

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MCI TELECOMMUNICATIONS CORPORATION,
Petitioner v. AMERICAN TELEPHONE AND
TELEGRAPH COMPANY and CONSOLIDATED UNITED
STATES, ET AL., Petitioners v. AMERICAN
TELEPHONE AND TELEGRAPH COMPANY, ET AL.

CASE NO: 93-356 AND 93-~~531~~ 521

PLACE: Washington, D.C.

DATE: Monday, March 21, 1994

PAGES: 1-53

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

IN THE SUPREME COURT OF THE UNITED STATES

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MCI TELECOMMUNICATIONS :
CORPORATION, :
Petitioner :
v. : No. 93-356

AMERICAN TELEPHONE AND :
TELEGRAPH COMPANY; :
and : CONSOLIDATED

UNITED STATES, ET AL., :
Petitioners :
v. : No. 93-531

AMERICAN TELEPHONE AND :
TELEGRAPH COMPANY, ET AL. :

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Washington, D.C.

Monday, March 21, 1994

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
1:00 p.m.

APPEARANCES:

CHRISTOPHER J. WRIGHT, ESQ., Deputy General Counsel,
Federal Communications Commission, Washington, D.C.;
on behalf of the Federal Petitioners.

DONALD B. VERRILLI, JR., ESQ., Washington, D.C.; on behalf

1 of the private Petitioner.

2 DAVID W. CARPENTER, ESQ., Chicago, Illinois; on behalf of
3 the Respondents.

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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: Well, we'll hear
4 argument now in No. 93-356, MCI Telecommunications
5 Corporation v. AT&T and United States v. AT&T.

6 Now, Mr. Wright.

7 ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT

8 ON BEHALF OF THE FEDERAL PETITIONERS

9 MR. WRIGHT: Mr. Chief Justice, and may it
10 please the Court:

11 Under section 203(a) of the Communications Act,
12 telephone companies are required to file tariffs. The
13 issue in this case is whether the Federal Communications
14 Commission has authority to relieve nondominant long
15 distance companies of the requirement that they file
16 tariffs.

17 In our view, that question is answered by
18 section 203(b)(2) of the Act, which provides that the
19 Commission may modify any requirement of section 203.
20 Since the Commission may modify any requirement of section
21 203, it may modify the tariff filing requirement
22 established by section 203(a).

23 QUESTION: Could it go so far as to say nobody
24 has to file a tariff?

25 MR. WRIGHT: That is the position that the FCC

1 has taken, and, of course, the D.C. Circuit struck that
2 down. Now, we believe that "modify any requirement" would
3 mean that. Let me point out, in response to your
4 question, that the FCC has not gone nearly that far.

5 The --

6 QUESTION: Modify including AT&T or just the
7 nondominant carriers? Could you do away with the rate
8 filing altogether, or is your position just that you can
9 do away with it with respect to nondominant carriers?

10 MR. WRIGHT: Well, that's certainly all we're
11 arguing about today. Now, I guess I'd interpreted Justice
12 Souter's question as sort of assuming that AT&T would
13 become nondominant at some point in the future. I don't
14 know any rationale for eliminating the tariff filing
15 requirement for a dominant carrier like AT&T.

16 QUESTION: Why do you draw the distinction,
17 market power?

18 MR. WRIGHT: Yes, that's exactly the --

19 QUESTION: That's a reason, but where do you
20 find that in the text?

21 MR. WRIGHT: Well, the Commission has the
22 authority. Under our broadest reading of the statute, the
23 Commission has the authority to modify any requirement.
24 There would be a question as to whether or not it was
25 reasonable to relieve dominant carriers of the authority.

1 QUESTION: And your position would be it would
2 not be reasonable.

3 MR. WRIGHT: I don't -- I -- the Commission
4 hasn't taken any view on that.

5 QUESTION: You think it would be reasonable for
6 us to take the position that it would not be reasonable.

7 MR. WRIGHT: Well, right now the Commission has
8 not articulated any reason for relieving dominant carriers
9 of such a requirement, but --

10 QUESTION: No, but I think we just want to know
11 whether we accept your position here -- and if your
12 position here, do we, in effect, and by implication, go
13 the whole hog?

14 MR. WRIGHT: Our reading of the statute, "modify
15 any requirement," yes, would allow the Commission, for
16 appropriate reasons, to relieve all carriers of the tariff
17 filing requirement.

18 QUESTION: Sort of the Act is no longer
19 necessary, it's a fully competitive industry, and we'll
20 simply modify the Act to no longer exist.

21 MR. WRIGHT: If and when it happens that the
22 industry is fully competitive, then we believe Congress
23 has authorized the Commission to do away with a tool to
24 enforce just and reasonable rates that would no longer
25 have a purpose.

1 QUESTION: Well, why is it that -- I think you
2 acknowledged that the only purpose of the -- that the
3 purpose of the Act is not only to assure reasonable rates,
4 but also to prevent price discrimination, and I don't know
5 why it is so self-evident that when there is competition
6 there cannot be effective price discrimination. I don't
7 understand that at all.

8 MR. WRIGHT: Well, I --

9 QUESTION: Have you ever bought a new car? A
10 very competitive industry, but unless you're a good
11 negotiator you're not going to get as good a price as
12 somebody who is.

