mention a case called Carterfone, which the -- 30 years later, the London economists called the magna carta of the information revolution. You people won't be -- won't really believe the world that existed prior to this decision. You could not plug anything into the telephone system, except an electrocardiogram machine, that wasn't provided by the telephone company. And, not only was this the rule in the United States, this was the rule everywhere in the world.

And, so, along came this crazy guy, this Texas guy from the oil fields, who created a funny little phone that you could plug into your receiver and take your other phone -- this was a way -- you know…relay phone, and it would go out and it would ring out on the oil rig for you. And, he sued the telephone companies in federal court on the grounds that they were boycotting his device, that the federal court, the Court of Appeals for the Fifth Circuit, in a really excellent decision, said that this was primarily a matter for the jurisdiction of the Federal Communications Commission. And, so, therefore, they referred the case to the Federal Communications Commission, but, as I recall, kept jurisdiction, so that I mean, the antitrust case might yet go forward. So, this problem arrived at the Federal Communications Commission with a mandate from the Court of Appeals for the Fifth Circuit, which gave the staff more room than they would have had if they were just starting this up on their own motion.

So, Mr. [Thomas] Carter arrived, and they had an evidentiary proceeding about whether it was safe to allow this device or other devices. And, there was engineering testimony and so forth. And, organizations like retailer associations and so forth supporting opening up and allowing people to

have their own stuff. Well, after the hearing officer had decided tentatively in favor of it, I arrived at the antitrust division, and my boss said, "You know…there's this interesting case going on over at the Federal Communications Commission. Perhaps, we ought to think about intervening." So, I sat down and wrote a brief saying that this was monopolistic and you could solve the problem with technical standards. Then, I got to argue the case in front of the commission, not knowing, as a very young lawyer, that I was in fact involved in this landmark. And, you know…years later, you wander into ~~the~~ a Federal Communications Commission party and they treat you like someone who must have been there at the Battle of Antietam or something.

But, anyway, the commission then held, and as I explained in this quote, that the telephone company couldn't just have a blanket ~~[unintelligible]~~ prohibition, that it could have technical standards, and it could prohibit particularly harmful devices. Well, the telephone company then tried to figure out the most expensive and burdensome ways possible -- they had complicated fusing devices that cost more than telephones that you had to use in the first go around and so forth. And, we -- and, so, there started to be a sort of five-year or so battle over what the technical standards were going to be. I should mention this whole system of preventing customer-owned equipment was, in part, supported by Robin Hood principles. The state regulators loved it because your second and third phone in your home, which you were definitely supposed to only get from the telephone company, you know…there weren't Radio Shacks selling them, was very expensive. The first one wasn't bad, but the -- and, so, this was all -- this sounded good. This is relevant.

So, anyway, we went on with this battle. And, I remember having a guy from AT&T, who both of us know, a really smart engineer, come into my office. And, he wanted to make sure there was a big blackboard and a lot

of -- and, he came in with all his chalk and colors and he drew this big network to explain all these problems that we were going to have if I could plug my frying pan into his network, and so forth. And, 10 years later, after the technical standards had been in effect for five years, and I'd been out of the government for two --

Female Voice: -- And, nothing had blown up.

Don Baker: -- No. And, nothing blew -- and, I ran into him on an airplane. And, I said, "Tom, you're someone I [unintelligible]. Remember, when…" "Oh, yeah, I remember our meeting." And, I said, "Well, tell me how it actually has worked." He was still with them. He said, "Well…" I said, "Is it as bad as you said, or as good as I said?" He said, "Well, with these technical questions, you never got a totally unambiguous answer. But, it's a lot closer to what you said than what I said." And, then -- and, so, this battle is going on and, eventually, we get technical standards.

Tom Whitehead: Let me just interject. The power of an idea or a concept -- [unintelligible] Theodore Vail, in 1910, that really developed the idea of the Bell system. And, he used that word -- system. It is a system, meaning it is all connected. It was all coherent. It was self-sustaining. And, the concept of the -- today, you [unintelligible] fiber optic [unintelligible] system, which -- but, you don't -- in today's discourse, you don't understand the total import of that word as it was applied for most of the 20th century. It was the system, and anything outside the system was like a cancer.

Don Baker: And, the point was that we didn't have a model of something that worked differently.

Tom Whitehead: Sure, we did. It was called competition.

Don Baker: Oh, no, no, no, no, no. But, I mean, we couldn't point to the Swedish telephone system and say look at what's exactly that -- what -- you know…And, so, it was definitely regarded as, the point he had, in theory books.

The next stop on this business of foreign -- so called foreign attachments, is actually on the next to the last page of my outline, on the bottom of page six. What happened was, the Bell system, that knew perfectly well that we only had one telephone system, as you said, went out and persuaded, really on Robin Hood grounds, the North Carolina Public Service Commission to re-impose the old, pre-Carterfone rule on intrastate calls on the theory that the Public Service Commission had jurisdiction over intrastate communications, and that, therefore, they could impose this rule, which would of course defeat, and follow all the other states as it probably would, would defeat Carter's phone because you weren't going to have your computer on one -- I mean whatever you had in those days -- a recording device that you provided for intrastate and not for -- and so forth. And, I gave a speech, which I couldn't find yesterday, in which I was describing this case. And, I said that -- I think this was Ken Robinson addition to the scene. I said, "This performance by AT&T reminds me of Pudd'nhead Wilson."

Now, remember, Pudd'nhead Wilson -- a guy's name, a funny character because he was coming across -- ashore in Dawson's Landing, Missouri, and there was a dog barking at him. And, he said, "I wish I owned half that dog." They said, "Why half the dog?" And, he said, "Because I'd shoot my half." And, I always say that here's an AT&T, this famous, responsible ~~[unintelligible]~~ Pioneer, treating our national telephone network like Wilson's dog. Anyway, the court held that ~~it~~ North Carolina was pre-empted. What I didn't know until 20 years later, when I actually had dinner with one of the three judges on the court, was that, although it was a unanimous decision,

i.e., there was no dissent, the court was very closely divided. And, he talked about how much trouble he had persuading -- he was actually a Fifth Circuit Court of Appeals judge sitting by designation on the Fourth Circuit that day. And, so, I don't know all that happened. In fact, I think the Federal Communications Commission would have taken it to the Supreme Court, and we probably would have won that battle. But, it was -- it is, again, interesting or close [unintelligible].

