ORAL HISTORY OF
DANIEL "MACK" ARMSTRONG

Third Interview – May 17, 2012

This interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewee is Daniel "Mack" Armstrong and the interviewer is Matthew S. Sheldon. The interview is taking place at the Law Offices of Goodwin Procter on May 17, 2012. This is the third interview with Mr. Armstrong.

MR. SHELDON: Thank you for doing this. When we last left off, we had just reached the year 1975, and we left 1975 onward for our discussion today. I'm hoping you can give me a background of where you were in 1975 and what you were doing.

MR. ARMSTRONG: I was in the Administrative Law Division of the General Counsel's Office at the FCC. I had gone there about Labor Day of '74 as the Deputy Chief of the division. I continued during the '74 and early part of '75 to do an occasional litigation case. The most notable of which was the case dealing with the so-called Prime Time Access Rule in the 2nd Circuit. That case was argued and decided in April – argued in March, decided in April of '75. In early June of '75, the then-chief of the Litigation Division took a position in the Common Carrier Bureau, and then Chairman Wiley of the Commission offered me the position as the Chief of the Litigation Division, which I accepted. I assumed its duties in the summer of '75.

MR. SHELDON: What were the job responsibilities of the Chief of the Litigation Division?

MR. ARMSTRONG: The Chief of the Division was at that point, it's larger now, but at that point I think we had about six or seven attorneys. And the Chief of the Division was responsible for assigning the cases when they came in; he was responsible for reviewing the briefs; and then he was responsible for assigning the oral argument. Sometimes, if it was a case of particular sensitivity or particular difficulty, the guidelines were somewhat unclear. It was a

matter of judgment on some occasions, but the Chief would tell the attorney who wrote the brief that this is a case where the Chief or the Deputy Chief would have to take the oral argument.

MR. SHELDON: And who did you report to?

MR. ARMSTRONG: There were – I mentioned the Administrative Law Division, the Litigation Division, and there were – in the front office, there was the General Counsel. There was usually at least one deputy, sometimes two deputies. It varied from time to time, the extent of which – when I first assumed the job, the front office was not interested in routinely reviewing the work of the Division. Occasionally that was because of a recusal. I recall that in 1977 with the incoming Carter administration, Chairman Charles Ferris was appointed to the Commission. His General Counsel was recused from one of the more important matters early in my tenure which was the newspaper/broadcast cross-ownership proceeding, which was in the D.C. Circuit, and then it went to the Supreme Court. Ordinarily, of course, even if the General Counsel would not routinely review our briefs before they were filed in court, certainly in a case of that importance, dealing with the Supreme Court, the Litigation Division would not file a brief without clearing the filing with the General Counsel. But in that particular case, because of the recusal of the General Counsel, there was no one to report to in the General Counsel's Office, so we didn't. But ordinarily the Division reported directly to the General Counsel, or the Chief Deputy in the GC's office, who oversaw the Litigation Division.

MR. SHELDON: And did the FCC handle all its own appellate work, or were other parts of the administration involved?

MR. ARMSTRONG: The appellate work of the Commission was generally governed by Section 402 of the Communications Act. Subsection A is the Hobbs Act, which applies not only to the FCC, but also to some other agencies. In those cases, which are – rulemaking would be a

classic example of a 402 – a petition for review case. The Justice Department represented the United States as a statutory respondent in cases of that type. The Commission was also named as a respondent. It was direct review in the Court of Appeals. We would ordinarily be responsible for writing the brief. We would coordinate with the Antitrust Division of the Justice Department, and they would certainly, before they signed on to the brief, they would review what we did. But the laboring oar for drafting the brief, and then having the attorney do the argument, rested with the respondent FCC, and not with the Antitrust Division of the Justice Department. The other direct review cases, which are Section 402(b) cases, in shorthand they are radio licensing cases, and there are a number of categories listed as being exclusively under Section B as opposed to the Hobbs Act. In the B cases, only the Commission was a named appellee. We wouldn't deal with the Justice Department at all until the case was ready for possible review at the Supreme Court. Cases under Section 402(b), unlike the Hobbs Act cases which could go to either the D.C. Circuit or to a Circuit in which the petition satisfied venue requirements, were within the exclusive jurisdiction of the D.C. Circuit.

MR. SHELDON: Was there ever any tension with the Department of Justice and FCC regarding positions to take on strategy?

MR. ARMSTRONG: In many instances, once the Commission decided a matter, the Justice Department will defer to the Commission and either sign our brief or simply take no position in the court case. In the very early part of my tenure as the litigation chief, there were two very important rulemaking cases in which the Department and the Commission took different positions. The Department had actively participated before the Commission and after the Commission did not accept the Department's arguments, the Department persisted in opposing us in Court. They filed a respondent's brief in support of the petition, so those two

cases were the newspaper/broadcast cross-ownership matter, where there was the disagreement with the Department on the issue of how much divestiture to order, and then the other one was the case that became *Home Box Office*, which dealt with the so-called anti-siphoning rules, in which the Commission sought to restrict the movies and sports events which could be offered on the pay cable medium.