13 MR. WRIGHT: Well, unreasonably discriminatory,
14 as construed by the Commission, includes -- I'm sorry,
15 competition assumes that there'll be give-and-take of
16 negotiation, and that -- the fact that different rates get
17 determined does not necessarily show that something's
18 unreasonably discriminatory.

19 I'd like to rely on AT&T's submission to the
20 Commission to answer your question, though. I mean, they
21 said that by definition, nondominant carriers lack
22 sufficient market power to be able to engage in improper
23 price discrimination without suffering the discipline of
24 the marketplace.

25 QUESTION: You're not urging us to believe AT&T,

1 are you?

2 MR. WRIGHT: In this particular instance, Your
3 Honor.

4 QUESTION: In this particular.

5 MR. WRIGHT: I also wanted to make the point, in
6 response to Justice Souter's question, that so far all the
7 Commission has done is relieve part of one of three
8 markets of the tariff filing requirement. It has not been
9 lifted for international calls. It has not been lifted,
10 by and large, for the local exchange carriers, which do 99
11 percent of the interstate access service. It's only been
12 lifted for 40 percent of the long distance market not
13 served by AT&T, and with respect to that 40 percent,
14 nondominant carriers like MCI frequently choose to file
15 tariffs, especially with respect to residential customer
16 services.

17 QUESTION: So another way to put it is that it's
18 been eliminated for all of the interstate market except
19 AT&T.

20 MR. WRIGHT: For -- and for carriers who choose
21 to -- choose to file tariffs, and --

22 QUESTION: The requirement's eliminated for
23 everybody in that whole market except AT&T.

24 MR. WRIGHT: Yes. It's not mandatory for the
25 nondominant carriers.

1 AT&T reads the statute differently. It says
2 that it doesn't apply to any requirement. Specifically,
3 it doesn't apply to the tariff filing requirement, because
4 that's a core requirement of the Act. In AT&T's view, the
5 statute only allows the FCC to modify formalities.

6 We have two responses. First, that's not what
7 the statute says. The statute doesn't say anything about
8 core requirements or formalities. And, in fact, it's not
9 at all clear that such a rule would be needed for
10 formalities. Section 203(a) says very little about
11 formalities, and what it does say is the following:
12 "Tariffs shall contain such other information and be
13 printed in such form and be posted and kept open for
14 public inspection in such places as the Commission may by
15 regulation require."

16 So there's another provision that gives the --
17 another provision in section 203 that gives the Commission
18 authority over -- over those formalities.

19 QUESTION: There was a time when the Commission
20 took a different view of 203, was there not, that 203
21 required rates to be filed?

22 MR. WRIGHT: There's a 1980 order of the
23 Commission that in the text says something that sounds
24 like that, and in the accompanying footnote says, but, of
25 course, section 203 is very broad. And the issue in that

1 case was not whether or not -- you know, that was dicta in
2 that case. Both of those contradictory statements were
3 dicta in that case. Since 1980, the Commission has been
4 firmly of the view that it has authority to lift this
5 requirement.

6 QUESTION: Well, was the 1980 case a case where
7 the Commission had been requested to modify the
8 requirement?

9 MR. WRIGHT: No, Your Honor. No, it was a
10 different matter.

11 QUESTION: To give "modify" a very broad
12 reading -- and you are explicit about that, you say it
13 means more than the word "exempt," is that your position?

14 MR. WRIGHT: Well, yes, we define it in light of
15 Webster's Ninth New Collegiate Dictionary.

16 QUESTION: But, yet, in legal litany modify is
17 usually a kind of an inbetween word, like courts have
18 authority to affirm, modify, or reverse a lower court
19 decision.

20 MR. WRIGHT: And I would concede even that one
21 of "modify"'s meanings would even be more limited than
22 that. In some cases it would only mean circumscribed
23 alterations. But there are different --

24 QUESTION: Not one of its meanings. It's its
25 normal meaning. I mean, you say you have Ninth -- there

1 are bad dictionaries, just like there are bad regulations.
2 There are a whole bunch of English words that come from
3 the same Latin root, all of which have a connotation of
4 limitation. Moderate, modulate, even the word modest, it
5 all comes from the same root, and they all -- a root which
6 means measure, and they all contain that limitation of
7 measured, limited, and it seems to me that "modify" bears
8 that same connotation as all of them. I don't care what
9 one edition of Webster's might have said about it.

10 MR. WRIGHT: Well, Justice Scalia, Webster's
11 Collegiate Dictionary very clearly -- the FCC's
12 construction fits within its definition. And this is not
13 an obscure dictionary; this is one this Court's relied on.
14 This Court's favorite dictionary is Webster's Third New
15 World Dictionary. You've relied on it as recently as
16 January, you relied on it 9 or 10 times last term, and it
17 includes a definition "to make a basic or important change
18 in." So --

19 QUESTION: To make a basic or important change,
20 that's what "modify" means, to make a basic change?

21 MR. WRIGHT: That is one of the definitions --

22 QUESTION: Which meaning is that in terms of
23 numbers?

24 MR. WRIGHT: I'm not sure, Your Honor.

25 QUESTION: And wasn't there a point made that at

1 the time this Act was passed perhaps that definition
2 wasn't there?

3 MR. WRIGHT: Well, AT&T has not actually said
4 this. It suggested that perhaps "modify" has changed in
5 meaning since 1934, but actually the definitions that they
6 cite from the thirties all say "alter." Now we'd be happy
7 if you want -- if this means "alter" any provision, we
8 think that the FCC has authority to alter any provision.

