Department of Justice

COMPUTERS, COMMUNICATIONS, AND ANTITRUST:
SOME CURRENT MYTHS AND REALITIES

Remarks by

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I would like to talk today about the Antitrust Division and some current myths and realities about our efforts to help bring more competition to the computer and communications industries. This is a fitting occasion, an ideal audience, and probably also a logical time to review our activities and concerns in these areas, and also some of our institutional limitations.

But let me first of all pay tribute to this group -- its members and its secretariat. In the world of antitrust, where we have surprisingly few allies from business -- despite our efforts to promote competition and preserve the vitality of the free enterprise system -- you have stood solidly in support of the Division's efforts. You have been witnesses in one of our major pieces of litigation, at substantial cost and inconvenience to yourselves. You have testified at oversight hearings supporting us and our mission. You have offered constructive advice, and not infrequently, sharp, yet helpful, criticisms of the sort I would expect from good friends. The Division values its relationship with you, and with the other businessmen of this nation like you, who remember the historic values America has put on competition and innovation and entrepreneurial opportunity and the right of businessmen to achieve success by offering better products at better prices. If you and we do nothing more than rid one major industry of the shackles of entrenched monopoly, we will all have something of which to be proud. I am committed to that end, and I welcome and need your help.

Much in the area of computers and communications, as you know, is happening currently in the courts and at the FCC. We are a reform-minded Administration, and we are in some respects still feeling our way into what are clearly complex and far-reaching issues. A new and important player, the "National Telecommunications and Information Administration," is almost in place, with very able and progressive leadership in Henry Geller. All across the Administration, there are appointees with a special sensitivity to antitrust issues. With strong support from the Administration, and with the important commitments of the Congressional leadership to the principles of competition policy, we can look forward to important progress on a number of fronts. A list of the computer and communications issues we are involved in gives an indication of the breadth and variety of competition policy questions that exist in these areas. Among those issues are, for example, the AT&T and IBM cases, the IBM-Comsat "Satellite Business Systems" joint venture, the FCC's "Second Computer Inquiry," and the

1956 Western Electric consent decree. We are also involved in matters having to do with electronic funds transfer, "EFT," and the Postal Service's plans for "electronic mail."

One question that arises at the outset is, "How can you cover a waterfront this broad?" The answer, of course, is that we cannot as well as we would like. That answer also brings me to the first myth I would like to discuss: that those whose anticompetitive conduct we challenge in these industries are pitted against the "vast resources" of the government.

Antitrust Division Resources

I expect that less than 10 percent of the public has the foggiest idea about how big an animal the Antitrust Division actually is. For fiscal 1978, the Division's "vast resources" consisted of about 850 employees, 420 of which were lawyers. About 650 people are located in Washington, and the rest are in our 8 field offices or working on out-of-town cases. The Division's budget was about $40 million -- $10 million of which is earmarked for state attorneys general as grants.

This is it, to police a $1.8 trillion economy. For comparison's sake, consider that the Antitrust Division has about half the people and disposable income of the other Federal agency primarily concerned with your business, the FCC.

How do we deal with current, ongoing computer and communications matters (outside of AT&T and IBM)? We have the equivalent of about two to three full-time employees in one of our sections (the Special Regulated Industries Section) assigned to worry about these problems. Much of their effort goes into FCC proceedings, as those of you who have read the briefs know. Generally speaking, since computer and communications policy questions -- like the technologies involved -- are converging, these questions are piggy-backed on the same people.

These figures obviously don't include the resources devoted to litigating the AT&T and IBM cases. The conventional wisdom is that these two cases are bleeding the Antitrust Division dry. These are significant matters, obviously. Again, however, the "vast resources" devoted to these actions are surprisingly modest.

On our side of the IBM case, for example, we have about 45 employees (including 25 attorneys) earning total salaries of about $872,000 a year. The total annual budget for that effort runs between $2 million and $2-1/2 million. The

AT&T case currently is about half the dimensions of IBM, with around 26 employees (and only 8 lawyers) and a $1 million to $1-1/2 million budget.

