

The AT&T Case: A Personal View

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The *AT&T* case,¹ asserting that the company had acted in violation of the antitrust laws and seeking its dissolution, was filed under my direction in 1974, and culminated in a consent decree² that brought the largest dissolution in American antitrust history. From the outset the case presented a host of institutional, regulatory, procedural, and substantive issues that continue to plague antitrust enforcement agencies, courts, and economic policy makers both here and abroad. It also had the elements of a soap opera, with a degree of suspense, a bit of anger, some embarrassment, a lot of courage, a large cast of characters, intra-agency battling, and leaks to reporters. This brief paper addresses the case in personal terms, with an emphasis on why and how the case was filed, along with an assessment of its consequences, with some history and a few anecdotes thrown in.

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The *AT&T* case,¹ asserting that the company had acted in violation of the antitrust laws and seeking its dissolution, was filed under my direction in 1974. It culminated in a consent decree² that brought the largest dissolution in American antitrust history. This brief paper addresses the case in personal terms, with an emphasis on why and how the case was filed, along with an assessment of its consequences, with some history and a few anecdotes thrown in.

From the outset the case presented a host of institutional, regulatory, procedural, and substantive issues that continue to plague antitrust enforcement agencies, courts, and economic policy makers both here and abroad. It also had the elements of a soap opera, with a degree of suspense, a bit of anger, some embarrassment, a lot of courage, a large cast of characters, intra-agency battling, the intervention of Watergate, leaks to reporters, shareholder protests, but, I am afraid, with little interest that could be called romantic. It was a case with a long history, a history in a sense going back to 1913, where I will begin in a moment.

But first let me list the several issues I will address. Why was the case filed in the first place, and could it have been filed and won today? Did the case accomplish anything that modern technological development and the market would not have accomplished anyway? Should we simply have substantially deregulated and left it to the market without antitrust intervention at all? In short, was the case pointless? Did the case result in any significant development of Section 2 of the Sherman Act?³ If not, and I do not think it did, what other lessons can we learn from it?

From the outset, the decision to file the case, and subsequently the entry of the decree, was severely criticized on a number of grounds. The United States had the best telephone system in the world (probably true in 1974) so why mess with it? Shareholders (who seemed to be about half the population of the United States) who relied on AT&T's dividends would be badly hurt (not true as it turned out). Consumers would be confused as to source of service (as they undoubtedly were for awhile) and would not receive the benefits of lower prices. Moreover, many consumers would not want choice—reliance on Ma Bell was easy (this proved to be true for at least a significant number of consumers). Still others expressed the view that the case was nothing more than a power struggle between an entrenched Justice Department bureaucracy and a comparable bureaucracy at AT&T.⁴

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Finally, the case and settlement were criticized on the grounds that it was not based upon a single, coherent philosophy or a genuine, reasoned consensus or a farsighted public policy strategy.⁵ In one sense, there is merit to this criticism. When we filed the case, we did not have a complete telecommunications plan with defined roles for free markets and economic regulation and a clear sense of

technology as it would evolve. I am confident that Bill Baxter⁶ had no comprehensive scheme in mind when he pushed for the settlement.

But the criticism, I believe, misses the point. The antitrust laws in the United States stand on their own. There is no process for bringing antitrust cases into some overreaching public policy making mechanism. The Sherman Act seeks the preservation of markets, absent some clear direction from Congress to the contrary. We did not believe such a determination had been made by Congress.

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As we viewed it, the case was largely about opening telecommunications markets to the rapid technological change that was occurring. It was our expectation that the market would do the rest.

This, I assume, is the expectation in any government antitrust litigation. Establishment of some amended and newly created regulatory regime would not have been possible then or in the foreseeable future. No one knew where new technology would take us. Indeed, it is not clear that we know yet. But the regulatory regime as it existed in 1974 did not extend to everything in the case, and in any event, as those charged with its administration asserted, it was failing. Although clearly as many uncertainties should be eliminated as possible, antitrust cases rest on the belief that markets work.

To understand the thinking that led to the case, we must go back in time. AT&T was the result of a series of consolidations following the creation by Alexander Bell and others of the Bell Telephone Co. Until 1894, all local exchanges operated under license from Bell. When the basic patent expired in that year, the number of local exchanges expanded dramatically. Meanwhile the beginning of long distance transmissions was underway through AT&T, which initially was a subsidiary of Bell until the ownership structure was reversed about 1900. With the burgeoning of independent local exchanges, the first interconnection issues began to arise as exchanges sought ways to connect to each other. In 1913, the government accepted the basic premise that the phone network could operate most efficiently as a regulated monopoly, and took from AT&T a commitment—the so-called “Kingsbury Commitment”—that it would connect otherwise independent exchanges through its network.⁷ This early set of interconnection issues was the reverse of those at issue in the 1974 case, where one major issue was connection of independent long distance providers to local exchanges, virtually all of which were, by the 1950s, controlled by the Bell operating companies.