MR. SHELDON: Was the tension between the FCC and the Department of Justice palpable in those cases?

MR. ARMSTRONG: Frequently in a case where we get a heads up that the Department is having difficulty with defending the Commission's position in court, that's certainly a matter you bring to the attention of the General Counsel. Little bit hard to do, as I said a minute ago, in the radio/newspaper case, because the General Counsel was recused. But that case spanned two administrations, and the General Counsel who was there when the case first began, who would in fact argue the case initially in the D.C. Circuit, he was not recused. So, I don't specifically recall, but I think that probably what happened was we discussed the case with the GC as soon as we got word that the Department felt sufficiently strongly about the matter, that they intended to oppose us in the Court of Appeals. He would consult with the Chairman, sometimes an effort would be made to go to the Assistant Attorney General in charge of antitrust, possibly even go to the Solicitor General, and try to urge the Department to support the Commission, or at least take a neutral position. Don't remember specifically, but my recollection is that in both the divestiture case and in the anti-siphoning case, it was so obvious and so well known that there was a disagreement between the Department and the Commission. I think it was just assumed as a foregone conclusion that the Department would be filing a brief in support of petitioners in the court. So there wasn't much going on behind the scenes. That's a little bit atypical because in

the other cases that weren't of quite such high visibility, there would be discussions, perhaps at the General Counsel level, perhaps even in a rare case at the Chairman level, to try to see if we couldn't come to a meeting of the minds.

MR. SHELDON: Did you ever feel or notice political pressure to take a certain position that was coming from the administration rather than the FCC itself?

MR. ARMSTRONG: Well that wouldn't – I didn't enter the picture until the Commission had made its decision. Presumably while the decision making process was underway at the Commission, there would be an opportunity for that kind of back and forth to develop. But by the time it got to my desk, and that was sort of water over the dam, and I don't remember – I mean, everybody understood that the job of the Litigation Division was simply to make the best legal arguments we could make to defend whatever position had been taken. We were not nervous about proceeding to do just that, no interference with us.

MR. SHELDON: When you took over as Chief in 1975, give me a sense of what you came into, what kind of work you were looking at, and what were the major controversies that you were dealing with.

MR. ARMSTRONG: Well, we touched on two of them. One was the newspaper divestiture issue in the cross-ownership proceeding. I mention specifically the divestiture issue because there was another aspect of that preceding, which 30 years later has become a much more important issue than it was in '75, and that's the issue whether the Commission should have any rule even prospectively restricting newspaper/broadcast cross-ownership. In 1975, the newspaper and broadcaster trade associations were challenging the entire rulemaking. The real fight, however, the real area of disagreement with the Department was on the issue of whether or not the order should require the divestiture of newspaper/broadcast combinations that had been

in existence in some instances since the beginning of television or the beginning of radio. The other case involving an obvious policy disagreement between the Justice Department and the Commission was the anti-siphoning case, which was the *Home Box Office* – ultimately became the *Home Box Office* decision. A third bid ticket case on our plate around this time in which, unlike the other two, the Justice Department and the Commission were on the same side consumed much of the summer of 1976. The case involved a significant controversy in the Fourth Circuit concerning the rules for connecting customer-provided equipment to the telephone network. The Commission in the – back up a minute – in the common carrier area there was an attorney in the Litigation Division, John Ingle, who, when I came to the Commission and when I became the Chief of the Division, specialized in the telephone common carrier area, and he and I had a division of the market when I became the Chief. He concentrated on the common carrier cases, and I concentrated as the Chief on everything else. I mean, technically, we were in a Chief/Deputy Chief vertical relationship; as a practical matter, we were co-equals. Common carrier cases would funnel through John and everything else would funnel through me.

Getting back to the Fourth Circuit litigation I mentioned a moment ago, the Commission won a case which, before I became the chief, and which over the strong opposition of the State of North Carolina Utilities Commission, the Commission's jurisdiction over the attachment of customer equipment to the telephone network was upheld. The jurisdictional argument arose from the fact that the telephone network was used for both interstate and intrastate calls. And if you wanted to attach equipment to that network, you were attaching equipment which was going to be ultimately used in the course of both interstate and intrastate calls. Now, that led to a very strong argument about who had jurisdiction. That case was handled without my involvement

and the Fourth Circuit upheld the Commission's jurisdiction in a decision that was issued shortly after I became Chief.

The next case that came up, which was also in the Fourth Circuit, was a case in which the Commission adopted rules, the so-called equipment registration rules, setting forth what conditions had to be met in order to attach equipment to the network. So then there was a subsequent significant case, also in the Fourth Circuit, challenging the Commission's exercise of its jurisdiction, which had been upheld in the first case. That second case was on a fast track in the Fourth Circuit in the summer of '76, and the Chief of Common Carrier Bureau in that case specifically asked that I assume responsibility for – even though ordinarily common carrier cases weren't in my area – he specifically asked that that was one that he wanted me to be actively involved with, and so that one was a major case for me in the summer of '76. So we had those three. We then had – it is a little fuzzy here, but most of the cases we're talking about right now occurred in the first four years I was in this job, roughly between '75 and '79. There was a big controversy brewing over – we talked about the last meeting, which I did not handle for reasons we discussed there.