9 QUESTION: There's a wonderful -- wonderful line
10 sung by the bass in the Messiah, Mr. Wright, where it says
11 "and we shall be changed." There's a feeling of
12 transformation about it, and you say that could be sung
13 "and we shall be modified."

14 (Laughter.)

15 QUESTION: They really convey the same notion.

16 MR. WRIGHT: Well, on a practical level, it's
17 occurred to me that before I went to law school I thought
18 edit meant, you know, change a few tenses. Then after
19 seeing what a law review would do to something I wrote, I
20 realized that it means rewrite. Now, if somebody on a law
21 review told me they were going to modify rather than edit
22 what I was submitting, I'd really be scared about what was
23 happening.

24 (Laughter.)

25 MR. WRIGHT: Let me also say that this case is

1 very similar to the Amtrak case, the case decided 2 years
2 ago, National Passenger Railroad v. Boston & Maine. The
3 issue in that case was what the word "required" meant.
4 The D.C. Circuit had said that it had to mean necessary,
5 that "required" meant necessary, that's the first
6 definition. The ICC had said, no, we're going to
7 interpret it just to mean useful in this context; we're
8 going to give it what was effectively a broader meaning.

9 This Court said that few phrases in a complex
10 scheme of regulation are so clear as to be beyond the need
11 for interpretation when implied in a real context, and
12 went on to say that the existence of alternative
13 dictionary definitions of the word "required," each making
14 some sense under the statute, itself indicates that the
15 statute is open to interpretation. In this case, you can
16 put "modify" in place of "required" and reach the exact
17 same conclusion.

18 Let me add in that respect that AT&T has cited
19 the -- even though we devoted a few pages of our brief to
20 it, has cited that case only in a footnote where they say
21 that the reason it's distinguishable is because our
22 definition of the statute makes no sense at all.

23 QUESTION: What about the other language, Mr.
24 Wright? It not only says "modify" but also says "in
25 special circumstances." Do I have the language right?

1 MR. WRIGHT: That's one of -- it says "in its
2 discretion and for good cause shown, modify any
3 requirement either in particular instances or by general
4 order applicable to special circumstances" --

5 QUESTION: And you say the "special
6 circumstances" could be that the entire industry is now
7 competitive. The special circumstance is, what, 1993?

8 MR. WRIGHT: Well, we think looking at the
9 situation today from what Congress saw in 1934, that --

10 QUESTION: Today is a special circumstance.

11 MR. WRIGHT: The fact that AT&T no longer holds
12 a monopoly over long distance service, but that there are
13 481 other nondominant carriers --

14 QUESTION: They're not specified circumstances.
15 It says "special circumstances." Don't you think that
16 contains a connotation of limitation; not general
17 circumstances applicable to the entire industry, but
18 special circumstances, some limit?

19 MR. WRIGHT: Well, it's not yet -- I mean, as
20 I've said, it's only applicable to one part of one of
21 three markets here. The fact that there's competition
22 there has not gotten --

23 QUESTION: Well, okay, now we're just arguing
24 about how special "special" has to be, but that already
25 backs you off of your initial position, which is that

1 really it could extend to the entire --

2 MR. WRIGHT: No -- well, that's another -- we
3 would think that the Commission has authority to define
4 what "special circumstances" are too, and could decide
5 that the interest -- that especially viewed from the lens
6 of 1934, that -- when there was really no competition at
7 all, that today's telecommunications world is very
8 different.

9 QUESTION: So "special circumstances" can
10 include everything; the entire realm of communications can
11 be special circumstances?

12 MR. WRIGHT: If, in fact --

13 QUESTION: Yes, if the Commission says so.

14 MR. WRIGHT: If, in fact, the communications
15 industry has changed that dramatically.

16 QUESTION: So your rule is that when the general
17 circumstances are different from the predicate for the
18 original legislation, as long as this modification power
19 is in there, in effect the legislation can, in effect, be
20 repealed by the Commission.

21 MR. WRIGHT: Well, I wouldn't phrase it that
22 way, but --

23 QUESTION: Well, I wouldn't either, if I were
24 arguing your side of the case.

25 (Laughter.)

1 QUESTION: But, I mean, that's where you go,
2 isn't it?

3 MR. WRIGHT: But, look it, in this -- in 203
4 there are -- there are seven sentences. One of them is
5 203(b). Five of the others contain a direction that
6 carriers shall do something. The verb "shall" is used in
7 five of those sentences. The Commission has said that --
8 is told that it may modify any of those requirements. It
9 seems clear to us that the Commission may change the
10 rules, that that's what Congress has authorized it to do.

11 And, in fact, I don't think I quite made the
12 point that how little AT&T's view allows the Commission to
13 do under "modify any requirement." As I say, all it says
14 is that we may modify formalities, and we already have
15 authority to modify most of the formalities. They --
16 Congress expressly delegated that to the Commission as
17 well. AT&T reads this to modify some requirements.

18 QUESTION: Well, maybe you're both wrong. I
19 mean maybe they can affect tariffs, but not all of them.
20 Maybe they can suspend one now and then or whatnot. I
21 don't think we're driven to take either view in
22 particular.

23 MR. WRIGHT: Well, the logic of AT&T's position
24 may be that we can go as far as we've gone and detariff
25 part of one of three markets and not go as far as to

1 detariff it if that becomes appropriate, but I don't
2 really think that they've made that argument.