How much are the defendants spending on defense? I doubt if anyone really knows. Most reports I've seen in the public press have estimated substantially higher numbers. Clearly, the parties to these pieces of litigation are together spending substantial sums. Is it too much? The answer depends on your perspective. Last year, however, the revenues in the two industries involved were around $40 billion for communications and $30 billion for computers. If we assumed that each household contributed equally, these revenues would account for some $570 and $430 each year on the part of each American family, which for them is also a lot of money.

The IBM and AT&T Cases

This audience is well versed in the issues and recent developments in the IBM and AT&T cases. Let me discuss them briefly.

First, while we are making every possible effort to expedite these cases and "big cases" generally through a variety of procedural and management reforms, we are firmly convinced that our cases against IBM and AT&T are soundly conceived and well supported by hard, factual evidence. The cases are not merely "structural," but have important conduct elements. Consequently, no matter what you think you may have heard, there will be no half-baked settlements or motions for a change of venue to Capitol Hill.

In fact, for the first time in a while, there are some signs of visible procedural progress in these cases. In IBM, Judge Edelstein, upon our motion and with IBM's concurrence, recently ruled that, henceforth, depositions, instead of being read into the record or mechanically typed into the record, may be simply marked and entered as necessary. We estimate that this change will save us between $100,000 and $200,000, and up to six months of trial time.

In AT&T, the first status call in over a year was recently held, after three years of jockeying and stays and unsuccessful jurisdictional challenges. The case is finally moving into active discovery. Judge Waddy recently appointed a Magistrate to deal with discovery matters, ans we are committed to working with him to confine and expedite discovery in this case in every responsible way possible.

In spite of the serious and important antitrust issues posed by the suits and these hopeful, if modest, procedural developments, the defendants have each in their own way continued to try to discredit the cases. Recently, some of these attempts have been more curious than usual.

Some of you, for instance, may have seen the recent letter to the New York Law Journal from Nicholas deB. Katzenbach, General Counsel to IBM, attacking my recent speeches on the problems of "big case" litigation management and accusing the government of causing delays in the IBM case.

As for the allegations relating to specific instances of plaintiff-caused delays, I do not really think that either a letters-to-the editor column or, frankly, this meeting is the appropriate place to dispute procedural matters currently before the court.

I am intrigued, though, by the parts of Mr. Katzenbach's latest jeremiad that attack my speeches on improving "big case" procedures. I would respectfully suggest he protests too much.

Neither of the two speeches that I have given on this topic made any allegations whatsoever about the delaying tactics of IBM.

I did point to the IBM case as one of several current protracted antitrust cases that "have correctly focused public attention on the failure over the last several decades to come to grips with the procedural problems of complex antitrust cases."

In addition, I did discuss (in generic terms, and without reference to particular defendants) the generally conceded financial incentives for defendants in major antitrust litigation, particularly where the remedy sought involves divestiture, to delay resolution for as long as possible.

In both speeches I have also referred (again without reference to particular cases) to the need for the government to improve its management of "big cases," to resist overtrying its cases for fear of "leaving anything out," to narrow its witness lists and discovery requests, and otherwise to take responsible litigation risks "in order to restore confidence that the government is doing everything it possibly can to streamline and expedite major antitrust cases."

In view of the absence in these speeches of any attack on the behavior of IBM in the current litigation, Mr. Katzenbach's fervent denials leave me somewhat -- though not completely -- puzzled about the source of his hyper-sensitivity.

It is no secret that we see the AT&T case as an opportunity for the Antitrust Division and the courts to demonstrate that with a little hard work and common sense a very big, very significant antitrust case can be tried successfully in less than a lifetime.

