GHOSTS OF CHRISTMASES PAST… IN TELECOMMUNICATIONS

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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 <u>required</u> by well defined, basic regulatory goals. The burden of showing that a noncompetitive solution is <u>necessary</u> 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 <u>Computer Inquiry</u>, <u>Carterfone,</u> and <u>Specialized Carriers</u> 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."]