OK. So, now we've taken care of equipment. People can have equipment on the system. Manufacturers can grind out all kinds of great things. As you all know, sometimes the equipment works and sometimes it doesn't, and -- but, that's our fault, not the -- we can't blame the network anymore, most of the time. The other issue, which has Robin Hood elements, was competition -- long-distance competition with AT&T. Remember, I said that a big part of the system was to subsidize local rates -- long-distance rates, which were -- part of the long-distance rates were transferred by the Federal Communications Commission back through the rate phases of the local companies. And, the first chink in this armor had, in fact, occurred in 1959 -- the first item on my list when the FCC, and what by the late '60's seemed to us a unique decision, said that companies could get licenses to -- in this frequency band to provide their own services, not -- and, that was not only railroads, but, you know…other kinds of companies. And, that, of course, gave big user -- big telecom users the ability to bypass the network and force AT&T to provide much larger discounts.

The next stop in this trip is this microwave communications decision on the bottom of page two. And, there, you had this funny company that proposed to set up a series of microwave lines all the way along -- from railroad -- from Chicago to St. Louis.

Female Voice: That's MCI -- Microwave Communications.

Don Baker: Yeah.

Female Voice: It is funny, Tom.

Don Baker: Well, it wasn't at the time. It was a very funny little company. And, they -- AT&T resisted it on every possible ground including the technical -- that it was technically inferior, that the -- their towers wouldn't withstand a tornado, and a variety of other things. And, it was part of the -- the AT&T's were, by gosh, the communications system of the country should be absolutely rock solid even if over-engineered in some -- at times. And, anyway, you look at the split on the commission, which I gave you a little bit of a flavor of, and here's the chairman saying that this is going to destroy the principle of nationwide average rate-making because the other piece of Robin Hood was that, in theory, that the people in rural areas and on light routes got telephone service for the same price as people in dense, big cities, or big, you know … big corridors. And, AT&T played that one very well. And, anyway -- and, the commission essentially said, "Well, the frequencies are available and these people say they can provide some new and different services." AT&T says, "All they're doing is going to provide cheaper services." And, "We ought to let them do it."

And, if -- but, in this Charles River Bridge article, you will note that what I did -- because I thought it made the point -- was I rolled out all these 19th-century technology arguments with 20th-century footnotes. So, that, while the argument about more vibration on the bridge sounded preposterous, it was just the kind of argument that AT&T was making against MCI. And, if you look at the footnotes in this Charles River Bridge thing, you will find any number of them to AT&T briefs in the MCI case.

The next stop on the train was that the -- was the Specialized Common Carriers decision, in which they come along and say, "We're going from a voice world to a data world. And, there's some people who -- some innovators who want to offer services that are mainly data centered." And, AT&T says, "Oh, we can do that and all the rest." But, what they -- what's significant there is how cautious the commission was. You still get this regulatory caution. This is going to be small ~~bear~~ beer compared to the telephone network. It has no risk of the telephone -- you know … there's no risk of real harm to the -- economic or other harm to the telephone network.

The next stop was domestic satellites, which was a Whitehead production with -- in which the staff at FCC was encouraged to allow competition in satellite services. Now, this seems easy, but it didn't at the time because, in 1966 I think it was, they passed the satellite act, the Comsat Act. And, at the time, the technology was a system of global-orbiting satellites. They kept on going around the globe. So, you needed some large number of satellites and some fairly expensive earth stations. So, the satellite would come over head, and the earth station would follow it, and then it would flip back and follow the next one. And, so, this thing had a fairly natural monopoly characteristic. We set up Comsat to run it. And, Comsat had a fairly arrogant view of the world, too.

And, I remember one thing that we dealt with -- a legal issue that we dealt with. The satellite act said, NASA shall launch for Comsat. Comsat construed this to mean NASA shall launch for Comsat and nobody else, which if they were right legally would prevent the whole program that we were trying to advocate. So, we all argued that that wasn't the proper reading of the statute. On the other hand, this was -- compared with the competitive carriers thing, this was a much more risky proposition. And,

of course, AT&T, because it wasn't in it at all, didn't like it anyway, and certainly wanted the least possible satellite development. So, I think my recollection was turning it over to Comsat was as good an answer as there could be because that would be less of it.

So, anyway -- and, the commission struggles with the fact that, if you really applied their normal standards, you couldn't, you know … the normal standard is it really has to be able to show that it's going to provide a service and it's going to succeed. They wouldn't be able to authorize. So, they said, "No, we're going to let people take risks." And, Dean Burch, the chairman, who was generally an ally of us, dissents saying, "This is a crazy form of competition. This is competition for slots as opposed -- and so forth. And, maybe, it'll work, but maybe it won't." Anyway -- and, then meanwhile, you had the populist, Nick Johnson, saying that you really wanted to make sure you kept Comsat out of the business, too, because they -- and so forth. And, when I pulled up his dissent, I included his quote, which is -- at the beginning of it, which is, "I'm reminded of the children's riddle. Where does an 800 pound gorilla sleep? And, the answer, anyplace he chooses." And, so, what they're saying, and what he's saying, is you got to control where the gorillas sleep in this business, and keep AT&T and so forth out.

Tom Whitehead: That was an interesting decision because, of course, I had taken a very strong position promoting competition and open entry. But, Dean Burch, who was the guy that we had appointed to be chairman of the FCC, was giving us flack and resisting. And, so, I had to go enlist a couple of Democratic commissioners to go along with the other Republicans to get a majority on the commission. Back in the olden days, there was a bipartisan way of doing things.

Don Baker: Yeah. And, it is just -- it is an interesting -- so, what we were -- what we had -- what was going on was a movement in this direction of opening up things that had never been opened up before. The antitrust division was a fairly regular participant in these proceedings. We put quite a bit of resources and wrote briefs, and tried to come to grips with what we saw to be -- with the hard questions. And, sometimes, that agency has -- so, will file a brief that says competition was good, thank you very much, which isn't -- I mean it doesn't usually help the regulators much who are struggling with particular issues.

Anyway -- and, this gets us back -- gets me back into the story by virtue of footnote to where I was when I sided with the fellow from AT&T on whether the White House could tell us what we could file and what we couldn't because I wasn't having any trouble with you, but I wasn't sure I was -- and the world and our successors was going to be as amiable. And, so, we went on filing our own stuff and people went on complaining about it. And, I remember at least two attorney generals who would say, "You know…you're part of the division, Don. That causes me more political trouble than the rest of the place put together."