In 1949, the Justice Department filed an action under the Sherman Act seeking divestiture by AT&T of its manufacturing arm, the Western Electric Company. The case was settled in 1956 with a consent decree prohibiting

AT&T, *inter alia*, from engaging in any line of business that was not part of its regulated telecommunications business or work for the government.⁸

My own thinking about AT&T began with the 1956 decree. The decree was agreed to under somewhat peculiar circumstances in a private meeting between AT&T and the Attorney General (Brownell) at a resort hotel away from Washington.⁹ But more importantly, the decree was, in my judgment, profoundly anticompetitive. Prohibition of entry by AT&T into new markets made little sense to me; a feeling that grew as AT&T had to seek approvals for business activities about which the decree raised questions. In essence, the Department was regulating the lines of business available to AT&T. I have had an aversion to regulatory decrees ever since. The most obvious adverse effect was to keep AT&T out of the computer business. Indeed, one may wonder whether the government's ill-fated IBM case would ever have seen the light of day but for the 1956 decree.

The 1956 decree needed to be re-examined. This would require a new investigation into AT&T's conduct with respect to equipment and the relationships among AT&T, its operating companies, and Western Electric. A full investigation would also have to deal with the impact these relationships had on the rapid degree of technological change then taking place, much of it originating from firms outside the AT&T system. Complaints about the inability to connect equipment of outside manufacturers were even made to the Justice Department by Bell operating company officials. The investigation was authorized in 1973.

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A second investigation was then already underway, born as a result of AT&T's refusal to interconnect potential rivals in the long distance market, particularly MCI, to the local Bell operating companies. Without such interconnection, MCI—developing long distance capability through microwave transmission—could not reach local telephone subscribers. The role of MCI in the investigation has been disputed. It had taken its grievances to Congress, the Federal Communications Commission ("FCC"), and state regulators, without much success.¹⁰ But the denial of interconnection to MCI and, subsequently, other potential long distance competitors, raised serious antitrust issues. So too did the refusal by AT&T to permit customers to connect their own terminal equipment to AT&T lines.

This issue had been fought before the FCC, leading to the *Carterfone*¹¹ decision by the Commission, a decision invalidating the AT&T tariff that prohibited so-called foreign attachments. But AT&T continued to resist, and the FCC seemed unable to keep up with each variant AT&T threw up. These interconnection issues were driven by technological change that AT&T had, to this point, managed to keep at bay. Even the FCC conceded that it seemed unable

effectively to regulate AT&T. In conversations FCC commissioners and staff took the position that AT&T was “unregulatable,” and that the only people who fully understood AT&T were employed by it.¹²

These two investigations proceeded apace and were ultimately joined into one. The Antitrust Division of the Department of Justice (“DOJ” or “Division”) did not have a great deal of economic expertise when the investigation began and was frustrated by difficulties in getting outside consultants because so many economists had ongoing relationships with Bell Labs. The newly created Economic Policy Office, with its coterie of industrial organization economists, was just coming into being. But the expertise was found, and by early fall of 1974 the staff recommended a complaint charging AT&T with violating Section 2 of the Sherman Act. The charges included obstructing sales of telecommunications equipment, particularly switching equipment, to the local Bells; similarly obstructing attachment of customer-owned equipment to the AT&T system; and denying interconnection with the local Bells to potential long distance competitors.

The complaint asked for the dissolution of AT&T, with the separation of Western Electric, the local Bells, and AT&T and its Long Lines Division. Such dissolution, it was believed, would be far more effective than various kinds of regulatory decrees a court might impose. (As it happened, however, even after the break-up, Judge Greene ended up regulating some elements of the former AT&T business.)

As we drew to the close of the investigation, the case became complicated by external events. Information was leaked (a chronic bureaucratic problem), to the point where I received a call from Jack Anderson, Washington’s most dreaded columnist, who clearly had in front of him a copy of the staff draft of a memorandum to the Attorney General and a full copy of the draft complaint. My “no comments” seemed to have little impact. We decided to hold the case up for awhile until the smoke cleared. We never did learn the identity of the leaker.