We are trying very hard to produce a fine-tuned discovery effort that will put us in a position to litigate this case within two years. We have absolutely no doubt that this case can be litigated and completed in the very near future -- but that is not to say that it will be.

Unfortunately, the incentives for the defendant are just the opposite of those for both the Antitrust Division and the courts -- the defendant's incentive is to delay. In a case like this, where the end result if the government is successful will be a significant restructuring of the defendant, there is absolutely no reason for the defendant to want to get to the end of the road. Even if the defendant honestly believes that at the end it will prevail, any chance that it will not is more risk than it rationally would want to take.

Thus, you see AT&T today acting as a rational defendant in a Section 2 case -- resisting expedition, multiplying issues and obstacles, and engaging in a widespread public relations campaign to portray "The System" as the victim of quixotic prosecutors and as the saviour of everything from the national defense to pro football telecasts.

Just two weeks ago, for example, the Chairman of AT&T told a Washington Star reporter that they were assembling a staff of 3,000 people just to handle government discovery requests, and that they thought the suit might cost as much as $1 billion in legal fees and expenses. AT&T's Chairman declined to estimate how long it would take to complete the case, but did volunteer the speculation that "I won't be working here when that case is completed."

I'm sure Mr. DeButts hopes that's true. The question is to what extent his lawyers should be permitted to make sure his statement comes true.

Those of you who haven't yet had the pleasure of reading the document to which I am about to refer should do so, for it is fascinating. The paper, entitled Memorandum in Support of Motion for Entry of Pretrial Orders Establishing a Sequence of Discovery and Dealing with Certain Related Matters, was the main AT&T filing made after they lost their final attempt in a three-year-long effort to have the case dismissed on jurisdictional grounds. The reason I think you ought to read this document is that it is probably one of the most honest statements ever filed by a defendant in a Section 2 case.

The document includes a discussion of how the government is attempting to carve down the case to move it ahead as quickly as possible, and to put the case to trial in less than two years. Then follows this remarkable sentence: "The government apparently neither has considered nor has any concern for the needs of defendants in preparing for a case of this magnitude." AT&T does not want to expedite, and their paper is designed to explain why not.

Let me quote another line or two. The defendant describes several discovery issues and then summarizes:

> Although seemingly unrelated, these controversies all stem from a single cause. The Antitrust Division has embarked upon a strategy to use the enormous power that comes from its position as the representative of the government to attempt to force this case to trial before defendants can possibly be prepared to defend themselves, before they are even apprised of the precise nature of the charges upon which the government will rely, and in circumstances where they will not even know where their efforts ought to be directed. . . The government seeks to leave defendants in a position in which they will not know what aspects of their activities are subject to the antitrust laws.

As I understand that statement, AT&T is complaining that they don't know what they are alleged to have done wrong, and thus are in no position to engage in litigation until, presumably, they have had a lengthy discovery process. In fact, of course, they do have a 400-odd page response to interrogatories which comprises quite an extensive description of what we believe the case is about; and they do have our Memorandum in Opposition to Certiorari that, according to AT&T itself in this same filing, "concedes that [the government's] complaint focuses upon only a very few specific issues." Still, if the standard for trial readiness is AT&T's subjective perception or understanding of the trial issues, we will likely never get to trial.

There is also the issue of whether we should have the benefit of the discovery done in recent private litigation involving AT&T, where many of the allegations are similar and where the private plaintiffs are willing to provide the discovery material obtained. Typically in such cases, discovery was taken under some form of protective order. Thus, with the permission of the private plaintiffs, we have sought in two of those cases -- the MCI case in Chicago and the Litton case in New York -- to save everybody a very great deal of time and money by gaining access to the massive discovery and analyses thereof that have already taken place.