3 QUESTION: Have we held, Mr. Wright, that
4 Chevron deference is equally applicable to an independent
5 commission as is to an agency of the Government?

6 MR. WRIGHT: I believe so. Certainly the Amtrak
7 case that I just cited was an ICC case, and, if anything,
8 it would seem that more deference would be appropriate,
9 but I'm not asking for any more, just the same amount.

10 QUESTION: More deference is due to a body that
11 is not controlled by elected representatives directly?

12 MR. WRIGHT: Well, I'll stand on the Amtrak case
13 and the fact that that case is almost exactly like this
14 one.

15 If I may, I'd like to reserve the remainder of
16 my time for rebuttal.

17 QUESTION: Very well, Mr. Wright.

18 Mr. Verrilli.

19 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

20 ON BEHALF OF THE PRIVATE PETITIONER

21 MR. VERRILLI: Mr. Chief Justice and may it
22 please the Court:

23 I'd like to start, if I could, with the text of
24 203(b). I think it's clear that, as a practical matter,
25 what the Commission has done here is not to eliminate the

1 tariff filing requirement. We think that's also true as a
2 textual matter. What the Commission has done here is to
3 make the requirement conditional.

4 In theory, this requirement continues to exist
5 and operate for every carrier. The question is whether
6 the carrier meets the conditions that trigger the
7 requirement. It seems to us it is as much a modification
8 of a requirement to change the conditions that trigger it
9 as to change the obligations that are, in fact, triggered.
10 The Commission has done no more than that here.

11 Additionally, we think that section 203(c), in
12 fact in particular the first sentence of 203(c), makes
13 clear that the Commission has the power to remove the
14 tariff obligation entirely, because it says that service
15 must be provided under tariff unless otherwise provided by
16 or under the authority of the Act. Plainly, section
17 203(b)(2), in our view, which is the very preceding
18 sentence in the Act, is authority conferred in the Act to
19 remove the tariff filing obligation.

20 QUESTION: Mr. Verrilli, in terms of the
21 "plainly," do I recall incorrectly that it was at one time
22 MCI's position that the FCC must require rate filing and
23 it could not do away with that requirement either on a
24 mandatory or even a permissive basis?

25 MR. VERRILLI: 10 years ago, Your Honor, MCI

1 took that position in the court of appeals. We now think
2 that that position is wrong. We've thought that position
3 was wrong for many years, and we tried to indicate that in
4 our brief at footnote 5, our reply brief. In any event,
5 it's our view now that this statute is capable of the
6 meaning that the Commission has ascribed to it, which
7 under Chevron is all that ought to be required to trigger
8 deference. But, yes, Your Honor --

9 QUESTION: I just wanted to establish that the
10 "clearly" -- you didn't really mean the "clearly," because
11 you were arguing just what we have been discussing 10
12 years ago, so at least you found a plausible basis for
13 making the argument that you made successfully 10 years
14 ago.

15 MR. VERRILLI: Yes, Your Honor, 10 years ago MCI
16 made that argument. We think, though, that the reading
17 that we're advancing today is the better reading,
18 particular given section 203(c), which makes clear that
19 the requirement can be removed.

20 QUESTION: Well, all that that gets you is that
21 you can remove some -- you can modify tariffs, just as you
22 can modify other things. It doesn't necessarily show that
23 you can make the kind of massive modification to, in
24 effect, detariff an entire segment of the industry, save
25 for one provider, right?

1 MR. VERRILLI: But --

2 QUESTION: I mean, all it shows is that you can
3 affect tariffs.

4 MR. VERRILLI: It shows --

5 QUESTION: You're still left with the problem
6 of, you know, how far "modify" takes you and what are
7 "special circumstances."

8 MR. VERRILLI: Yes, Your Honor, that's correct.
9 But it seems to us that the logic must be that if the
10 Commission has the authority to remove it in some
11 circumstances, therefore the necessary implication is that
12 it's not in those circumstances indispensable to the
13 functioning of title II if the logic that would allow the
14 Commission to take that step exists with respect to 10
15 carriers and also exists with respect to a hundred or four
16 hundred carriers, that there's no natural stopping place.

17 That if the logic works for that -- for the
18 small number of carriers and the logic works equally well
19 for the large number of carriers, the Commission ought to
20 have the discretion to expand that power to include a
21 large number of carriers. There's simply no policy
22 justification for saying, well, it's okay to exempt 10,
23 but it's not okay to exempt 400.

24 QUESTION: Just a textual justification, the
25 word "modify" and the word "special circumstances."

1 MR. VERRILLI: Well, Your Honor, so long --
2 there are special circumstances here, which is the lack of
3 market power. The requirement hasn't been eliminated,
4 it's been made conditional, so the Commission has remained
5 faithful to the text. And as long as it has done that --

6 QUESTION: Are you still of the view that the
7 mandatory no filing would be impermissible, so that you --

8 MR. VERRILLI: No, Your Honor, we're not. I
9 think the logic of our position is that mandatory
10 detariffing would, as a matter of statutory
11 interpretation, be a permissible step.

12 QUESTION: So you really have come 180 degrees.

13 MR. VERRILLI: With respect to the meaning of
14 section 203, yes, that's correct, Your Honor.

15 QUESTION: But then so has the Commission, so
16 has AT&T. I mean there's enough of that to go around,
17 isn't there?

18 (Laughter.)