But we were being overtaken by other external events. The Watergate scandal had reached a crisis point. Attorney General Kleindienst was dismissed and replaced by Elliott Richardson. Richardson apparently did inform President Nixon of the ongoing AT&T investigation, which Richardson fully supported, but by early 1974 the White House was in total disarray. It is unlikely that the AT&T investigation was anywhere on the President’s radar screen. Indeed, to those of us who had any dealings with the White House, it appeared that there was no effective presidency at all. Then came the Saturday Night Massacre, born of the President’s desire to fire the Watergate Special Prosecutor. Elliott Richardson refused the President’s request and was fired. The Deputy Attorney General also refused and met the same fate. Robert Bork, who supported the case, became Acting Attorney General and, ultimately and critically for us, Senator William Saxbe was named Attorney General. In the meantime, President Nixon resigned and Gerald Ford assumed the presidency.

Continuity in these circumstances was difficult. We began keeping our briefing material in loose leaf binders. It was hard to know who knew what, or had said what to whom. As a result of Watergate, credibility of Department attorneys was at an all-time low. It was at this point that my recommendation to file the AT&T case moved to the Attorney General's office. We advised AT&T that we had recommended a case. At their request, we set up a meeting for November 20, 1974 with the Attorney General to give AT&T counsel the opportunity to present their arguments against the case to him. I assured them that they would be heard before any final decision about filing was made.

One of the lessons I learned that day was that things are not always what they seem, or you would like them to be. Saxbe had been given a lengthy memorandum about the case. He was briefed first thing in the morning, the briefing ending with the statement that the meeting was simply to hear AT&T's arguments, and that I and others on the Division would meet with him subsequently to make a final decision on filing. The meeting began with AT&T's counsel asking Saxbe about his state of mind, so that he could address Saxbe's concerns. Saxbe's answer shocked everyone. He simply said "I intend to file an action against you."

This was not what we anticipated nor what counsel for AT&T expected. I had personally promised them a meeting with the Attorney General *before* any final decision was made, a promise that had now been broken. AT&T's counsel had every reason for anger. Notification was given to the Securities and Exchange Commission, and trading in AT&T stock was suspended. Following a recess and a brief meeting with the Attorney General and those of us from the Antitrust Division involved, the decision was made to file the case early that afternoon. And so the case was filed on an earlier date than originally intended. Attorney General Saxbe left immediately to go hunting. President Ford was traveling in Japan. The process to break up AT&T was formally underway.¹³ The case was filed the same afternoon, starting the process that led to the breakup of Ma Bell.

Why, in the end, did we file the case? What did we expect (or hope) to achieve? The obvious answer is that AT&T's conduct was subject to the antitrust laws; that it violated those laws; and that its anticompetitive conduct required the breakup of the company. This is the so-called law enforcement answer, and by that measure the case was a success. But while obvious, the answer is too simple. In the end, the case was about breaking the hold of AT&T on technological development while frustrating others' efforts to enter markets in which AT&T had long been the entrenched incumbent, protected in part by a regula-

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tory regime that was, in our minds, irrelevant to some of AT&T's conduct and which, in any event, was failing.

The refusal to provide local exchange interconnections to potential long distance rivals, the frustration of the attachment of user-owned terminal and other equipment to the AT&T system, the pressure on the operating companies to utilize only equipment manufactured by Western Electric, and the cross-subsidization running from regulated markets to unregulated markets (a particular concern of William Baxter, the Assistant Attorney General who ultimately was responsible for the final decree),¹⁴ were all of a piece. All involved what we viewed as artificial barriers to entry and the frustration of technological development. We firmly believed that free markets would do better and would, in the long run, bring greater consumer choice and lower prices. Whether the case succeeded in these respects is a subject to which I will return.

With the filing of the case, it proceeded through discovery and trial before Judge Harold Greene. Between filing and settlement four different Assistant Attorneys General kept the case going, and remained committed to it. Such continuity has been a hallmark of the Antitrust Division's history. While the case ultimately was settled with the far-reaching dissolution decree with which we are all familiar, there were opinions written by Judge Greene dealing with the motions to dismiss filed by AT&T. Relatively early on Judge Greene rejected the defense argument that exclusive jurisdiction over the matters raised in the complaint was in the Federal Communications Commission and that therefore an antitrust court lacked the authority to proceed.¹⁵

I believed then, and I continue to believe, that this was the central issue in the case, the make or break point. In very broad terms, the motion to dismiss went to whether all the claims raised in our complaint should continue to be handled by a regulatory agency—an agency that had itself recognized its inability effectively to regulate AT&T in the face of fast moving technological change—or

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whether the antitrust laws should be used to bring about a more market-oriented approach to the future development of the American telecommunications system.