Anyway, now, the next --

Tom Whitehead: -- Of course, the nice thing about being in the White House is you can get a strong dissent from a guy like Don Baker that's largely very compelling. And, then, you could go to the commission and you just wave it off [unintelligible] and say, "Well, the administration position is this and you can disregard those minority positions."

Female Voice: I'm just surprised that the DOD went along with the Open Skies. I would have thought that they would have wanted some of the control of that, too, as opposed to open entry.

Tom Whitehead: They didn't see it as -- they didn't see satellites as a particular asset or threat to them.

Don Baker: And, remember, we were dealing with -- I mean, this was going to be domestic satellites for broadcasting and things. And, if -- and, so, I think the situation became different when you were dealing with this -- the issue that I was talking about before, where you were dealing with a transoceanic satellite, where AT&T would get to provide the cable if it were cable, but -- and so forth. And, I don't think AT&T saw the satellites as diverting huge amounts of traffic.

Female Voice: Mm-hmm.

Tom Whitehead: [unintelligible] they favored Comsat having the monopoly because it was a fellow monopolist. But, it was clear in any event that AT&T was not going to be a dominant player in the satellite region, so it wasn't worth their while to try to block it.

Don Baker: But, I think that is the situation.

Female Voice: Mm-hmm.

Tom Whitehead: And, they were -- this is an important point. AT&T's attention, at that time, was focused primarily on the specialized common carriers. I mean, which they did see as a direct economic threat because of its parallel microwave lines being used by big companies providing service at a lot cheaper rate. So, they were focused very -- all their political muscle was focused on making sure the specialized common carriers either didn't have it or were tightly constrained. And, indeed, it was the specialized common carrier docket that reinforced my determination to take on the

Open Skies policy because I saw the Open Skies policy being a precursor or a precedent model for competition in specialized common carriers.

Don Baker: But, remember, at this point, that the last mile was controlled by the telephone companies. And, so, we were talking about competition by and large for large users that could get to the specialized carrier because the telephone company wasn't providing them with access to the specialized carriers and so forth. And, it's the last-mile problem that became a key part of what's the next piece of the drama, which is the great government case against AT&T -- the Justice Department case against AT&T. And, that was one I was in the middle of and you were in the middle of, ~~and we~~ in 1956 -- At the time, there was this stupid consent decree that had been entered as a sort of pretense for getting rid of the prior case against AT&T, and it just -- so, kind of a little bit of an accounting separation between AT&T and Western Electric. But, really it didn't seem like a hugely important thing.

So, we're sitting there, and we ran this investigation, and we got economists and everything. And, we're looking at a world which runs directly contrary to [~~unintelligible~~] then current world. It is that you treat the telephone network as having essentially three pieces, (i) the terminal equipment, which we already now pushed off, (ii) the local loops and switching, which we took to be a monopoly, a natural monopoly, and (iii) the long distance, which we thought could be competitive. But, there was a great deal of uncertainty about how the long distance and the locals would interface.

And, the other piece of the problem was Western Electric because what you had at the time -- still do have for that matter in the local companies was rate-based regulation. And, so, the company gets to throw into this capital base what it paid for equipment. As long as the rate of return is higher than the real cost of capital, it would just as soon have a larger rate

base than a lower rate base. It's providing a monopoly service and so forth.

And, so, the telephone companies had no incentive at all, it seemed to us, particularly the AT&T companies, which had 90 percent of the country, to shop around for cheaper or less, you know…equipment. So, a very principal part of the job that we were [unintelligible] was to break up the line between the operating companies and Western Electric, and send them off. And, but the second thing we looked at and believed in was that you could also separate the long-distance companies. But, again, no one else in the world had done anything like this.

I was -- if you look at the top of page six, I haven't reread the Prayer for Relief in the AT&T case for a very long time. And, if you look at the whole thing, you see that, first of all, we wanted to break up AT&T and Western Electric. And, then, we wanted to make Western Electric divest sufficient manufacturing [unintelligible] to create competition in equipment figuring, otherwise, they would -- the companies would just keep on going.

But, then, the next thing, which I italicized because I didn't -- divesture of capital-stock interests or other assets to separate some or all of the long lines department from some or all of the operating companies. And, this was clearly cautious relief. Now, the trick to the -- bringing this case, which seemed extraordinary -- it seems extraordinary, was of -- we worked up -- did detail work and detail for the presentation for the Attorney General. But, we're right in the post-Watergate period. We have -- and, so, we're at the high point of not having political interference with the law enforcement process.

So, this complaint is sent up to the Attorney General, and we had -- with all the explanations and stuff. And, the Attorney General is a not particularly intellectual senator from Ohio named [William Bart] Saxbe. And, AT&T asked for a meeting, which -- what always did when the Attorney General had an important case. And, we assumed this was just going to be the first of a whole bunch of meetings. In fact, I was -- as the deputy for regulation, I was in the middle of the case. The attorney general schedules the meeting for a day that I'm supposed to fly to Los Angeles. And, so, I say to my boss, Tom [Parker], the head of the division, "Shall I cancel?" And, he says, "Oh, no…He says, "We're going to have so much meetings over this that, whether you're there for this one or not, it doesn't make a difference." I get on the plane for Los Angeles and I arrive at the field office, the antitrust division field office, and I can still see the telephone says, "AT&T case was filed at 4:04 Eastern Time today."

And, what apparently had happened was the Attorney General walks into the meeting with all these big bosses from AT&T. He says he's read the antitrust division's material, he agrees with it, and we're going to file a case. And, everyone says, "Oh, my God. We've got the biggest insider trading problem in the history of the Republic." So, people are dispatched to tell the FCC to stop trading and [unintelligible] get the signatures on the complaint, and get the damn thing filed. And, apparently, the other thing I didn't know for some years later, the president, who, on something of this scale, might like to be told -- this was Jerry Ford -- was on a plane to Japan. And, Saxbe, the Attorney General, calls up the assistant White House counsel, who's a fellow named Phil [Areta] [cannot CQ this name], a very famous antitrust lawyer, and says, "Well, I'm going to file this case and what do you think about this case?" And, so, the case gets filed.

And, you know … and, it's -- I mean it's just -- it was an amazing thing. Then, what happened on the case was we drew a dingbat judge who -- and, so, then AT&T was doing a wonderful job of stalling the whole thing out. And, fortuitously, this -- he died and we got a very activist judge, and who damn well was going to try this case. And, he put the people in the blocks and, you know…so, there was a lot of discovery. But, then, there was a trial and it started.