There was a significant case under the Clayton Act, dealing with, it was a joint venture of IBM and Comsat to provide domestic satellite service in competition, basically with AT&T. This was a potential competition case under the Clayton Act that was in the D.C. Circuit. That was one in which the Department, it ultimately became the *United States vs. FCC*. That was a case in which the Department again took a different position from the Commission. Another major case involved radio entertainment format changes in which a station, for example, which had been broadcasting classical music would propose to – the owner would sell, and the new owner proposed to have a different entertainment format, and there were arguments made that

under the public interest standard of the Communications Act, the Commission had the authority to take that into account, and if necessary, use its power over the license transfer to ensure that a so-called unique entertainment format was allowed to continue. Advocates of FCC intervention argued that it wasn't in the public interest to allow, for example, the city of Chicago to lose its only classical music station. Judge McGowan, who was from Chicago, was a judge on the D.C. Circuit, who felt very strongly that the Commission under the public interest standard was obligated to act in those areas. The Commission preferred to leave that issue to the marketplace, and there was some very unpleasant litigation in the D.C. Circuit and then ultimately in the Supreme Court on that matter.

MR. SHELDON: What was that case called?

MR. ARMSTRONG: It ultimately became WNCN Listeners Guild vs. the FCC. That's what it was in the Court of Appeals and when the Commission was the petitioner in the Supreme Court, it was FCC vs. WNCN Listeners Guild.

MR. SHELDON: And did you argue that case in the Supreme Court?

MR. ARMSTRONG: I did not. In the entertainment format case, the Deputy General Counsel under Chairman Ferris argued that case, and obviously the Division worked very closely with him. As I said earlier, there was varying interest in my time at the Commission as to how much the front office, to which we reported, would handle litigation. There was more interest in the front office in litigation under Chairman Ferris, than under Chairman Wiley, and David Saylor who was the Litigation Deputy, argued the format case. He argued it both in the Court of Appeals, and although that was a case in which the Department was on our side, this was not a policy disagreement with the Department of Justice, but that was one of those cases where the

Solicitor General agreed to allow the Commission to do the argument in the Supreme Court. So David did the argument in both the D.C. Circuit and in the Supreme Court.

MR. SHELDON: Tell me about the fairness doctrines and your role in litigating over it.

MR. ARMSTRONG: There were some cases applying the fairness doctrine, which were litigated before Chairman Fowler became chairman at the beginning of the Reagan administration.

MR. ARMSTRONG: A station had an obligation to discuss controversial issues of public importance, and, and this is where most of the litigation came up under the so-called 2nd branch of the doctrine to offer a reasonable opportunity for the presentation of contrasting viewpoints on controversial issues of public importance. Litigation would develop over what was the – you had to define, what was the controversial issue of public importance. It would develop over the question of whether or not the complainant presented a prima facie case that the doctrine had been violated. The Commission, recognizing the sensitivity in the First Amendment area, thought that it was appropriate to limit the Commission's intervention to cases in which the complainant made a prima facie case that a station had not met its obligations. We had a case early on in my tenure as the Chief in which the American Security Council I believe, I've forgotten exactly what the case – I think it was American Security Council Educational Foundation or something to that effect, in which a group headquartered down in Virginia I believe had a very strong interest in national defense issues, and they came at it from I guess you would call a so-called hawkish, conservative position on aggressive national defense. And they thought that the, I believe it was particularly CBS, their attention was directed to CBS, that CBS's coverage of national security issues didn't reasonably present the viewpoint that there

needed to be a more aggressive posture in defense. The Commission did not uphold the complaint, finding if I recall correctly that they hadn't properly defined, as a part of the prima facie burden, they hadn't properly defined what the issue of controversial importance was. And there was a panel in the D.C. Circuit which initially agreed with the petitioner that the Commission had improperly applied the doctrine.

MR. SHELDON: Did you argue that case?

MR. ARMSTRONG: I argued that case – I argued it on the en banc, and I believe I probably – I mean I have to check the records on whether I argued it before the panel or not, since we got beat at the panel level, I naturally want to forget about that, but I definitely argued it – I think I argued it at both levels, and…

MR. SHELDON: I assume that you petitioned for the en banc because you felt strongly about it.

MR. ARMSTRONG: We did. Well, obviously you had a leg up in understanding the issue at the en banc level because of the earlier involvement at a time in which we had – in recent years we haven't had much en banc experience with the D.C. Circuit – several en banc cases in the D.C. Circuit. The *American Security Council* fairness doctrine case was one. The joint case, which raised issues of potential competition where Comsat and IBM were proposing a joint entry venture was another; and there were a significant number of cases that came up in which public interest groups would argue that stations were guilty of employment discrimination. They would argue that the Commission had a duty to allow them to – since the only people who had real access to the information about employment were the licensees – the public interest groups argued that they should be allowed, even before they had made a prima facie case to warrant designating the renewal application for hearing, which is a high standard they have to meet under

the Communications Act, pre-hearing discovery. They were essentially arguing that in order to give them a fair chance to meet their burden to make a prima facie case of employment discrimination, they had to be allowed to seek discovery of stations considering their employment practices, the so-called pre-designation discovery. The Commission lost some cases at the panel level in the D.C. Circuit on that issue, and that was another instance where we successfully persuaded the Court en banc to hear the case and argued the prehearing discovery EEO issue en banc, and the *American Security Council* fairness doctrine issue en banc, and they were roughly within a year of each other.