19 MR. VERRILLI: Thank you, Justice Scalia, I
20 think that's correct.

21 I'd also like to focus for a minute on what I
22 take to be AT&T's central argument, which is --

23 QUESTION: Of course, the position you advocate
24 today is advocated by an older, wiser, and more
25 experienced lawyer.

1 (Laughter.)

2 MR. VERRILLI: That's correct, thank you.

3 What I take to be AT&T's central argument is
4 that title II of the Act cannot be enforced absent tariff
5 filings. We think that that is simply wrong. Although
6 tariff filing is one method of enforcing an
7 antidiscrimination provision, it is clearly not the only
8 method.

9 The Commission has made a decision here, in its
10 discretion, that it wants to use the complaint process as
11 the statutory -- as the principal enforcement method.
12 That is a decision that is owed substantial deference.
13 It's a reasonable policy decision, particularly given
14 AT&T's concession that nondominant carriers can't charge
15 unreasonable or discriminatory rates.

16 Indeed, many non -- many price discrimination
17 statutes, the antitrust laws, the Robinson-Patman Act,
18 State unfair competition laws, are routinely enforced
19 without any requirement of published rates. The logic
20 that allows those statutes to function is a logic on which
21 the Commission ought to be entitled to rely here.

22 QUESTION: Well, it's also -- those statutes are
23 applied to competitive industries as well. I'm not sure
24 those statutes help you. I mean, they -- those statutes
25 operate on the assumption that the mere presence of

1 competition does not eliminate price discrimination.
2 Indeed, the price discrimination is a tool that's often
3 used most often in fiercely competitive industries.

4 MR. VERRILLI: But they do operate on the
5 assumption, Justice Scalia, that the very existence of
6 competitors is likely to ferret out the price
7 discrimination, and that competitors have an incentive to
8 find out what the other competitors are charging, and that
9 customers have an incentive to disclose the best offers
10 they're getting from one competitor in order that another
11 competitor can come in and meet or beat that price. And
12 therefore it's a matter of disclosure of the rates being
13 offered that counts here, that makes the enforcement
14 mechanism work, and that's the kind of logic the
15 Commission relied on here. In our judgment, that was
16 plainly a reasonable decision.

17 The third point I'd like to make is -- if I
18 could, is that it would, in our view, be an unwarranted
19 extension of the filed rate doctrine to apply Maislin
20 here. In our view, by far more -- the case most on point
21 is Permian Basin. In Permian Basin this Court faced an
22 analog to the question faced today; does an agency have
23 the statutory authority to remove a tariff obligation, in
24 that case, the tariff obligations of section 4 of the
25 Natural Gas Act.

1 In Permian, this Court squarely held that the
2 Federal Power Commission had that authority. And it did
3 so in a statute, section 4 of the Federal Power Act, that
4 imposed an unequivocal obligation on every carrier to file
5 all rates. Section 4 of the Natural Gas Act also imposed
6 a nondiscrimination and a reasonable pricing requirement,
7 just as does the Communications Act. In fact, the Natural
8 Gas Act was modeled on the Interstate Commerce Act and was
9 passed in 1938.

10 Despite all that, this Court concluded that the
11 Federal Power Commission did not exceed its statutory
12 authority in removing that requirement for small producers
13 of natural gas. Now, that exemption from the tariff
14 requirement in Permian Basin, if one goes back and reads
15 the agency decision at 34 Federal Power Commission 235,
16 applied to 2,000 of the 2,100 producers of natural gas
17 who, in the aggregate, produced 15 percent of the natural
18 gas supply.

19 QUESTION: You want to let -- you want us to
20 allow the FCC to do for communications what the Federal
21 Power Commission did for the energy industry?

22 MR. VERRILLI: We think that the proper role of
23 the agency ought to be respected here, just as it was in
24 Permian Basin, recognizing that the tariff mechanism needs
25 to be adjusted in light of changed circumstances.

1 QUESTION: My impression is that Permian Basin
2 was the first step to a real regulatory diaster which
3 we've ended up sorting out during the past decade with
4 great difficulty.

5 MR. VERRILLI: Well, that may or may not be
6 correct, Justice Scalia, but that seems to me to be in the
7 bailiwick of the agency. The agency's made a decision
8 that this -- that removal of tariffs in this circumstance
9 will advance the public interest, will make this market
10 more efficient and more competitive, and in our view
11 that's a judgment that ought to be respected.

12 We think there's just a fundamental difference
13 between the question that was at issue in Maislin, whether
14 a filed rate must be followed, and the question at issue
15 here, where the agency -- whether the agency has the
16 statutory authority to remove that. We think, as we said,
17 that the text of 203, particularly focusing on that first
18 sentence of 203(c), makes clear that the FCC has that
19 authority.

20 If there are no further questions, I'd like to
21 reserve the balance of my time.

22 QUESTION: Thank you, Mr. Verrilli.

23 Mr. Carpenter, we'll hear from you.

24 ORAL ARGUMENT OF DAVID W. CARPENTER

25 ON BEHALF OF THE RESPONDENTS

1 MR. CARPENTER: Mr. Chief Justice and may it
2 please the Court:

3 The issue in this case is whether Congress has
4 given the FCC the power to exempt a broad and concededly
5 potentially unlimited class of communications common
6 carriers from a statutory requirement that was copied,
7 almost verbatim, from those of the Interstate Commerce
8 Act, and that is utterly central to the statutory scheme
9 for the same reasons this Court identified in the Maislin
10 case.