And, I remember the chief trial lawyers from both sides -- I was no longer in the antitrust division by the time it was tried -- were both Irishmen who liked each other. And, I went to a St. Patrick's Day party with them both, and the government was almost done with its case, and the lawyer for AT&T said, "Well, you know what? You're almost done. I'm going to ask for a six-week delay to let us file a brief urging dismissal of the case." And, the justice guy said, "I'm sure you will." And, then, they both say, "And, what the judge is going to say is, 'Well, I'll give you the rest of the week off and start putting on the defense case on Tuesday morning'." And, that's what -- you know…and, the case was never -- it was never completed because the judge ruled on those motions in favor of the government. And, then -- and, so, then, the case was settled on the basis that AT&T would keep the long distance business and Western Electric and the Bell companies would be spun off. And, there were huge, you know…

Female Voice: Ten years, though -- 1974, filed -- 1984…

Don Baker: Right. Well, it took us four years for the first judge to die.

Female Voice: So…

Don Baker: I mean, I was -- well, I was head of the division in '76, '77, and it was really frustrating. But, anyway, so you had -- I mean you had this thing and, fortunately, at each juncture, you had a critically smart, well-regarded person as head of the antitrust division because when they -- the Department of Defense hated this case, and hated the settlement. And, it would -- if the case hadn't been filed on this lightninglike basis, I'm sure there would have been a huge row at the White House over bringing the case.

But, anyway, there was -- when the settlement was agreed between Charles Brown and Bill Baxter, the Stanford professor, economist, who was head of the antitrust division, the Department of Defense went ballistic on this thing. And, it turned out that everybody between Baxter and the president was disqualified. So, then --

Female Voice: -- 'cause they all wanted AT&T back?

Don Baker: Yeah.

Female Voice: Oh.

Don Baker: And, so, then, Baxter ended up having to explain to Reagan why this was a good settlement. And, you know … President Reagan who would -- I never had to deal with, but was, you know … and, so, smart, decent, practical, but not detailed person, said, "OK," as I understand the story. I don't know of a good way to end. So, you ended up with this revolution.

Now, of course -- and this goes back to my initial thing of history looking back is different than it was at the time. Now, in most countries, not all, but in -- or in many countries, you have -- we -- they have opened up competition in toll services to the local state monopoly. And, sometimes

it works, and sometimes it doesn't work. And, what the Internet and Voice over Internet Protocols are going to do in terms of creating still more is an interesting thing. But, local access has, you know … has continued to be a very critical problem. And, that's why we assigned in the MCI case because that was a key piece of the puzzle, and is the leading formulation of what we now call the bottleneck monopoly doctrine or the essential facilities doctrine. And, as long -- and the rationale of the 1984 settlement was that, if you separated the local companies from the long distance business, they would be indifferent. They would be neutral as to -- on long-distance carriers and, therefore, that you wouldn't have the discrimination problem.

Once they started to get back into long distance, then the problems reappeared. I had an interesting -- and this is the last thing I'll say because I'll have a discussion. A couple or three years ago, I got a chance to do some work for AT&T in New York, where they were now in the long-distance business trying to get local connections to their customers out of Verizon. And, there were two [unintelligible] pieces. [unintelligible] first of all, every case that we would have cited, if we'd had to file and litigate, would have been -- involved cases in which AT&T was the defendant. And, we were now making the exact opposite argument than they had made in losing those cases.

The second thing was, of course, they knew exactly what was being done to them. No fools they. Anyway, so that was -- it's a -- but, it's a world that, if -- you know…if you and I had sat down a month after you arrived at the White House for OTP, and we had been given a multiple guess thing on what the world would look like in 35 years, there is no way in the world that we would have -- unless we'd been drinking a lot the night before -- come up with what in fact happened.

Anyway, let's…

Tom Whitehead: This is supposed to be an interactive class, so…

Male Voice: I'm sorry.

Tom Whitehead: Interact.

[laughter]

Female Voice: On command.

Female Voice: Well, we've been hearing a lot from the government point of view on how things happen and it's wonderful to hear these fact stories. And, I'm wondering what was going on in the private sector at this time? Were -- I mean, I'm assuming there were exceptionally smart people working for AT&T trying to strategize as well. I mean, they must have seen some of this coming to a certain extent, and been able to -- were they trying to shape what they saw as an inevitable future, or were they just pushing back?

Don Baker: You probably have a better answer than I. My sense was that they didn't foresee being broken up. What they were worried about was much more limited -- I think, as you were saying Tom, on being nibbled away at on long-distance communicate -- particularly, long-distance communications for businesses, and so that would have the nationwide average-pricing threat because then they had that not only on toll calls, but they had it on leased lines and everything else as I recall. It might hang -- it might hold true still on toll calls, but it was going to be undermined. And, of course, the more it was undermined on leased lines, the more businesses were

going to shift to self-leasing lines rather than using toll. I mean it -- and, so, I think they saw the world -- their grip on the world weakening.

Female Voice: Mm-hmm.

Don Baker: But, I don't think they saw it as disappearing. In a way, you might see this even on the settlement. They -- the people that negotiated the settlement kept the competitive parts of the business and turned out -- turned over to others the businesses that had the greatest monopoly promise. And, of course, it proved to be the successful parts of the business. And, so, they may have not really understood -- they understood the world. I mean, I remember talking to a person from AT&T ~~in the late~~ -- a smart guy -- in about 1990. And, he was saying, "The antitrust division really has done us a great benefit because it has forced us to think like a competitive company. And, we've always been a great enterprise, but being a great enterprise that's forced to think like a competitive ~~[unintelligible]~~ company is wonderful." Then, of course, they made a bunch of decisions and it didn't turn out so good from a business standpoint, and it ended up being part of --

Tom Whitehead: -- I think great enterprise is the key expression. They were the great enterprise, and they had been a great enterprise for --

Don Baker: -- for longer than anybody who was working there at the time could remember.

Tom Whitehead: -- could remember. Yeah. And, the system worked. The system worked extremely well. And, the system successfully rejected all kinds of competition. The -- AT&T had developed to a very fine art how to stall and stonewall any threats. They can delay things in the commission, and in the Congress, and in the courts for a decade without even trying. So, I

think in the -- I think they really came into this era like King Canute . I don't know if you all remember King Canute. King Canute was a possibly mythical king in Norway, who was so impressed with his own powers that he walked out into the ocean and commanded the tide to stay out. And, of course, he didn't succeed. And, I think AT&T, as this competitive wave came on, initially felt that if they just kept doing what they were doing, the stall, delay, you know…obstructing, that it would sort of go away, and we'll accept a little bit here, a little bit there around the edges, but the real purpose is to delay.