MR. SHELDON: When you wrote your en banc petitions, would you specifically target certain judges that you hoped would seize upon something or would you just try and make your best argument?

MR. ARMSTRONG: If you had gotten a dissent at the panel level, obviously that was a significant consideration in the first place about whether it warranted going for en banc, and certainly you would try very hard in the en banc petition to appeal to the dissenting judge. One example of a petition for rehearing en banc that was drafted with a specific judge in mind occurred shortly after the Supreme Court had upheld the Commission in the dispute with the Justice Department on the extent to which divestiture was required in the newspaper/broadcast cross-ownership matter. We had a comparative renewal case in the D.C. Circuit involving a television station in Daytona Beach, Florida. The licensing system has now been changed, but at that time, when the television station would come up for renewal, they were subject to competing applications. In this particular instance, the incumbent television licensee in Daytona Beach was challenged. The challenger argued that under the important licensing factors of diversification of ownership and integrating the owners into the day-to-day management of the station, it came out

ahead. The incumbent's argument was, look, in order to provide continuity – it's one thing to say if we were both new applicants for an initial broadcast license, it's one thing to decide the case on the basis of who makes the best showing under those factors – but in a case where you have an existing licensee with a record of service, the most important consideration at all times should be the performance by the incumbent and if the incumbent's record is substantial, that should outweigh the challenger's advantages under the diversification and integration of ownership with the daily management factors. The Commission, consistent with the position that it had taken in the Supreme Court divestiture issue essentially concluded that an incumbent with a substantial record would prevail in a comparative renewal contest over a challenger with advantages under the diversification and integration factors. The Commission's argument was, this case in Daytona Beach is not unusual; there are lots of incumbents that have to apply for renewal, and many, many incumbents have absentee owners, many, many incumbents own media properties elsewhere, so if you accept the argument of the challenger that the case should be decided the way it would be decided if these two applicants were competing for initial license, the potential is there for a significant disruption of ownership.

The Commission had just been before the Supreme Court resisting divestiture because the Commission wished to preserve continuity of ownership and to create an incentive for licensees to perform substantially during their license terms in order to get their licenses renewed. The issue in the individual comparative licensing cases seemed very much the same issue recently decided by the Supreme Court. So it was of great concern to us that we got a panel opinion from the D.C. Circuit in a licensing case, which as we saw it, raised the specter of significantly destabilizing the industry. So, we went for en banc review. The panel apparently understood how strongly we felt, at one point describing an argument as reflecting an "agitate" concern

about the practical consequences of the panel's opinion. The petition for rehearing was written with Judge Leventhal very strongly in mind. He had not been on the panel in the Daytona Beach case, but in an earlier comparative renewal case, he had authored an opinion that upheld a comparative renewal expectancy for the incumbent licensee in a typical comparative renewal case. As we read his opinion, it was on all fours with the favorable opinion the Supreme Court had just issues upholding the Commission's position on the divestiture issue. Rehearing was denied, but in denying rehearing, the panel wrote at length that our "agitated" petition for rehearing had not accurately interpreted the intent of the earlier panel decision. At the end of the day, even though we didn't get rehearing, the revised opinion of the panel gave the Commission the leeway in the remand proceeding to reward a renewal expectancy and renew the incumbent's license. I have no way of knowing this, but I will always believe that Judge Leventhal played an influential role in the Court's interval deliberations on the Commission's rehearing petition and his role had a lot to do with the panel's decision to write at length to the Commission's satisfaction.

MR. SHELDON: Let's talk about the kind of behind the curtain actions for how the Commission would prepare for arguments before the D.C. Circuit, and let's use the *American Security Council* case as an example. Do you recall what you did to prepare for the en banc argument, once you knew it was coming?

MR. ARMSTRONG: Well one of the benefits that I had as Chief of the Division was the opportunity to really get to know some of the lions of the communications bar who represented the private parties who intervened in litigation on the side of the Commission. I recall in the *American Security Council* case, which I believe focused on CBS, that was a case in which Roger Wollenberg, who's been in this series of interviews, I think you gave his interview as one