In legal terms the issue was not simple. The interface between free- and regulated markets still remains a primary issue in telecommunications even today. The role of antitrust in these markets today is unclear, particularly given the Supreme Court's predilection, as seen in its *Trinko* decision, in the direction of regulatory controls and away from antitrust, with "its considerable difficulties."¹⁶

In resolving the exclusive jurisdiction issue, Judge Greene was not asked what public policy should be. Rather, the inquiry was how Congress had resolved these

issues in the Communications Act, where there was no express antitrust immunity provided. His examination of the “relatively weak regulatory controls”¹⁷ that might be applied to AT&T’s conduct, as well as the fact that some of the alleged conduct was not subject to regulatory controls at all, led him to conclude that there was no implied repeal of the antitrust laws intended. So the biggest hurdle to the government case had been overcome.

The case moved on to trial of the substantive antitrust issues (where rightly or wrongly the government was convinced its case would easily withstand attack). While Judge Greene resolved the jurisdictional issues in favor of antitrust, one of the lessons learned from *AT&T* is that the case was but one step in what has become a long journey through the regulatory-antitrust interface. The case, and the restructuring it brought about, required policy makers to reconsider the role of direct regulation—indeed it forced such reconsideration—but it was hardly a definitive resolution. Competition in these markets have brought radical changes; changes that, in turn, have required almost continuous re-examination and searches for effective solutions to the new problems dissolution brought—problems Judge Greene could hardly have foreseen.

In any event, disposition of this initial critical motion brought the case to trial. If discovery and the trial teach us anything, it is that judges matter. In the government’s case against IBM,¹⁸ a case that was in a sense tainted from the beginning,¹⁹ discovery was protracted, disorganized, and bitter. Trial was laborious with very little judicial direction. As one of the Department’s trial lawyers observed to me, it was “not a trial but an institution.”²⁰ There were a number of reasons, but much can be laid on the judge.

In contrast, Judge Greene streamlined discovery, and kept a tight control on witnesses, their testimony, and other elements of the trial process. Filed more than five years after *IBM*, trial in the *AT&T* case was nearing the end when *IBM* was dismissed, still dragging along in trial. And the process came off very well compared to the two other big cases of the day, the FTC’s case against the cereal and petroleum industries.²¹ I said in an interview shortly before I left Justice that while the issues in both *AT&T* and *IBM* were important, it might well be that the primary question would be whether such cases could be tried to a conclusion at all. The *IBM* trial seemed to suggest they could not be. But *AT&T* convincingly established that, with good judicial management, such cases could be tried efficiently. That is one of the great legacies of the case.

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At the conclusion of the government’s case AT&T filed its second motion to dismiss, this time asserting that the government had failed in its case in chief.

Judge Greene rejected the motion in a strongly worded opinion, concluding that on all of the elements of the case the government demonstrated that the Bell System “had violated the antitrust laws.”²² This conclusion was so boldly stated that AT&T objected they had been found guilty without ever having presented its case in rebuttal. By this time, Judge Greene was well aware that there was a strong effort being made within the executive branch to get the President to order a dismissal or, failing that, to find a way to settle the case without substantial divestiture.²³ There is reason to believe that Judge Greene’s opinion was meant to strengthen the position of the government within the councils of the executive branch. It would be more difficult to order dismissal of a case that had already withstood a motion to dismiss than one where there had been no ruling.

The opinion is of interest today because it is the only major substantive ruling in the case. Given the court’s rulings, it raises the obvious question whether the outcome would have been the same had today’s governing standards been applied in 1981, or even in 1974 when the case was filed. The answer is far from clear. After reconfirming his ruling on jurisdiction, Judge Greene concluded without extensive discussion that AT&T did in fact have, and long had had, monopoly power in several defined telecommunications markets, a ruling I believe would have been made even under today’s standards. AT&T had, after all, long described itself as a kind of benevolent monopoly.

The treatment of conduct is more debatable. As to prohibition of the attachment of customer-owned equipment to the AT&T system, the court relied rather loosely on the *Terminal Railroad* case and several decisions relying on something at least akin to the essential facility doctrine.²⁴ It found that there was an adequate showing that AT&T lacked any reasonable business justification for its actions. On interconnection of rival inter-city carriers to local exchanges, Judge Greene was more explicit in his reliance on *Terminal Railroad* and the bottleneck monopoly and/or essential facility doctrines (noting that the conduct could also be described as monopoly leveraging).

He deferred ruling on whether compliance with standards of the Communications Act would be a defense to a claim of antitrust violation. Judge Greene was more cautious with respect to claims of cross subsidization from regulated to unregulated markets, the so-called Baxter theory. After discussion of whether predatory pricing standards (and particularly the Areeda-Turner test)²⁵ should be applied, he ultimately left that legal issue for subsequent resolution. Finally, with respect to the Western Electric equipment issues—the barriers imposed on operating companies with respect to use of non-Western equipment—the court concluded that the issue went well beyond simple vertical integration since the barriers and incentives employed by AT&T were not the result of vertical integration alone.