The head -- I told you they were very focused on the specialized common carrier decision, which had to do with private microwave systems. And, Bernie Strassburg , who was the head of the Common Carrier Bureau, told me that what the commission really wanted was not competition. What they really wanted was a little competition over here in some limited sector, so that they could understand what the real costs were of the Bell system. They didn't know what the costs were. They didn't know what the costs were. We got to set rates. We do rate-based -- we have this elaborate rate-based regulation thing. But, we don't know what their costs really are. So, this -- if we just allow a little competition over here in the corner, will give us some kind of a benchmark.

And, I think AT&T saw that little benchmark as maybe being the chink in the armor that couldn't go much further and they felt [unintelligible]. So, they fought these battles based on the idea that they could contain it, and it turned out to be fatal miscalculation.

Don Baker: Well, I've had --

Tom Whitehead: -- And, let me just say one other thing. There were lots of very bright people coming into his office and coming into my office who were not

AT&T people, manufacturers saying, "I can manufacture microwave equipment at a tenth of the cost of what Western Electric manufactures and charges AT&T. I can put in an all digital microwave that'll have an advantage on these small [~~unintelligible~~], whereas, AT&T will only give us analog lines.

Female Voice: Mm-hmm.

Tom Whitehead: I can put up a satellite system for a tenth of the cost of what Comsat is saying they would do it on a monopolistic basis." So, we had a lot of people -- and Motorola was coming and saying, "We can do cellular telephone service, you know … much higher quality, much better than the Bell radio phones." So, there were a lot of very smart people from all over the country who were coming in and feeding us, and that helped us formulate our perspective.

Don Baker: Yeah, I mean -- I think that is just -- I think the chinks in the armor, Carterfone, MCI, and specialized carriers encouraged -- they acted sort of like catalysts to encourage people. They saw the possibility of change. But, it is a very interesting thing. Prior to Carterfone, the -- AT&T had never paid much attention to the Justice Department. And, after we won the Carterfone case, they appointed a handler. I had a handler from AT&T's Washington office. He was a very nice guy. And, you know…he would occasionally play a game of tennis. He'd send me some information. He knew what other things I was doing -- my interest in banking or something. He'd see an article in a [~~unintelligible~~] and he'd send it to me. And, as soon as the AT&T case was filed in 1974, this guy disappeared. I mean, I don't know what Siberian power station he was sent to, you know…But, I just -- I don't think that they ever thought that -- as long as they had DOD on their side, there was anything like a big antitrust case that was going to come chase them.

Tom Whitehead: Any other questions?

Female Voice: Well, you said they miscalculated by trying to, like, you know…delay all of these things. What should they have done? Was there anything they could have done to protect themselves? I mean…

Don Baker: That's a really good question.

Tom Whitehead: That's a very good question.

Don Baker: Because it is like trying to turn a battleship or an aircraft carrier 90-plus degrees in a relatively short thing, and --

Tom Whitehead: -- I think they could have accommodated some of this change at a more rapid rate, which would have relieved some of the pressure. I may have, or may not have told the class this story. I spent most of my tenure at OTP in the White House opposing Don on the antitrust case. I felt like that the industry was too complex, too complicated, there was too much at stake, that breaking up the Bell system, this marvelous system, was like trying to cure a cold with a sledgehammer or an axe. It was just too blunt an instrument, it was too draconian, and that what we needed was to have an enlightened regulatory policy that would allow more and more competition in some of these new fields. And, Don, and some of his other people were regularly proselytizing me and my chief economist and arguing that, you know … an antitrust case was really a good thing.

And, I just sort of stonewalled. I was not very receptive. And, then, one day, I got a phone call from George Shultz, who was then Secretary of the Treasury. And, it was one of the, you know … my White House line and I picked it up, "Hello." "Hi, Tom. This is George." We knew each other

fairly well. And, he said, "Tom, are you about to do anything with respect to AT&T?" "No, nothing I know of." "Well, anything -- just anything." I said, "No. No." "You're sure? Not in, like, a couple of -- three weeks?" "No. No. No." I said, "George, if it makes you feel better, I'll just agree I won't do anything with AT&T at all." He said, "Oh, that'll be great until next Friday. Just don't do anything until next Friday." And, I said, "Fine. I won't." I said, "By the way, do you mind my asking why?" And, he said, "Well, we, with the United States Treasury, are going to float a major bond issue, and our interest rate follows the AT&T's interest rate. So, this year, AT&T will account for one third of the new corporate debt in the United States. And, if you did something that had an adverse impact on AT&T, it would significantly drive up interest rates on their bonds and significantly drive up the interest rates that the U.S. government has to pay." "OK, George. Thanks."

And, I remember staring out my window, more or less in the direction of the Justice Department and saying, "You know…this is the fastest growing industry in the United States. You have all of this copy of specialized common carriers. You have cellular telephone. You have satellites. You have cable. You have all this stuff going on and you have one company that accounts already for a third of the new capital investment in the country. This is just not viable." And, a few days later, I called Don and said, "OK, let's talk." And, so that -- and the moral of that story, I think, is that had AT&T gone along with some more enlightened deregulation, if they had sort of relieved -- it's like water building up behind a dam. If you let a little bit of the pressure out, then you can -- the dam can hold. And, they just fought it so monolithically, so [unintelligible], that I think they did themselves in.

Don Baker: Yeah. I think that another way to say the same thing is, if they had been willing to back off on some of what I was describing as the Robin Hood

stuff, and go to more cost-based services, and tell the state regulators, "I'm sorry, you know…we can't do it," -- it would have been -- I think the dynamics could have, would have changed. And, it certainly would have changed *vis-a-vis* the antitrust case because if -- it was a close enough deal. And, my version of our conversations wasn't that I was some raving break up the bastards and then see what happens. I mean, we were really quite, quite thoughtful in the process. And, we were struggling with the issues --

Tom Whitehead: -- Absolutely.

Don Baker: -- as illustrated by the fact of -- that some or all of these things. And, so I think that -- the other thing -- the other -- you know…and, this is -- the Charles River thing is useful, again, because they dragged out these regulatory proceedings by making all kinds of -- not fatuous arguments, arguments that were only barely passing the laugh test, but yet involved assembling evidence and requiring the agency to weigh things and so forth and so on. And, so, it's a -- I think it is -- I had just one other thing in what they might have done. I remember, as I said, the other great monopoly I was dealing with, which was totally different was the New York Stock Exchange. And, I had the chairman of the stock exchange come in one day and say, "You know … we're paying an enormous price to maintain this monopoly, and I think maybe at some point I'll say it." And, he did. And, then, he got fired.