of the examples to read, and was a lion of the Communications bar at Wilmer representing CBS, was the counsel for intervener in the *American Securities Council* fairness doctrine case. Very instrumental in – embarrassed to say I continue to remain fuzzy about who argued for the Commission before the panel, but I do remember that we ended up on the losing side. We had a lot of discussions with Roger about either to seek rehearing and then about how to draft the petition after everyone concluded that we would seek rehearing. Then when rehearing was granted and we were writing the brief, getting ready to argue the case en banc, we again benefitted from his advice. The relationship with the private bar in a situation like this is a very delicate one, and not all of my peers within the government I think shared my approach. There was a concern among some people that it's really, really dangerous to get too closely aligned with people who have perhaps different interests from the interest that the government should have, even though in that particular case they support the same result. Got to be very careful about dealing with those who have different perspectives. Whether out of necessity or just out of conviction or both, I didn't share the suspicion about working too closely with the private bar. I was relatively new to the communications business. In some instances, there was no one above me at the Commission to whom I could report and who could compensate for my relative lack of experience. We had people, first it was Ernie Jennes at Covington & Burling in the newspaper cross-ownership case, and it was Roger Wollenberg in a number of cases, including the one we're talking about now with the fairness doctrine, whose expertise and experience and respect within the communications bar is unquestioned. They had on behalf of their clients a common interest in trying to make sure that the case was handled successfully. I knew I must be sensitive to the fact there could be trouble if there were a conflict, and if against our better judgment we took a position in a court filing that might have served the interests of a private intervener, but

didn't serve the institutional interests of the Commission. We always had to be sensitive to that, but in the case of my relationship with Roger, for example, we developed I felt a very close bond of trust, and he understood the position that I was in, and I think he was always very sensitive to the fact that he couldn't – there's a limit to how much he could urge us to say something in a pleading. There were occasions where he would say that he intended to say something in his client's brief as an intervener but which he knew the Commission's attorneys could not include in their brief. But he would basically say the Court, in his judgment, reads your pleading much more—it's much more likely to read your pleading than it is to read our pleading. So it's really important from my perspective that I spend as much time working with you on your pleading as I spend on our own pleading. Mindful, had to be careful about what you put into your pleading at the behest of the lawyer for a private party. Nevertheless, we got over those problems and I was more than willing to bare my soul to Roger Wollenberg, for example, and his lawyers at Wilmer. And I remember very distinctly we'd have moot courts together. We sometimes had the moot court at their firm. Sometimes they would come to our building. But we would very definitely – now, in later years, I said earlier that I'm not sure all of my colleagues are quite as interested in the sharing relationship—they want to keep the private parties a little more at arm's length. And in later years when I was at the Commission, there would be much more of an emphasis on doing moot courts within the government, including the Justice Department attorneys in cases where we were together. They would sometimes have a second moot court and they would invite the intervener to come, but it wasn't quite like it was in my early years there. Basically, the moot courts – we wouldn't usually have more than one at the Commission in my early years, and in those big high-profile cases our supporting interveners would participate. In addition to the moot courts, I personally and perhaps unconventionally found that it was more helpful to just spend

about two or three weeks—first, pretty much on my own writing down everything that troubled me about a case. And in the course of doing that, I would communicate with the staff attorneys at the Commission or I would communicate with my colleagues—when I say staff attorneys, I mean people who were in the operating bureau. The *American Security* case came out of the broadcast bureau. So I would call up some of the pros at the broadcast bureau if I had some questions about the way the fairness doctrine had been applied. In the course of preparing for the argument, I would bombard them or ask them might be a better word—with questions. I would take these questions to my colleagues in the General Counsel's office or we would have a phone conversation, not a moot court, but just a phone conversation with members of the outside bar. I personally found these skull sessions were frequently more helpful to my preparation than moot courts.

MR. SHELDON: How would you moot an en banc hearing? Would you still just go with three people asking questions or would have a wide panel?

MR. ARMSTRONG: We didn't always in any way put the number of judges up there to match the number you would be arguing before. It's probably true just because of the higher profile aspect of the case that if you looked back and took a running count, you would probably find that more people participated when the moot court was for an en banc argument. In most of the en bancs, I remember nine judges heard the case, and I can't even remember having that many people judging me at a moot court before one of my en banc arguments. You might come close to approximating the size of the en banc court when there was a joint moot court with interveners and attorneys from both the Commission and interveners' law firms were on the court.

MR. SHELDON: Would you ever share drafts of your government's brief with private parties ahead of time?

MR. ARMSTRONG: Again, this is where I think probably even more so than on the moot court context, I had a more liberal – if that's the right word – approach than some of my colleagues, but I definitely would share drafts and get feedback from on private parties.

Again, subject very carefully you have to—you want to make sure you trust the person to be sensitive to the fact that it's a government pleading we're talking about here and not a private party pleading. And even though I certainly wanted the benefit of what was often the greater experience and wisdom, if you will, of the members of the private bar, I felt I could be sufficiently sensitive to make sure that we didn't include anything in our pleading that was inconsistent with the institutional interests of the Commission.

MR. SHELDON: Were you ever convinced to make a serious strategy change based on input from private parties?