What would we make of this today? In *Trinko* the Supreme Court pronounced that it has never approved the essential facility doctrine.²⁶ It has applied the

below-cost standard adopted in *Brooke Group*²⁷ to a variety of pricing actions.²⁸ Vertical integration and its necessary consequences are likely to be viewed more favorably than twenty-five years ago. At the same time, the opinion was for the most part consistent with antitrust precedent of its time.

Would the outcome today be the same? Given the current views on essential facilities and vertical integrations that seem to prevail today, would the Department even file the case? While there is no obvious answer to these questions, I remain convinced that AT&T's conduct was anticompetitive and should have been challenged. In substantive terms the case today would have been more difficult. And it would have been yet more difficult given *Trinko*'s seeming preference for regulatory solutions to interconnection problems, although the Court in *Trinko* was confronted with a far more detailed, comprehensive, and crafted regulatory regime than existed in 1974.

In the end, the case settled and Judge Greene never actually ruled on the merits. But the opinion on the motion to dismiss played a major role in the outcome, for three reasons. First, I believe it finally convinced AT&T that it was more likely than not to lose the case at the trial's conclusion. Second, it strengthened the hand of the Department in any settlement negotiations. And, as noted, it made it far more difficult for officials in the Executive Branch *outside* the Department to secure a dismissal of the case. For by the end of the government's case, pressures were mounting to bring the case to an end without the breakup of AT&T. The case was, in fact, being fought on a different front.

From the outset, AT&T and others had sought solutions to the case outside the courtroom. But on the legislative side, its attempt to deal with some elements of the case through extensive amendments to the 1934 Communications Act died in the bowels of the House Antitrust Subcommittee. A settlement that would have required partial divestiture—specifically of Pacific Telephone, two smaller local companies, and 40 percent of Western Electric—along with a detailed agreement on interconnection with other long distance companies was nearly agreed upon on the eve of trial, as trial preparations were proceeding.²⁹ Judge Greene set the trial date back to permit finalization of the proposed settlement. The settlement was in the hands of Sandy Litvack, the then Division chief, whose two superiors were recused. In the end, the deal fell through. Litvack was departing, and William Baxter, the incoming Assistant Attorney General, found the deal unacceptable. Baxter had publicly supported the case and the relief originally proposed.

Baxter took office with the Reagan administration. Despite his commitment to the case, which he reaffirmed publicly, several incoming cabinet members (most notably the Secretaries of Commerce and Defense) had publicly called for its dismissal.³⁰ Indeed, during his campaign, President Reagan had offhandedly criticized the case.³¹ As the trial began, AT&T officers were seeking the assistance of these

and other officials to get the case dropped. A cabinet level task force, without the participation of the Justice Department, recommended dismissal by the President.³² The Attorney General, William French Smith, was recused.

So when the day came to meet with the cabinet and President, Baxter was basically on his own. (In fact, had Attorney General Smith not been recused, he likely would have dismissed the case on his own—once again, the quirk of recusal may have had a dramatic impact.) The matter was left hanging. When the proposal to dismiss came before James Baker, the newly appointed White House Chief of Staff, the process slowed down, though the cabinet committee tried hard to get the President to act before Judge Greene ruled on the motion to dismiss. But Baxter refused to budge, and Baker was nervous about the political fallout of a presidentially-directed dismissal, apparently referring to a fear

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exacerbated by Judge Greene's expressed concern about administration meddling.³³ So perhaps Watergate saved the day again. Then came his opinion on the motion to dismiss, and all hopes for intervention was lost.

It was a courageous and, as it turned out, politically skillful stand by Bill Baxter. The last legislative efforts simultaneously failed. In the end, AT&T made the basic decision to break itself up in accord with a reorganization plan it had initially prepared, and to accept provisions requiring equal access by long distance carriers to local exchanges. The 1956 decree was formally abrogated. There was high drama in the negotiations but there is not time for that here. But to add to the drama, Justice announced the dismissal of the IBM case the same day the deal in the AT&T case was announced.³⁴ The Department's two big cases effectively ended. Baxter was correct in dismissing IBM. It was a case with an aura of illegitimacy, filed on the last day of the Johnson administration. My predecessor, angered by its filing, did little to move the case along. I made the unfortunate decision to put the case to trial. For all that went right in the trial of AT&T, we can and have learned from all that went wrong on IBM.