But, at least, they were -- the people were thinking -- even in that kind of an organization, were thinking about it. I don't think people at AT&T were thinking we're paying an enormous price to [~~unintelligible~~] a monopoly.

Female Voice: Well, in your readings too, just -- I mean, a little bit in AT&T's defense, one of their defenses apparently that they put up against the complaint that was filed was that, well, you guys made us do it this way. I mean, you know…

Tom Whitehead: Oh, yeah.

Female Voice: The government told us to be Robin Hood in essence, both at the federal and the state level. And, you guys, in terms of a big ship changing course --

Tom Whitehead: Yeah.

Female Voice: -- you guys are now bringing a suit against us for essentially doing, in some way, what you had sanctioned up until now.

Tom Whitehead: That's fair. That's a fair defense.

Don Baker: That's a fair defense.

Female Voice: Well, no. I'm not defending them, but that was --

Don Baker: No, it's a fair defense.

Tom Whitehead: No, it's absolutely true.

Female Voice: I mean, it does seem a bit like breach, you know…I mean, I don't know.

Female Voice: Yeah, but the government decided that it was [unintelligible]

Tom Whitehead: Yeah. I think it clearly was the government had been a willing co-conspirator. There's no doubt about it. Jamie, you had a question.

Jamie: Yeah. I think that -- on that point, you know… [unintelligible] In terms of a mandate that [unintelligible] But, anyway, how do you equate that AT&T saga with basically [unintelligible] interest in the past [unintelligible] with Microsoft, and how they responded [unintelligible] In this case, they [unintelligible] about possible splitting Microsoft into ~~[unintelligible]~~ pieces?

Don Baker: Well, that's a very good question and I want to -- let me give you this answer. We have, in Section 2 of monopolization law, we have a fundamental tension. Everybody has it. You both want the monopolist, particularly the vigorous monopolist to defend its turf. But, you don't want it to do things ~~that the~~ whose principle purpose is just to exclude other people from the market. And, after looking at AT&T -- the AT&T case, I came away with the view that the legal standard is quite close to the pass interference rule in football, that you want the defender to defend, but you don't want him to defend by throwing the other person on the ground or grabbing his shirt. And, as in football, the question of whether you're pushing him or not is often a close case.

My view on Microsoft was that they were clearly guilty of pass interference, and the interesting thing about the case was what the relief was going to be. And, then, unlike AT&T, they got ~~this dingbat~~ initially a district judge who, frankly, I thought had done a very good job on finding of [Thomas Jackson], that had done a good job on finding -- making legal factual findings. And, then, -- so, I've been writing -- I, in fact, wrote an article saying, "Now, we're into the interesting stage of this case and what do you do?" I don't know what -- I didn't -- I wasn't sure what the solution was. And, he treats it like a ~~[unintelligible]~~ criminal case. Says, "Well, the

government succeeded, so we'll take whatever relief the government says they want," which was a dumb thing. It was a dumb thing to do.

And, so, the Court of Appeals reverses him. Although, you might say a very good decision in that it -- the Court of Appeals decision in Microsoft is excellent. Then, it goes back to the antitrust division, and exactly what didn't happen in AT&T happened in Microsoft, which was they didn't do a very good job of negotiating the decree and it isn't a particularly effective piece of work. But, then, I say with the next breath, do you know exactly what you would have done Mr. Baker? And, the answer is, I don't because I think that it's a very -- and, I'm not sure breaking up Microsoft was the answer. But, I am sure that the relief stage of Microsoft deserved a thorough trial with good experts and decent factual findings. And, I just don't think that the government's done very well, which just picks up on the very last piece of something you said of commenting internationally, and it obviously opened up a gap with the European Commission, which didn't think the U.S. had done very well either. And, they weren't particularly inclined to defer to the U.S. government as you would normally like with [unintelligible]

So, but, it is -- I mean, this is just a tough damn area and there aren't very many government antitrust cases that turned out as well as AT&T did. And, it was -- but, it was the break of having very good people heading the antitrust divisions at both ends.

Female Voice: Mm-hmm. I mean, because Microsoft straddled two administrations, right? I think.

Don Baker: Yeah. Well, so did AT&T straddled three.

Tom Whitehead: Four.

Don Baker: Yeah, four because it was [unintelligible] who?

Tom Whitehead: Nixon, [unintelligible]

Don Baker: No, no. Nixon had gone by the time we actually brought the case.

Tom Whitehead: Yeah, but Saxbe and I agreed we were going to do it while Nixon was still there.

Don Baker: Oh, did you?

[laughter]

Don Baker: Now, I know something that I didn't before.

Male Voice: Were there any -- like Microsoft to DOD was like one -- that's one of their biggest allies, but was there anything similar in Microsoft in terms of [unintelligible] any particular area of the government? Did they, you know…it would have been harmful to them to…?

Don Baker: I don't think they have anyone like that, and --

Female Voice: -- In fact, all the government agencies were buying Microsoft software while this case was going on.

Don Baker: Yeah.

Female Voice: I mean everybody used [unintelligible]

Don Baker: And, it really -- it's -- you know…and, it does -- Microsoft really does underscore what's a very important point in all this stuff that you're studying in this course I think -- is, what's the relief? What is actually ordered is the question. You can get all kinds of -- and, as you all know from law school course, you can get all kinds of wonderful sounding opinions from an appellate court based on a motion to dismiss or something like that and then you find what really happened in the case afterwards had very little to do with the case that you read in your case book. Anyway -- and, so, it is an interesting thing. But, I think -- it's such a good question, Tom. If I think of something that is useful in the Microsoft thing, I'll just email it to you and you can --

Tom Whitehead: -- We'll send it around.

Don Baker: We'll send it around because I think it's a fun question.

Tom Whitehead: Well, we're out of time. Thank you, Don.

[applause]

Don Baker: It's an honor to be here.

Female Voice: We'll let you know what's going on next week.

Tom Whitehead: OK. Well, it's going to be the same as usual --

Female Voice: -- Right.

Tom Whitehead: -- as far as that goes.

Female Voice: Right. OK. Can you [unintelligible]

Don Baker: Take as many as you want.

Female Voice: I know. These are yours. I know. I want to get it straight.

Don Baker: Well, take as many -- I, you know…that's fine. That's fine.

Female Voice: There is. OK. There are a few who couldn't be here today.