11 And we submit that it's very clear from the
12 language of the Act, both 203 looked at in isolation and
13 in context of the Act as a whole, and from its history,
14 that the Communications Act just isn't susceptible to the
15 FCC's interpretation, which was the basis for the court of
16 appeals' decision. But that even if the statutory terms
17 were ambiguous, a century of decisions of this Court,
18 reaffirmed recently in Maislin and the '86 Square D
19 decision, established that exceptions to statutory filed
20 rate requirements can't be inferred from general or
21 ambiguous provisions, and there's no way that section
22 203(b) is an explicit exemption.

23 The statute --

24 QUESTION: Excuse me, I don't -- I really
25 didn't -- I didn't follow you there.

1 MR. CARPENTER: Didn't follow that.

2 QUESTION: Yes. Why is it not an explicit
3 exemption? I can understand how you can quarrel about the
4 scope of it, but surely it's an explicit exemption.

5 MR. CARPENTER: Well, as I say, we say the
6 statute is not -- 203(b) can't be read as authorizing what
7 they want to authorize, which is exempting carriers from
8 the requirement of 203(a) that they file all their rates,
9 or the requirement of 203(c) that they charge only filed
10 rates.

11 QUESTION: And your position is that they cannot
12 exempt any carrier at any time, no matter the circumstance
13 and no matter how narrow the circumstance, right?

14 MR. CARPENTER: That is our position, that's
15 correct. They cannot exempt. They can modify the
16 requirement, but they can't exempt.

17 QUESTION: Well, what's the difference between
18 modification and exempting?

19 MR. CARPENTER: They cannot remove the
20 requirement that carriers file all their charges somehow,
21 someplace, somewhere, and the requirement that they charge
22 only the rates that they'd filed, except in the situations
23 where the statute explicitly authorizes exceptions, and
24 there are many such exceptions.

25 QUESTION: Then what does exemption mean, which

1 you say they can't do?

2 MR. CARPENTER: They cannot do. They cannot
3 remove the requirement that every carrier file all its
4 charges, and they can't remove the parallel requirement
5 that carriers charge only filed rates.

6 That's our position, and that follows from the
7 terms of the statute. 203(a) requires every carrier to
8 file all charges. 203(c), just the flip side, prohibits a
9 carrier from charging unfiled rates, and 203(b) only
10 requires that the FCC may modify any requirement of the
11 statute in particular circumstances.

12 QUESTION: May I ask, Mr. Carpenter, do you
13 think they could modify the filing requirement by changing
14 the agency where the rates are filed?

15 MR. CARPENTER: Yes. Yes, in fact, both
16 circuits that have adopted the interpretation that we're
17 advocating, the Second Circuit and the D.C. Circuit, have
18 allowed precisely that.

19 QUESTION: What if they said we'll file them in
20 the sales office of corporate headquarters?

21 MR. CARPENTER: Well, we're now quibbling --
22 we're now quibbling about the --

23 QUESTION: Well, I'm not quibbling, because I
24 imagine they may do that. They may -- they may have all
25 their people know what the rates are, just file them, and

1 have them open for public inspection at the home office.

2 MR. CARPENTER: Well, the question ultimately --
3 I think they have to be filed in some public -- public
4 agency, but the question ultimately boils down to this,
5 you cannot enforce the other provisions of the statute --

6 QUESTION: Well, let me just interrupt you a
7 minute.

8 MR. CARPENTER: Yeah.

9 QUESTION: If you will agree they don't have to
10 file them with the Commission, what is it in the statute
11 that says they must file them with some other public
12 agency?

13 MR. CARPENTER: What is it -- what is -- my
14 position ultimately is that they can modify the
15 requirements of 203(b), and -- but they can't modify the
16 other provisions of the statute, which they concede, and
17 the courts have, you know, long held that the publication
18 and filing of the rates somehow, someplace, somewhere, is
19 ultimate -- is central to the enforcement of all these
20 other provisions of the statute that can't be modified:
21 the ban on unreasonable discrimination, the requirement
22 that rates be just and reasonable.

23 So unless the rates are filed and published
24 somewhere, those other provisions can't be enforced and
25 won't -- the statutory --

1 QUESTION: Somewhere must -- could not be their
2 own corporate offices open to the public if anybody wants
3 to come in and look at it?

4 MR. CARPENTER: The -- that being so far from
5 this case, I'm -- you know, I guess my position is it
6 should be a public agency because I'm not confident that
7 they really would be open anywhere else. But that's so
8 far from this case --

9 QUESTION: But as I understand, your opponents'
10 position is that we should really treat this as sort of a
11 Robinson-Patman Act; as long as they're nondiscriminatory
12 and they adhere to uniform rates and so forth, that the
13 purpose of the statute is served.

14 MR. CARPENTER: No, the purpose of the statute
15 wouldn't be served in that event because the purpose of
16 the statute is to assure that all similarly situated
17 customers pay equal rates. And what -- and these
18 quotations of AT&T positions taken out of context, you
19 know, we freely acknowledge that if there's no market
20 power, that you obviously won't have rate differences that
21 result from exercises of market power. But for the
22 reasons that I understood Justice Scalia to be
23 identifying, in a competitive market you are always going
24 to have rate differences. And you have rate --

25 QUESTION: Yes, but most economists take the

1 view that in a true competitive market there cannot be
2 economic discrimination.