AT&T has vigorously opposed every such attempt to avoid this kind of duplicative, grossly wasteful discovery. In their view, contained in the same filing I cited, such a procedure would "run roughshod over fundamental considerations of fairness." Referring frequently to the "enormous resources" of the government, AT&T argues that fairness requires "mutual and reciprocal" discovery, meaning that neither side should be permitted to move faster than the other. Again, you can see the Catch-22 logic: fairness means mutuality means discovery at the chosen pace of the slowest party.

As for our enormous resources, you have heard me describe them and they are a matter of public record. Mr. deButts and I might file simultaneous affidavits with the court specifying exactly what resources each has committed to the case. Compared to the "staff of three thousand" that he described to the Star reporter, I am afraid we would feel -- in Congressman Celler's old phrase -- like "chickens trying to dance in the ring with elephants."

Having reassured you I hope that we intend to stay the course in both the IBM and AT&T cases, let me turn now to some other less cosmic, but very important, areas of our activity in the communications and data processing fields.

The SBS Proceedings

"Satellite Business Systems," or SBS, is the trade name for the IBM, Comsat, and Aetna Life Insurance domestic satellite joint venture, as you know.

The Antitrust Division urged the FCC to hold a hearing on IBM's initial proposal to team up with Comsat in June 1974, and we have participated in all the subsequent FCC proceedings. When the FCC summarily approved the joint venture last February, we filed an appeal in the

D. C. Circuit, and I understand oral arguments are scheduled for March 29th.

At the same time we appealed the FCC's action, we opened our own independent antitrust investigation, one of the first under the new law that permits us to ask for both documents and depositions. Since the FCC would not investigate the competitive issues, we felt compelled to do so. That investigation is well under way.

The Division's questions about SBS relate not so much to whether IBM enters the satellite business, but how. As the architect of the Defense Department's worldwide computer and communications network, for example, it is not clear that IBM needs Comsat's knowledge about space and communications to enter the industry. And with some $6 billion in surplus cash, there would seem to be no serious problem of IBM's needing the money. On the other hand, Comsat may well be a necessary partner for some other potential entrant into the business.

I cannot tell you with certainty what our final recommendations will be in SBS, but I can say with some confidence that I think we will have succeeded in raising and forcing study of competitive issues that would otherwise have been ignored.

The FCC's Second Computer Inquiry (along with the related issue of the 1956 consent decree) is one of the most interesting items on the current laundry list, and one that brings some of the problems raised by converging computer and communications technologies into focus.

The FCC decided in August 1976 to reopen their 1969 computer rules, rules which in the best of traditions had divided the world into three parts -- fully regulated "communications," fully unregulated "data processing," and "hybrid services," which were either regulated or unregulated, depending. About the same time as the Commission's Dataspeed 40/4 ruling that your Association appealed to the Second Circuit, the FCC staff apparently decided that because of converging computer and communications technologies, the middle ground "hybrid" category was getting too large. The FCC maintains, as you know, that they are required to regulate anything that is "communications," too, a contention they sustained in the Resale and Sharing decision the Association and IBM took to the Second Circuit, and just lost.

Most engineers regard the FCC's efforts to differentiate between "data processing" and "communications" as a futile undertaking, since increasingly the same piece of equipment or system is used to do both. Of course, the fact that two things may look the same does not mean that regulatory agencies, including the FCC, cannot draw -- and enforce -- a number of complex, even elegant, legal distinctions.

Right now, for example in other fields, it makes a great deal of difference whether a broiler chicken is "iced," "speed chilled," or "frozen," in terms of whether it falls into the "raw agricultural commodities" exemption in the Interstate Commerce Act. Where that chicken was raised, and how and by whom, I just argued to the Supreme Court, makes a big difference in terms of whether the Capper-Volstead Act, which gives agricultural cooperatives a limited antitrust immunity, applies. And you probably know about the ICC's view of wine as food and beer as drink.

The question with these types of distinctions usually is not confined to whether they are artificial or just silly. The issue almost always is: who pays?