Don Baker: And, I will -- well, yeah. And, the other thing I can do is I --

Tom Whitehead: [unintelligible]

Don Baker: No, tell me about that one. We found a few errors and [unintelligible]

Tom Whitehead: And, then, I saw a few typos.

Female Voice: Tom, I would like to [unintelligible] if you can.

Male Voice: Yeah. That [unintelligible]

[unintelligible -- speaking simultaneously]

End of recording.

GHOSTS OF CHRISTMASES PAST... IN TELECOMMUNICATIONS

Donald I. Baker
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October 19, 2005

1959 FCC. *Allocation of the Frequencies in the Bands Above 890 Mc., 27* FCC 359, 29 FCC 190.

Absent a shortage of frequencies, and in the absence of any showing of reasonable likelihood that expanded eligibility for private point-to-point microwave systems would adversely affect the ability of the common carriers to provide a nationwide communications service or to serve the general public, it does not appear that the Commission would be warranted in refusing to authorize private users to use microwave frequencies for point-to-point operations.

1961 Chicago attorney (now Justice) John Paul Stevens. Speech, *19 ABA Antitrust Section 355, 360-1.*

With due respect for the expertise and diligence of the [Interstate Commerce] Commission, a review of its decisions suggests that *the administrative process is not adequate to cope with the complex, dynamic character of our economy.*.

It may be suggested that ....the railroads are so important to the country as a whole that we cannot risk the bankruptcies which might result from unrestrained competition. *In short, we are afraid of free competition in such a basic industry.*

If the antitrust philosophy that we have preached abroad is to be practiced at home, it would seem that the argument should run the other way: *The more basic the industry, the more significant are the benefits to be derived from free competition.* Consider, for example, the effect of a lower rate structure throughout the economy on America's competitive position in the world market. The risks that would be faced by a competitive transportation industry are not essentially different from the risks which we require other basic industries to assume.

Our professed faith in free competition is based on precepts which are as sound as the logic of the Fifteenth Century scholars who opposed Columbus' voyage.

Nevertheless, *the transition from competition to regulation that is plainly illustrated in the transportation industry finds its counterpart in other areas of the economy. We are traveling in the direction of more, rather than less, economic regulation.* Like Columbus, we may encounter unexpected obstacles on our voyage to shores of soft competition. (emphasis added)

1968 FCC. *Use of Carterfone Device,* 13 FCC 2d 420.

AT&T has urged that since the telephone companies have the responsibility to establish, operate and improve the telephone system, they must have absolute control over the quality, installation and maintenance of all parts of the system in order effectively to carry out that responsibility. Installation of unauthorized equipment, according to telephone companies, would have at least two negative results. First, it would divide the responsibility for assuring that each part of the system is able to function effectively and, second, it would retard the development of the system since the independent equipment supplier would tend to resist changes which would render his equipment obsolete.

No one entity need provide all intercommunication equipment for our telephone system any more than a single source is needed to supply the parts for a space probe. We are not holding that the telephone companies may not prevent the use of the devices which actually cause harm, or that may not set up reasonable standards to be met by interconnection devices. These remedies are appropriate; we believe they are also adequate to fully protect the system.

In view of the unlawfulness on the tariff [prohibiting "foreign attachments"], there would be no point in merely declaring it invalid as applied to the Carterfone and permitting it to continue in operation as to the other interconnection devices. This would also put a clearly improper burden upon the manufacturers and users of other devices.

1968 FCC. *Microwave Communications, Inc.* 18 FCC 2d 953, 21 FCC 2d 190.

Majority Opinion: This is a very close case and one which presents exceptionally difficult questions....However, it would be inconsistent with the public interest to deny MCI's applications and thus deprive the applicant of an opportunity to demonstrate that its proposed microwave facilities will bring to its subscribers the substantial benefits which it predicts and which we have found to be supported by the evidence in this proceeding.

Chairman Hyde, dissenting: But the law is equally clear that the public interest is in *the* test – that this agency should not authorize new services simply because it constitutes "competition".

The effect of the majority decision is to destroy the principle of nationwide average rate making. Perhaps, as some economists have urged, this is a desirable result. But it certainly should not be accomplished through the vehicle of a grant of a radio authorization which represents a wasteful use of our scarce spectrum of space.

Commissioner Johnson, concurring: The really high-cost-low revenue subscribers--those who live in rural America–would never have had telephone service had they waited for the Bell to ring. They had to get government assistance through the Rural Electrification Administration, their own cooperative telephone services, and non-Bell microwave carriers.

No one has ever suggested that government regulation is a panacea for men's ills. It is a last resort; a patchwork remedy for the failings and special cases of the marketplace.

But I am not satisfied with the job the FCC has been doing. And I am still looking, at this juncture, for ways to add a little salt and pepper of competition to the *rather tasteless stew of regulatory protection that this Commission and Bell have cooked up.* (emphasis added)

1970 President's Council of Economic Advisors. *Annual Report 106-7.*

The American experience with regulation, despite notable achievements, has had its disappointing aspects. Regulation has too often resulted in protection of the *status quo*.

[M]ore reliance on economic incentive and market mechanisms in regulated industries would be a step forward....Industries have been more progressive when the agencies have endeavored to confine regulation to a necessary minimum and have otherwise fostered competition.

1971 FCC. *Specialized Common Carriers,* 29 FCC 2d 870.

The existing carriers' facilities and practices have been developed primarily to meet the needs of voice transmission. Major modifications may be required to meet the different needs for efficient data transmission....New entry will provide

flexibility and wider choice in satisfying expanding and changing requirements in this field.

New entry in the specialized field would not adversely affect the furnishing of services to the public by existing carriers. The specialized communications services involved constitute only a very small percentage of AT&T's total market. The market for standard voice communications services is not affected; it accounts for the bulk of AT&T's revenue, and is also expanding with great rapidity. AT&T will also be free to compete in the new field and is likely to obtain a very substantial portion of the potential market for specialized services.

1971 D. Baker. *The Antitrust Role in Communications* (speech February 18, 1971).

[C]ompetitive policies make us ask the hard ultimate questions of why we regulate particular activities – of why we have the government make choices rather than the public.

There are some – a growing number – who question whether the regulatory process can ever work well. These critics argue that an agency will nearly always reject competition against its industry. Professor George Stigler, of the University of Chicago, took this approach in a recent local debate with...the exaggeration appropriate to such an occasion..."Regulation and competition are rhetorical friends and deadly enemies: over the doorway of every regulatory agency....should be carved: 'Competition Not Admitted.'"