3 MR. CARPENTER: There -- absolutely, there
4 cannot be economic discrimination and there cannot be
5 anticompetitive discrimination in a competitive market,
6 but there will be rate differences between similarly
7 situated customers, and this statute rests on the ground
8 that you want to prevent those. And the certain and
9 direct method of preventing those kinds of rate
10 differences, which is what the statute is directed at, is
11 requiring that they be published so that all similarly
12 situated customers can know of them and demand them.

13 And that this Court's held many many years that
14 that was the congressionally prescribed means of carrying
15 out the statute, and it's for this reason that in *Maislin*
16 you held that exceptions to the rate-filing requirements
17 can't be inferred even from facially applicable
18 provisions. There it was the ban on reasonable practices,
19 and the conduct at issue there was, in my view,
20 fraudulent, was an unreasonable practice under normal
21 interpretation of that term.

22 But you refused to -- the Court refused to
23 construe the term broadly because that would undercut the
24 central provision of the statute, essential to achieving
25 all these other purposes, and that you said you wouldn't

1 allow exceptions to the rate-filing requirements unless
2 they were explicit in the statute. And that rule, we
3 submit, would control here if you reached the issue, but I
4 would submit you don't have to, that the D.C. Circuit was
5 correct that you cannot construe the term "modify" broadly
6 to allow the removal of the rate-filing requirements for
7 any carrier.

8 As we point out in the brief -- you know, this
9 battle of the dictionaries is one we've been fighting --
10 certainly the ordinary meaning of the term and the term in
11 effect in the dictionaries at the time the statute -- the
12 definition in effect when the statute was passed wouldn't
13 allow exemptions.

14 MCI has this argument now that "modify" means
15 make conditional, which means that it authorized
16 conditional exemptions. That's not a definition of
17 "modify," but even if it were the text of the statute
18 forecloses this because it says modify in special
19 conditions. As they say, page 8 of their brief, they want
20 to read "modify" so it means remove the tariff-filing
21 requirements in special conditions. They're just
22 rewriting the statute. The statute says modify particular
23 circumstances or conditions, and they want to rewrite it
24 to say remove.

25 QUESTION: Well, Mr. Carpenter, what provisions

1 do you think the modification provision applies to? If it
2 doesn't apply to tariff, what does it apply to, what --

3 MR. CARPENTER: What provisions of 203 can be
4 modified?

5 QUESTION: Yes.

6 MR. CARPENTER: Yes. Well, I got in trouble
7 when I referred to the first one, which is where the rates
8 be filed. And the other one, which is -- has been a big
9 issue in the past is what constitutes a rate schedule.
10 Obviously, in the ordinary meaning a rate schedule or a
11 tariff is a price list, and it's something that you can
12 place an order under. You see the list of prices and you
13 go to the carrier and you place an order under the tariff.

14 Well, the ICC has interpreted the statute to
15 allow the filing of ordinary contracts, contracts between
16 customers and carriers, which aren't, you know, price
17 lists that you can place an order under; they only apply
18 between the parties. And the courts have held that
19 that's -- that that's a permissible modification because
20 it doesn't undercut the other purposes of the statute,
21 because the rates are filed so similarly situated
22 customers can request them.

23 QUESTION: Yeah, but the point I'm getting at is
24 are you willing to apply your categorical notion that
25 modify cannot include elimination, not even elimination in

1 narrow circumstances. For example -- to the other things
2 that it covers. For example, to whether you have to apply
3 schedules to each of your connecting carriers. I suppose
4 you're compelled to take the position that there can be no
5 exceptions, no complete exceptions to say that this --

6 MR. CARPENTER: I fear I may be, to some extent,
7 misleading you. Our position is they can modify the
8 requirements -- the filing requirements of the statute,
9 and that in deciding what that means you have to look at
10 the other provisions of the statute for -- to which the
11 filing requirements are centrally important. And the key
12 thing, as you said in Maislin, is that the rates charged
13 each customer be stated in or ascertainable from the
14 public filing.

15 So if that purpose is being served, I think they
16 can do lots of things to these other requirements, so long
17 as that purpose is served. And the example I just gave
18 you, where they allowed things that aren't traditional
19 rate schedules, would be an example of the modification of
20 the requirements of the statute that does modify the
21 requirements of 203 but's consistent with the statute as a
22 whole because it doesn't affect the enforcement of the
23 other provisions that the filing requirement is designed
24 to serve.

25 So there's all sorts of things that I could

1 imagine being done in modifying the requirements of 203,
2 but the one thing that can't be done, which is that there
3 can't be any modification of the requirement that the
4 rates and the terms and conditions affecting the rates be
5 filed so that similarly situated customers are in a
6 position where they can know what they are and demand
7 them.

8 Which is what -- what this Court's held really
9 for a century, going back -- you know, all the decisions
10 you cited in Maislin stand for the proposition that this
11 rate-filing requirement that the rates be filed somehow,
12 someplace, somewhere, is utterly central to the statute as
13 a whole.

14 QUESTION: Suppose a Federal Agency gets into
15 the telecommunications business and its rates are
16 published in the Federal Register pursuant to its statute,
17 could the FCC say that the rates of that particular
18 carrier do not have to be filed under the Act?