Thus, as the director of marketing for AT&T put it, the Second Computer Inquiry is not a fight over regulatory metaphysics -- "it's about money." The reason, of course, is the 1956 Western Electric consent decree, which generally limits AT&T to offering only "regulated communications services," or selling equipment used to provide such services.

While the court in New Jersey is the ultimate authority on what the judgment covers, as a practical matter, just about anything the FCC decides is not "regulated communications service," the Bell System companies are not permitted to provide. Unless, of course, the decree is modified to allow it.

I think that most companies in what has classically been considered the computer industry see AT&T pressuring the FCC to balloon the boundaries of "communications," so that Bell won't be excluded. And the FCC has already stated on several occasions that they feel obliged under the present law to extend what they see as the benefits of their regulation to cover any "communications" activities.

The brief that the Division filed with the FCC is interesting, for those of you who haven't read it. While there is very little in terms of public policy topics it doesn't discuss, it doesn't reach many ultimate conclusions.

It does take a fairly hard line on the proposed "solution," having "wholly separate" Bell subsidiaries entering data processing, pointing out, among other things, that Western Electric as presently constituted would probably qualify as "separate" under the suggested approach. It also includes a reminder that the purpose of the FCC's regulation isn't to be "fair" or "unfair" to any particular corporations, but to protect the public's interests.

The underlying competitive issues are somewhat tougher. On the one hand, of course, the primary interest of the antitrust laws is in promoting competition and innovation, not protecting individual competitors and innovators. And certainly it is not impossible to imagine AT&T and IBM fiercely competing with each other, using traditional practices, on the fringes of their respective core monopoly markets.

The problems, however, are obvious. The risk you run is that anyone caught commercially in this "free fire zone" without very deep pockets may well be forced to move to safe ground or to reach detente when the battle begins. Compounding the problem is that neither of these giants has a particularly laudable record in terms of the tactics used to meet competition. Indeed, in our lawsuits, we allege the use of systematic predatory practices in both industries.

Thus, from a very fundamental public policy standpoint, you have the question of to what extent and how best to protect smaller companies that traditionally have been the seedbed for most communications and computer industry innovation. This very basic policy issue is at the heart of most of the FCC's current work in this area.

From another competitive perspective, one must also ask how fiercely one expects two companies the size of AT&T and IBM to "compete" over time, absent structural changes in each industry.

Postal, EFT, and Related Matters

The entry of the Postal Service into the electronic communications business obviously raises a number of questions. Under legislation now pending before the House, the Postal Service would be obliged to start spending some $300 million a year to develop "electronic message transfer systems." Your Association solicited my views on the subject late last fall and I responded as you know on January 3d.

There is a major question presented here, as I pointed out in my letter, of whether a government agency ought to be embarking on this kind of commercial venture, since the private sector seems quite willing and able to offer the same services to the public. In the case of the Postal Service, you have additional questions, however, since the Postal Service has some authority to declare the competition illegal.

Writing to the Postal Service in 1974, for example, one of the largest private data processing businesses, GTE, complained that there is "pervasive uncertainty inherent in what is a 'letter' for purposes of the Private Express Statutes." Now, for those of you not steeped in postal lore, a letter is usually defined as "anything written on or in a physical object and intended for delivery to a specific addressee." And, the regulations now extend to certain kinds of data processing activities.

The Postal Service defines "letters" with much the same logic as the FCC proposes to use in its computer rules, moreover. San Francisco Forty-Niners season tickets, for example, have been declared to be "letters," along with Disneyland and Disneyworld posters. Bumper stickers are not "letters," because they are intended to be permanently affixed on a bumper, but new car price stickers? They are "letters" because they're intended to be peeled off.

Electronic fund transfer systems and the role the Federal Reserve may play in running them present similar questions. Currently, the Fed operates the paper clearing processes used by most banks, and diversifying into new electronic systems makes a certain sense. You also have interesting questions about how quickly private entrepreneurs will enter the EFT field, when waiting in the wings is an organization with $90 billion in assets and annual "profits" of $7 billion, even bigger by some than AT&T.