Needless to say, I do not take quite such a bearish view of the [Federal] regulatory scene. I do believe, however, that regulation is generally a second best solution from the economic policy standpoint; and that noncompetitive solutions should not be accepted except when required by well defined, basic regulatory goals. The burden of showing that a noncompetitive solution is necessary to the regulatory scheme should be always put on those who oppose competition. This does not mean passive regulation. It does not mean more imagination is needed in reconciling the fundamental needs of the regulatory scheme with the economic opportunities of the marketplace – the kind of imagination that [FCC] Common Carrier Bureau has shown us in the Computer Inquiry, Carterfone, and Specialized Carriers inquiry to name a few. This is a genuine challenge requiring skill and courage. A regulated enterprise will usually present the Commission with the most anticompetitive solution arguably required to meet any regulatory goal. The issues involved will often be technical and difficult, and they can only be met by a commission and staff able to evaluate them critically and frame any less anticompetitive alternatives available.

1972 FCC. *Establishment of Domestic Communications Satellite Facilities by Non-Government Entities,* 35 FCC 2d 844.

Majority Opinion: Notwithstanding the specific proposals that have been submitted, the true extent and nature of the public benefit that the satellites may produce in the domestic field remains to be demonstrated.

We are further of the view that multiple entry is most likely to produce a fruitful demonstration of the extent to which the satellite technology may be used to provide existing and new specialized services more economically and efficiently than can be done by terrestrial facilities.

But if we adhere too strictly to conventional standards in this unconventional situation, such as requiring a persuasive showing by new entrants that the competition is reasonably feasible and that the anticipated market can economically support its proposed facilities, most such new applicants may in effect be denied any opportunity to demonstrate the merits of their proposals at their own risk and without any potential dangers to existing services – thereby depriving the public of the potential benefits to be derived from diverse approaches by multiple entrants.

Chairman Burch, dissenting: [T]he Commission has gone off in pursuit of a peculiar and novel form of competition – measured, so far as one can tell, by how many satellite systems go aloft in how many "space segments" (a benchmark that I strongly suspect would strike the typical consumer as irrelevant even if he could grasp its meaning). "Space segment" competition may, of course, translate into the consumer benefit one day.

Commissioner Johnson, concurring: I'm reminded of the children's riddle: "Where does an 800 pound gorilla sleep?" And the answer: "Any place he chooses." True competition is one of the most highly regulated states of economic operation possible. That's what the antitrust laws are all about – when they are enforced. You either keep the 800 pound gorilla (in this case the $18 billion Bell) out of the canary cage entirely, or you tell him where to sleep.

If we want a competitive arena I would keep out ATT and Comsat entirely. (ATT has never been consistently enthusiastic about using space anyway.) Let anyone else in who wants it. Let them experiment with equipment and search for services and markets.

1974 DOJ. *United States v. AT&T, Complaint (D.D.C. 1974).*, Civil Action No. 74-1968.

Equitable Relief Sought:

3. That defendant AT&T be required to divest all of its capital stock in Western Electric.

4. That defendant Western Electric be required to divest manufacturing and other assets sufficient to insure competition in the manufacture and sale of telecommunications equipment.

5. That defendant AT&T be required, through divestiture of capital stock interests or other assets, to separate *some or all* of the Long Lines Department of AT&T from *some or all* of the Bell Operating Companies, as may be necessary to insure competition in the telecommunications service and telecommunications equipment. **(**Emphasis added**)**

1975 D. Baker. *Competition, Communications, and Change* (speech January 17, 1975)

[S]ome seem to assume that the [Justice] Department prefers "horse and buggy" competition to "efficient" monopoly. This is not so. Quite to the contrary, our "bottle-neck" approach to communications assumes that some natural monopoly bottlenecks exist in communications. What we sought is to prevent those controlling a monopoly position from using it to control other related areas by means not dictated by efficiency. It is a recurring theme.

In Carterfone, we argued that control over the local switched telephone network did not justify or require the telephone companies to foreclose competitive development of the terminal equipment market. In the Computer Inquiry the next year we argued against the "utility" concept; we argued that monopoly control of the network need not prevent independent competition in development of remote access data processing services.

Finally, our AT&T case rests heavily on the premise that control of the telephone network should not be used to dominate the related field of communication equipment; and that its control of local telephone switched networks should not be used as a basis for eliminating any potential competition in long haul transmission.

CA-4 1976. *North Carolina Utilities Commission v. FCC,* 537 F. 2d 787 *cert. denied* 97 S.Ct. 651.

[Southern Bell, AT&T's operating subsidiary in the Southeast, persuaded the North Carolina PUC to impose the pre-*Carterfone* rule for *intrastate* calls—*i.e.*, that no "foreign

attachment" was permissible unless provided by the phone company. Since there is no separate *intrastate* network (as AT&T well knew), this prohibitory rule would have defeated the post-*Carterfone* rules that the FCC had adopted to open up the *interstate* communications network. The 4th Circuit Court of Appeals upheld the FCC's position that the North Carolina rule was preempted under the Supremacy Clause in the Constitution.]

1976 D. Baker.. *Testimony on Competition in the Common Carrier Communications Field* (September 30, 1976).

There is in fact room for a lot of intelligent risk taking or experimentation both in developing new technology and designing new communications services, and I think the Congress simply must keep the door open for these developments as wide as, or hopefully wider than, it's been open in the past.

Now the opponents of more effective competition in the communications field may well say "Why bother? Haven't we brought you the finest telephone system in the world, with the cheapest basic service and available to all?" Leaving aside the fact that the Government itself has stepped in to assure that many rural residents get telephone service – with loans totaling some $3 billion to about 900 rural telephone cooperatives – the critical question to ask when you hear these relative judgments as to the "finest," and the "cheapest," is: Compared to what?

Has innovation been pressed as far and as fast as it would have been in a less regulated, more competitive market environment? The history of the telephone service both in this country and overseas has been one of steadily declining costs. Have costs declined as rapidly as they might have in the face of effective competition?

CA-7 1983. *MCI Communications Corp. v. AT&T,* 708 F.2d 1081

[AT&T was found to have monopolized and attempted to monopolize long distance communications. It was required to provide MCI with reasonable access to local loops so that MCI could compete in the long distance market dominated by AT&T. The 7th Circuit Court of Appeals held that the "essential facilities" doctrine requires the plaintiff seeking access to prove: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically to duplicate the essential facility; (3) the denial of use of the facility to a competitor; and (4) the feasibility of providing the facility."]