The AT&T case did not of course end with the decree. Details of the reorganization were left largely to AT&T. And there were hundreds of public comments to be dealt with. Judge Greene made decision after decision that had a significant impact on the industry (some quite ill-advised). The operating companies were kept out of the long distance market; they were to be in essence "quarantined." This may have been ideologically pure, consistent with Baxter's keeping of regulated- and unregulated markets separate, but I am not sure it was wise. For a number of years Greene continued to make rulings that became more and more regulatory, ultimately provoking legislative change, most recently embodied in the Telecommunications Act of 1996.

So what do we learn from *AT&T*, and what was its effect?

1. First, we learned that such a case can be tried. The trial procedures and methods used to control discovery and trial worked, and became the model for the relatively expeditious trial of the *Microsoft* case.³⁵
2. Second, judges truly matter, as any comparison with *IBM* demonstrates. Judge Greene was prepared to organize and push the parties, and it worked. He was a quick learner. He may have been driven by a desire to build his reputation, but that ambition served everyone well.
3. Third, we began to get a better handle on the use of economists in both the Division and at trial. This was a transition time for the role of economists at the Division, with the new Economic Policy Office just coming into being. The *AT&T* case was an immediate challenge.
4. Fourth, time and again we learned that in litigation, as in life generally, things are not always as they appear. The trial proceeded apace while, largely unbeknownst to the trial staff, the real forum was the White House. It was at that level that the case was ultimately won.
5. Fifth, we also learned that presidential involvement in an antitrust case, while surely legitimate, is almost never likely to occur. In *AT&T*, virtually the entire cabinet and most likely the President as well agreed the case should be dismissed. Yet the fear of political repercussions caused the President to stay his hand.
6. Sixth, we learned that actors matter. What if there had been no Watergate and no Attorney General Saxbe? What if President Ford had been informed of the case in advance of its filing? What if Sandy Litvack's superiors had not been recused, or if Attorney General Smith had not been recused, leaving Bill Baxter to act on his own? What if the Assistant Attorney General had been someone other than William Baxter, or the White House Chief of Staff had not been James Baker? We will never know, but any change in the cast of characters could have affected the outcome.

We did not, it seems to me, learn much about substantive standards under Section 2 of the Sherman Act. Judge Greene's opinion was not final, but might not have survived *Trinko*. It is the cross-subsidization issue that today is of the greatest interest, referencing the yet-to-develop sacrifice standard. But the whole cross-subsidy argument was never resolved. Little was said about general Section 2 standards, but it has always seemed to me that in bench trials verbalization of general standards matters little. Nor did we learn much about the mechanics, as opposed to the appropriateness, of divestiture. This was a unique case. The remedy was by consent, representing AT&T's judgment that it likely would lose and wanted to play a major role in restructuring. So the court itself did not make the decision on basic relief, and it is not altogether clear that it would in fact have ordered divestiture even had the court found on the merits

against AT&T. It was AT&T that drew up the basic reorganization plan. Moreover, AT&T was structured in a way that clearly facilitated dissolution. It is highly unlikely that this set of circumstances will ever be seen again.

What did we learn about the appropriate roles of antitrust and direct economic regulation in the telecommunications market? Two things seem clear. First, the regulatory structure as it existed in 1974 was inadequate to meet, in a timely fashion, the challenges of an explosion in technology. Second, the direct regulatory role played by Judge Greene in administration of the antitrust decree was inappropriate, undesirable, and equally ineffective in dealing with the larger issues being presented (even though Judge Greene may have had little choice but to fill the vacuum in policy implementation that existed following the decree's entry).

Beyond that, we may not have learned much. The 1996 Act attempted to redefine the antitrust regulatory interface by legislatively mandating steps to open local markets. It has not been an overwhelming success. So the debate on these questions goes on, and will do so for the foreseeable future. The *AT&T* case was but a step along the road. Finally, there was one more important lesson. If you are going to file a case as politically charged as *AT&T*, do it in the wake of a Watergate scandal and while the President is outside the country.

What then was the effect of the case? Could or would competitive markets here have come into being simply as a result of technological and market changes without antitrust intervention at all? And even if such intervention was appropriate, was the dissolution of AT & T a necessary remedy?

The immediate effects of the decree were shareholder anger and consumer confusion. It did not take us long to figure that out. There were also surprises. A number of executives of the Bell operating companies were pleased. One was actually heard to assert the famous Martin Luther King line "free at last."³⁶ Most shareholders ultimately prospered and, over time, consumer confusion dissipated. Over the decade that followed, consumer choices (at least for long distance service) expanded and—I think most would agree—consumer prices, adjusted

for inflation, dropped. Technology-driven changes came even faster than we envisioned. While there are many reasons for this, the breakup played at least some part.