Implicit in what I have been saying, of course, are some judgments about the regulatory process itself. First, economic regulation further complicates already complex issues and industries -- almost by definition. Second, a regulatory bureaucracy's natural tendency to expand its own jurisdiction is usually inconsistent with the procompetitive parts of its mandate. Third, to be effective in the long run, advocates of antitrust and a competitive economy have little choice but to pursue a <u>combined</u> program of litigation, agency filings, and, where appropriate, regulatory reform efforts.

Particularly since courts often look to regulatory expertise in deciding antitrust issues, litigation and regulatory advocacy have to be treated as complementary. Our combination of litigation and agency filings in the ending of fixed commission rates on the New York Stock Exchange is a good example. We plan to continue to take such a broad-gauged approach where necessary, and will obviously continue to do so in the communications and data processing fields. In this connection, the introduction by Senator Kennedy of the Competition Improvements Act is a marvelous opportunity for the Congress in a clear and predictable way to ensure the regulatory decision process focuses hard on benefits to be gained by the public from competition.

I have given you the laundry list of our major communications and computer matters. It is not all that long, but it tends to get longer every week, for the simple reason that the role of computers and communications is becoming more pervasive in the U.S., indeed world, economy. Just the dollar figures, for example, afford some insight into the almost geometric growth both fields are currently experiencing.

In 1965, for example, the "data communications market" was estimated at only about $1 billion, one of the figures we used in our recent computer brief. In 1975, however, this data communications market accounted for $5.5 billion in sales, and by 1985, they project, total revenues will top $22.5 billion.

By comparison, domestic telephone company operating revenues over the period 1965 to 1975 trebled -- from about $11.8 billion to $35 billion. Total revenues of American companies from key sectors of the electronic data processing field, according to Standard & Poor's, roughly quadrupled from 1967 to 1976 to about $30 billion.

Not only have the dollars increased, but there have been sweeping changes in the nature of the products and services involved. Silicon chips and magnetic bubbles and other innovations, some pioneered by firms in this audience, have created rafts of new products. In 1976, for example, annual minicomputer sales were about $1.85 billion, compared to less than $500 million in 1968. Microprocessor sales in 1976 were well over $200 million, for a business that didn't exist 10 years before.

Data terminals, such as the AT&T Dataspeed 40/4 are reportedly the fastest growing part of the computer business. Sales of just point-of-sales terminals, for instance, have gone from $63 million in 1972, to $490 million in 1975, to about $650 million in 1976. National Cash Register no longer even makes the old style electromechanical machine, which, like the old slide rule, will probably just disappear.

This growth in the availability of new, and cheaper, data handling systems is working major changes in all aspects of business, education, and finance. Some indication that the government is finally waking up to what's happening is reflected in the name of Henry Geller's new Commerce Department shop, the "National Telecommunications and Information Administration," or NTIA.

What can you in the private sector do to help? You as an Association are already doing your part. Keep it up. An important contribution is advice, information, experience and views -- what you know and think we should too. Don't ever assume, please, that the government knows everything about this field. Face it: Most of the policy makers are lawyers, like me. As you know from experience, there is something about digital technology and higher calculus that's not always compatible with the legal mind.

A second suggestion is that if you think we are all making a mistake, let us know. More importantly, give us alternatives.

A third suggestion would be to try and be optimistic, even when the complexities of Federal policy-making seem to get you down. Complicated problems unfortunately tend to be met with complicated solutions. But as Judge Leventhal of the D.C. Circuit said: "Simplicity is a goal for which we all strive, until it adversely affects our basic economic interests."

With that note of judicial realism, I'll close. You can't always count on us to agree with you, I'm afraid. But you <u>can</u> expect that we will resist simple solutions to complicated problems, particularly when the simple option is called monopoly or shared monopoly of the computer and communications industries.