MR. ARMSTRONG: Yes, there were instances where an intervener's counsel would persuade me that our brief could take a particular approach favored by interveners which was also consistent with the Commission's institutional concerns. Often it was just a matter of what to emphasize. In getting specific, the years have gotten to me, but one example that comes to mind, which also ties in with your earlier question about writing a brief with a particular judge in mind, is the domestic satellite joint entry case involving Comsat and IBM. The Commission lost before the panel which held that the Commission's responsibilities as the agency that enforces the Clayton Act in the communications common carrier area requires it to hold an evidentiary hearing on a potential competition issue. The argument of the potential competition proponents was that IBM and Comsat would individually enter the domestic satellite market if they were not

allowed to enter jointly, and therefore the Commission was sacrificing potential competition if it approved the joint entry. The panel held that their argument was at least serious enough to warrant an evidentiary hearing. When we were discussing the en banc issue, I remember very distinctly that Mr. Wollenberg – again, he wasn't the only attorney, but I remember him as one who said that on the D.C. Circuit Judge Wright, Judge Skelly Wright, was a very influential judge, and ordinarily he would support what the panel had done. But in this particular case, Judge Wright could be on our side if he could be persuaded that a bird in hand is worth two in the bush. Specifically, entry by Comsat and IBM's joint venture could provide strong competition against AT&T in the domestic satellite market. And Judge Wright in the recent ExuNet litigation had reversed the Commission with some very strong language for resisting MCI's attempt to compete against AT&T in the ordinary long-distance telephone market. So the argument in discussing our strategy for the domestic satellite case was that Judge Wright would be sympathetic with an argument that if the Commission spends a long time holding an evidentiary hearing on whether Comsat and IBM will individually enter the market. This will only delay the time when AT&T, which is already in the market, will have to compete against them. If you really push the argument that there are better ways than an evidentiary hearing to deal with the competitive issues raised by the entry of a joint venture, you are likely to have Judge Wright on your side. That was the argument.

MR. ARMSTRONG: That was their, they strongly thought that was the best chance that the Commission had. We all shared an interest in avoiding a lengthy evidentiary hearing. They argued that the way to win this case en banc is to get Judge Wright on your side by pitching this as the opportunity to get a strong immediate competitor to AT&T. And the way to do that is not to have an evidentiary hearing. There were a number of recusals; it was an unusual en banc case

in that we only had five judges on the Court en banc. Three judges upheld the Commission's decision not to hold an evidentiary hearing in a majority opinion written by Chief Judge Wright. It was very apparent from that opinion that Chief Judge Wright accepted the argument that an evidentiary hearing would have been a source of great delay. And at the end of the day, the issues that you're grappling with on potential competition, who would have done what under a different set of circumstances, are very difficult issues, they don't really lend themselves very easily to specific findings and conclusions after an evidentiary hearing. The argument was, it might not have been all that helpful. In any event, it certainly would have taken a lot of time. There was no doubt in my mind before this case that it was worth listening to Mr. Wollenberg, and certainly if there had been any such doubt, what happened in that en banc opinion would have removed it.

MR. SHELDON: Circling back to the *American Security Council* argument, was that your first en banc argument?

MR. ARMSTRONG: No, I think we, the first en banc argument was the prehearing discovery hearing I mentioned a minute ago and the argument there. Again, that was a case, like the *Daytona Beach* comparative renewal case, the case where we felt we had really won on rehearing even though on the surface, it might appear otherwise.

MR. ARMSTRONG: We had gone into the en banc proceeding with two panel opinions which had seemingly said that the Commission in these employment cases has to allow the petitioner to deny, which would generally consist of a public interest group of listeners within the station's service area, usually with a public interest law firm in Washington representing them to engage in discovery before the Commission decided whether the case required an evidentiary hearing. The en banc court, however, gave the Commission discretion to avoid pre-hearing

discovery conducted by public interest groups. The en banc majority sympathized with the complainant's dilemma in this area where most of the information is within the control of the broadcaster, and it's hard for a person to make a prima facie case if your opponent has the information you need to make the case. The approach the en banc Court took was, they said the Commission staff, which is processing the renewal application, has got to not just simply accept the licensee's opposition to a petition to deny, the staff has got to be prepared to read the petition to deny, to read the licensee's opposition to the petition to deny—and it's really when I say petition to deny, really a petition to deny was just really a petition to designate for an evidentiary hearing, and then the staff must stand ready to supplement the record. Specifically, go back to the licensee with specific questions seeking more detailed information about the licensee's employment practices. The licensee responds to the staff-generated inquiry, a copy of the response is served on the petitioner to deny, the petitioner to deny then gets an opportunity to make a filing with the Commission responding to what the licensee's response has been, and at that point with a supplemented record the Commission can then decide whether an evidentiary hearing is warranted. At the end of the day, the number of cases that actually ended up going to a full hearing were very, very few, but the supplemental record provided a basis in many instances for the Commission to take remedial action against a licensee with deficiencies in its EEO record, short of designating the renewal application for an evidentiary hearing. If I had to name one proceeding in which I've been involved which is most appreciated by the Commission's professional staff from a practical standpoint, I would cite the case in which the en banc D.C. Circuit gave the Commission the discretion to use staff-generated inquiries as an alternative to pre-hearing discovery conducted by outside groups in these EEO petitions to deny cases.