There was another impact that no one envisioned. In foreign markets, particularly in Europe, where telephone systems were state-owned or in the hands of monopolists, the

AT&T case contributed to privatization and the opening of markets simply by provoking some of these countries to look to the opening of markets in the United States.

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KING LINE "FREE AT LAST."

In short, it seems to me that the historical record demonstrates that the case accomplished most of what we believed it would and more besides. But it was not any kind of final solution. Technological change came too fast and brought a myriad of new problems to the fore. The changes worked by the decree were nothing but the first steps. There are many more to be taken.

The question remains whether the case, with all its time and expense, was either unnecessary or futile. It could be argued the case was unnecessary because technological change could not be held back and would have worked to open markets even without the breakup, or because some less disruptive remedy—either in an antitrust court or in some regulatory process—could have affected the same outcome with far less disruption or expense. Or it could be argued it was futile in the sense that the industry, through a series of mergers and consolidations, has returned to the highly-concentrated markets that existed before the case was filed. AT&T, it is said, has simply recreated itself.

This last argument I find specious. It is true that concentration levels have been increasing across a spectrum of technologies. But it is a different, far more competitive set of markets. To be sure, vigilance is required to assure that they remain so. But we are nowhere near the entrenched monopoly of AT&T in 1974. Would technological change itself have brought competitive markets over time? In my view, it is at least clear that it would have taken far longer and would have required dramatic regulatory change. Had it been left to the FCC with the statutory authority it had in 1974, I see no reason to believe change would have come faster, at less expense, or more effectively.

The most difficult question for me is whether some less costly and disruptive remedy in the antitrust case could have achieved the same ends. I simply do not know whether a court-mandated open interconnection requirement, coupled with some equipment divestiture and sale of assets to a new company, would have been sufficient. Assistant Attorney General Litvack was close to such a settlement but Bill Baxter found it unacceptable. Whatever the logic, the die was cast.

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In the end, and with the benefit of hindsight, the case acted as a catalyst that both facilitated rapid technological change and brought new regulatory regimes into being. It, of course, required an act of faith in the operation of open markets. But, in the end, does not all of antitrust? ▼

1 United States v. American Telephone & Telegraph Co, Civil Action No. 74-1698 (D.D.C. 1974).

2 The consent decree was in the form of a modification of the 1956 consent decree that ended earlier litigation against AT & T. The decree may be found at 1982-2 CCH Trade Cas. ¶64,900 (D.D.C.).

- 3 15 U.S.C. §2.
- 4 See e.g., STEVE COLL, *THE DEAL OF THE CENTURY: THE BREAKUP OF AT&T* 373 (1986).
- 5 *Id.* at 369.
- 6 William F. Baxter was the Assistant Attorney General in Charge of the Antitrust Division who negotiated the settlement agreement.
- 7 *United States v. American Telephone & Telegraph Co.*, DECREE AND JUDGMENTS IN FEDERAL ANTITRUST CASES 483, 497 (D.Ore. 1914) (consent).
- 8 The 1956 decree may be found at 1956 CCH Trade Cas. 68,246 (D.N.J.).
- 9 See STEVE COLL, *supra* note 4, at 59, noting that Attorney General Brownell met privately with representatives of AT&T “at a West Virginia resort” and referring to the settlement process as a “scandal.”
- 10 Space does not permit a recitation of the history of the involvement of MCI and its chairman, William McGowan, in the process leading up to the filing of the AT&T case in 1974. This involvement is chronicled in considerable detail in STEVE COLL, *supra* note 4, at 11-52, 200-210.
- 11 *In re Use of the Caterfone Device in Message Toll Telephone Service*, 13 F.C.C. 2d 420 (1968). For an extended discussion of *Caterfone* and its implications by one of the FCC Commissioners involved, see Nicholas Johnson, *My Story*, 25 SANTA CLARA COMPUTER AND HIGH TECH L.J. 677 (2009).
- 12 This was the view of Dean Burch, Chairman of the FCC from 1969 to 1974, in several private conversations. Others on the staff of the FCC shared this view. See STEVE COLL, *supra* note 4, at 373.
- 13 The events of November 20, 1974 are recited in far greater detail in STEVE COLL, *supra* note 4, at 66-71. Most of Coll’s information about those events came, I believe, from Keith Clearwaters, a deputy in the Antitrust Division who took part in all of the meetings on that day. While Coll’s report of the dialogue during the meetings seems somewhat overblown, the facts as he recited them are accurate.
- 14 Baxter had expressed this concern throughout the negotiations over the decree.
- 15 *United States v. American Telephone & Telegraph Co.*, 461 F.Supp. 1314 (D.D.C. 1978). In an earlier ruling made before Judge Greene was given the case, Judge Waddy had reached the same conclusion. *United States v. American Telephone & Telegraph Co.*, 427 F.Supp. 57 (D.D.C. 1976).
- 16 *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 414 (2004). In *Trinko*, the Court narrowly read its precedents with respect to the duty of monopolists to deal with their rivals and declined to expand this duty, suggesting that such issues were better left to the regulatory regime established by the Telecommunications Act of 1996, 47 U.S.C. §251.
- 17 461 F.Supp., at 1328.
- 18 *United States v. IBM Corp.*, Dkt.No. 69-Civ.-200 (S.D.N.Y.) (complaint filed January 17, 1969).
- 19 The case was viewed as tainted in the minds of some because it was filed on virtually the last day of the Johnson administration, a legacy left to the incoming Nixon administration to deal with.
- 20 See also Donald I. Baker, *Government Enforcement of Section Two*, 61 NOTRE DAME L.REV. 898, 911 (1986) (“The case simply became unwieldy beyond anyone’s worst expectations of antitrust nightmare”). Baker headed the Antitrust Division during some of the IBM litigation.