MR. SHELDON: What was it like appearing before an en banc panel?

MR. ARMSTRONG: Well, you almost always knew the judges on the en banc panel from other cases in which they had been on a panel, so it wasn't like you're going to meet three people up there that you're familiar with and there are going to be six others up there that have never heard of you before, never heard you argue before. So, it wasn't all that different from appearing before a panel. The one advantage you had, you mentioned earlier. Do you ever tailor your arguments? You already knew how three of the judges on the en banc court had decided the cases at the panel level. So, you had a bit of a head start, you already knew probably, you knew that the majority, the judge who had written the majority opinion for the panel was probably going to be the more difficult judge for you to deal with at the en banc arguments. You didn't always know when you went in for a panel argument where trouble was going to come from, you could guess at it, but you had a much better indication in an en banc argument of the source of the tough questions and you also knew who was likely to be on your side. But, my recollection of my preparation is that it wasn't all that different from what it was if it was just an argument before a panel.

MR. SHELDON: And we've been talking today generally about the period from about 1975 to 1980 and now we've gone over a number of the most important cases. Do you remember any other disputes involving the Commission during that period that stick out in your memory?

MR. ARMSTRONG: Well we talked about the Fourth Circuit case which was dealing with the equipment registration program. There is an unusual aspect of that Fourth Circuit litigation I did not mention before. Every judge on the Fourth Circuit was recused in that case except for one, Judge Emory Widener, who was down in southwest Virginia.

MR. SHELDON: Tazewell County, or something like that.

MR. ARMSTRONG: I believe that's correct. He had been joined on the panel in the initial case by two judges from the Fifth Circuit, I'm sorry—one judge from the Fifth Circuit, Judge–the esteemed, very esteemed Judge Tuttle and another distinguished judge, Judge Hastie, from the Third Circuit. Judge Widener was I think you'd probably say very hostile to the Commission's position. In his mind, you're involving intrastate communications here and the Commission in Washington is imposing rules for attaching telephone equipment to the telephone network that are going to affect intrastate communications, and the intrastate regulators don't like these rules. Judge Widener thought this was not an area where the Commission had jurisdiction. He had dissented very strongly from the first opinion, but he'd been outvoted by Judge Tuttle and Judge Hastie. About the same time as the release of the decision upholding the Commission's jurisdiction, the Commission had come out with – there had been no stay imposed in this area, so the Commission, while the Court was deliberating on the jurisdictional case, the Commission was in the process of coming out with its order adopting the rules that would govern if the Commission won on the jurisdictional issue.

A motion for stay of the order adopting the rules was up for the decision in the Fourth Circuit as about the same time that court upheld the Commission's jurisdiction, but the only Fourth Circuit judge on the panel had strongly dissented and he was the only judge on the Fourth Circuit, because of the recusals, who could rule on the stay motion. Not surprisingly, Judge Widener granted a stay. This is one time in which an FCC Chairman, Chairman Wiley, was very upset. I had not been involved in the Fourth Circuit ligation on the jurisdictional issue, and when the motion to stay the rules was being litigated, I had been preoccupied with preparing for an oral argument in the *Home Box Office* case. When I returned to the office after that argument, I was

in a group of staff members summoned to the Chairman's Office to discuss the stay Judge Widener had just ordered. There was much discussion about whether Judge Widener, who had been so deadest against the Commission in his dissent in the jurisdictional case, should have been sitting on this motion for stay. This was the only case I can recall where serious consideration was given to trying to get a judge recused from a case.

And you talked earlier about discussions on litigation with the Justice Department. The Fourth Circuit litigation was one high-profile situation where, unlike the *Home Box Office* or newspaper divestiture case or later case on the IBM/Comsat joint venture case, the Justice Department was on our side. So, in this particular instance, the Department's attorneys were very active in coming to the decision whether to try to remove Judge Widener from the case. Ultimately, we decided this was something that should not be done and the better thing to do is just get on with it and Judge Widener will not be the only judge sitting there when this case is agued and decided. As it turned out, the merits panel included in addition to Judge Widener, Judge Tuttle again, but not Judge Hastie because he had died of a heart attack in Philadelphia on, I think, the very day he and Judge Tuttle came out with their decision upholding the Commission's jurisdiction. Judge Reeves from the Fifth Circuit replaced Judge Hastie on the panel for the second Fourth Circuit case.

Judge Widener, with his southwest Virginia roots, succeeded in having the argument held in Abingdon, VA. It was on an expedited briefing schedule and there were, this was an unusual case in that the Court insisted that the government and the private parties who were supporting the government, file a brief under the same cover. This really did arouse some consternation because obviously it's one thing in preparation for a brief to have consultation with private parties, and I strongly defended that practice and believe in it, but even I was a little reluctant

about actually filing a brief in which we're under the same cover. So ultimately a compromise I think was worked out and there was to be a joint brief and then everybody at the end of the brief could have a very short brief that was individually signed. But it was putting together a joint brief on a case of this magnitude with all of these high-powered clients, high-powered law firms. It made for an extraordinarily busy summer, this was the summer of the bicentennial. Judge Widener had lost none of his hostility to the Commission's position and it was a very, very difficult argument which he dominated pretty badly. We were hoping that Judge Tuttle and his colleague from the Fifth Circuit, Judge Reeves, would not ultimately be persuaded and that's the way it turned out. The, it was another two to one decision, certiorari was ultimately denied, but it was a very fun experience. I had grown up not very far from there, seventy miles away from there. And there was this beautiful old inn in Abingdon, the Martha Washington Inn, and it was you know, all of these high-powered lawyers from D.C. and former Governor Sanders of Georgia was hired to represent the state's interest in this argument. And we were all in this lovely old hotel which I had visited frequently with my Tennessee family. On one side of the dining room on the night before the argument were the attorneys for the federal government and its supporting interveners. Petitioners' attorneys and their interveners were on the other side.

MR. SHELDON: I'm surprised they had enough hotel rooms to house you all.

MR. ARMSTRONG: Some of us were elsewhere for the night in nearby hotels. We were very gratified about six months after the argument when we got the 2-1 decision in our favor, but there was no time to celebrate because several days after the Fourth Circuit decision, the D.C. Circuit decided the *HBO* case concerning the pay cable anti-siphoning rules, which sought to ensure that popular movies and sports events would be available to the public over-the-air television stations. We lost badly on the rules themselves, but probably the most significant

part of that opinion concerned the panel's imposition of ex parte requirements for informal rulemakings in an opinion written by Judge Wright. Before the argument, we got some indication that this was a matter of concern to at least one member of the panel, who we thought was almost certainly Judge Wright. There was a pre-argument order for the Commission to produce a list for him of the ex parte contacts with decision makers during the rulemaking.

MR. SHELDON: And by "him" who are you referring to?

MR. ARMSTRONG: Well, giving it to the Court, but it seemed clear to us that Judge Wright was taking the lead on this issue. The request for a list of ex parte contacts was a particularly sensitive one for the agency because this proceeding dealt with movies. Many prominent figures, including some Hollywood stars, had visited the Commissioners in their offices to make ex parte arguments pro and con concerning the pay cable anti-siphoning rules. So then here comes an order from the Court requiring that the record be supplemented with the people who had made contact with the Commissioners concerning this rulemaking, and it was a very interesting submission to the Court because it revealed that Commissioner X had been visited in his office at the certain time by this or that well-known celebrity. When the opinion came out, the panel held, I believe their opinion is susceptible to this reading, that an agency should not have ex parte communications in rulemaking proceedings. Everything should be on the record. The Court was not going to make the Commission do this proceeding all over again, but it wanted the record to show what the ex parte communications had been, and they wanted to allow parties an opportunity to respond to this. It so happened that on the week-end after the panel issued its opinion, the annual convention of the National Association of Broadcasters was held in Washington and in light of the panel's ruling against ex parte contacts, it looked like the Commissioners and other decision makers would not be able to do as they usually do, and be at

the convention and mingle with the people who had interests in proceedings. The attorneys were busy that weekend trying to figure out whether the Commissioners and the staff could participate in convention activities. Ultimately, the D.C. Circuit accepted the validity of ex parte communications, provided the participants described in the record what was discussed. Allowing ex parte communications is important because in the minds of many, including myself, if ex parte communications are not allowed, a party that wants its arguments to get to a commissioner is at the mercy of the Commission's professional staff.

I can certainly sympathize with parties who wished to state their arguments in their own words and avoid the risk that something could be lost when the staff translates these arguments. One more development in this case relates to our earlier discussion about when to seek en banc review. We didn't go for en banc in that case because the panel included Judge MacKinnon. When a dissent from Judge Mackinnon was not forthcoming, we concluded that an en banc petition wouldn't stand a chance. About three months after the *Home Box Office* opinion, there was another panel of the D.C. Circuit, which did not include Judge Wright, which also had before it a challenge to the permissibility of ex parte contacts in a rule making, this time in the context of the Children's Television rulemaking. The proponents of the ex parte argument in the *Home Box Office* case were also before the Court in the *Children's Television* case, and a different panel, headed I believe by Judge Tamm, did not buy the argument. It was obvious from the opinion of the panel that Judge Tamm's panel did not share the views of Judge Wright's panel three months earlier. Judge MacKinnon was the one common link in both cases. He had been on the *Home Box Office* panel in the spring, and three months later he was on this panel, and he joined this opinion by Judge Tamm which had been very critical of the earlier opinion. Judge MacKinnon had a very short concurring statement in which he said basically, I

joined the earlier opinion, but upon further reflection, I now think that the views that have been taken in this later opinion more accurately reflect mine. Had we known that, in March, of course, we could've gone for an en banc in the *Home Box Office* case, but in that unusual situation where we didn't know that we had a sympathetic judge until, by this time, I think the train was already going towards the Supreme Court.

MR. SHELDON: And I think I've run out of time with you today because you've got another appointment to get to, so let's stop there, and we'll pick up again next time, maybe with your Metro Broadcasting experience. Thanks very much.