- 21 Kellogg Co., FTC Docket No. 8883 (1972), *dismissed*, 3 CCH TRADE REG.REP. §21,899 (FTC 1982) (cereals); Exxon Corp., FTC Docket No. 8934 (FTC 1973), *dismissed*, 3 CCH TRADE REG.REP. §21,866 (FTC 1981) (petroleum). Both cases were protracted and characterized by discovery and procedural hassles.
- 22 *United States v. American Telephone & Telegraph Co.*, 524 F.Supp. 1336, 1381 (D.D.C. 1981).
- 23 See note 33 *infra*.
- 24 *Terminal R.R. Ass'n of St. Louis v. United States*, 224 U.S. 383 (1912). Judge Greene also relied upon *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977). The essential facilities doctrine, as he perceived it, requires a monopolist controlling a facility access to which is essential to rivals in order to compete, to provide such access, if feasible, on a reasonable non-discriminatory basis, 524 F.Supp., at 1351, 1360.
- 25 Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV.L.REV. 697 (1975) (adopting a below-average cost standard to be used in identifying pricing that is predatory).
- 26 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004). The Court found it unnecessary to reach the question since access could be obtained through the FCC and compelled access was therefore not "essential."
- 27 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-3 (1993) (to establish predatory pricing that violates Section 2 of the Sherman Act prices must be below "an appropriate measure" of costs and the monopolist the probability of recouping what it lost because of its below cost strategy).
- 28 See *Weyerhaeuser v. Ross-Simmons Hardwood Lumber Co.*, ___ U.S. ___, 127 S.Ct. 1609 (2007) (predatory bidding); *Pacific Bell Telephone Co. v. linkLINE Communications, Inc.*, ___ U.S. ___ (2009).
- 29 STEVE COLL, *supra* note 4, at 148-160, 172-179.
- 30 Secretary of Defense Casper Weinberger and Secretary of Commerce Malcolm Boldridge had both very publicly called for dismissal of the case. See James B. Stewart, *Whales and Sharks*, THE NEW YORKER 40 (February 15, 1983). These two cabinet secretaries led the attack on the case, an attack leading to the appointment of a cabinet level task force to consider the matter. See STEVE COLL, *supra* note 4, at 211-223.
- 31 STEVE COLL, *supra* note 4 at 185.
- 32 *Id.*, at 185. The brief version in this paper of the events leading up to the President's decision not to order dismissal of the case is based in large part on conversations with William Baxter. They are spelled out in far greater detail (and accurately I believe) in STEVE COLL, *supra* note 4, at 211-229, 239-253.
- 33 References were made at a meeting in the White House to Dita Beard, the IT&T lobbyist who played a significant role in the alleged antitrust scandal concerning the settlement of an antitrust case against IT&T. See James B. Stewart, *supra* note 30, at 40. The investigation of the charges made White House officials very nervous about any contacts with the Antitrust Division.
- 34 *United States v. International Business Machines Corp.*, No. 69-Civ.-2001 (S.D.N.Y.) (complaint filed January 17, 1969). The stipulation of dismissal was filed on January 8, 1982. In dismissing the case, Assistant Attorney General Baxter stated that he had found the case to be "without merit" and that there was "little prospect of victory." See *In re International Business Machines Corp.*, 687 F.2d 591, 594 (2d Cir. 1982).

35 United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001). While critical of the trial judge in some respects, the appellate court commented favorably on the handling and expedition of the case by the trial court.

36 Quoted in STEVE COLL, *supra* note 4, at 321.