19 MR. CARPENTER: Well, to answer your hypothetical
20 question, I could imagine someone arguing that the
21 statutory purposes were adequately served in that
22 circumstance. Happily, in this circumstance there's no
23 dispute that the statutory purposes aren't being served,
24 because the rates --

25 QUESTION: No, but I'm just testing about

1 whether you're really categorical --

2 MR. CARPENTER: Right.

3 QUESTION: -- About you must file tariffs. I
4 find --

5 MR. CARPENTER: What I'm categorical -- no, Your
6 Honor --

7 QUESTION: I find that a very hard argument to
8 sustain.

9 MR. CARPENTER: Well, I think you -- I think
10 what I'm categorical about is that carriers cannot be
11 excused from the obligation that they file their rates.
12 They don't have to look like tariffs, they maybe don't
13 have to be filed at the FCC. I'm categorical about the
14 fact that the requirements of the statute can be modified
15 up to the point that there's no interference with the core
16 of the statute which is -- goes to the whole statute, not
17 just 203, that the rates be published so that everyone
18 knows what they are and so the antidiscrimination
19 provisions of the statute can be enforced. And --

20 QUESTION: What about the argument put forward
21 by the FCC that the statute would be redundant if all that
22 "modify" implies is what you said, because 203(d) would do
23 that job?

24 MR. CARPENTER: 203(c).

25 QUESTION: Is it -- 203(c).

1 MR. CARPENTER: Yeah. Well, this is Mr.
2 Verrilli's argument, that the language of section 203 --
3 and the FCC's, that the language of section 203 shows that
4 you have to read section 203(b) to authorize the kind of
5 exemptions that we say are prohibited. But that's just
6 wrong. I mean, section 203(c) says that carriers have to
7 charge only filed rates, except as provided -- unless
8 otherwise provided by or under the authority of this
9 chapter. It says chapter, not section. If it were
10 referring to 203(b), it would say section.

11 And it's argued in the reply that there's no
12 other provision in the statute that authorizes exceptions
13 to the requirement -- that -- in which the FCC is
14 authorized to create exceptions to the requirement that
15 carriers charge only filed rates, but that's just untrue
16 too. In our brief, page 20, note 26, we list a number of
17 examples, and in each of them the FCC is delegated
18 authority to enter orders or take other actions that will
19 have the affect of excusing carriers from the obligation
20 that they file -- they charge only filed rates.

21 Just to take one of them, the first one we list
22 is 201(b) and 211, which say -- 201(b) which is page 1a of
23 our statutory appendix, says that nothing in this chapter
24 will prohibit contracts between carriers for exchanges of
25 service if the FCC enters an order that it's in the public

1 interest. So under this procedure, you file a contract
2 with the FCC, if it approves then you're authorized -- the
3 carriers are authorized to swap services with one other
4 and not charge each other filed rates.

5 That's true of each -- every other example we
6 list. In each of those other provisions, 205, 210, and
7 the newly enacted 332, the FCC is authorized to take
8 specific action that will have the effect of relieving
9 carriers from the requirement that they charge only filed
10 rates. And the fact that Congress enacts these specific
11 exemptions just shows that the modification authority
12 isn't as broad.

13 And if you want contemporaneous evidence that
14 Congress didn't understand the modification authority to
15 include the authority to exempt people from the
16 rate-filing requirements whatsoever, at the same time
17 Congress enacted the Communications Act, or the year --
18 the next year it enacted the Motor Carrier Act, and it has
19 the same filing requirements, same modification provisions
20 applicable both to motor common carriers, that's section
21 217 of the Act, and motor contract carriers, that's 218.

22 And in the contract carrier provision, it has
23 the rate-filing requirement, then it has the modification
24 provision, then after that there's a provision that says:
25 "The ICC is authorized to grant relief from the

1 requirements of this statute." That clearly shows that
2 Congress didn't understand the modification authority
3 reaches as broad as they say, because it enacted a
4 specific additional provision authorizing them to grant
5 relief.

6 So whatever the scope of modification --

7 QUESTION: Was the additional provision subject
8 to any restrictions? That seems like an extremely
9 broad --

10 MR. CARPENTER: It was subject to the
11 restriction the ICC had to find it to be in the public
12 interest and consistent with, I believe it said national
13 transportation policy. So, I mean, when Congress wants to
14 authorize exemptions from the statutory rate-filing
15 requirements, it uses different language, it doesn't say
16 "modify."

17 In fact, in the court of appeals opinion that's
18 really at issue here, an '85 opinion, the court of appeals
19 goes on -- at pages 16 and -- through 18 -- to describe
20 all sorts of statutes where there's explicit exceptions to
21 the rate-filing requirements, and each of those have the
22 same sort of modification provisions that are at issue
23 here.

24 QUESTION: Mr. Carpenter, just on the example
25 you just gave us about the grant relief and how broad

1 that, when did Congress enact that statute?

2 MR. CARPENTER: 1935.

3 QUESTION: Oh, that's in the original, okay.

4 MR. CARPENTER: Yes. No, that's the original
5 Motor Carrier Act, and that was obviously carried through.
6 In fact, in Maislin among your reasons for declining to
7 allow the FCC to create an exception to the rate-filing
8 requirements under the unreasonable practices ban is the
9 fact that Congress had adopted explicit exemptions for
10 motor contract carriers. And that was also at issue in
11 the regular common carrier decision that was relied on in
12 Maislin, and I believe judge -- then Judge Scalia wrote in
13 a former life.

14 QUESTION: Mr. Carpenter, what do you respond to
15 the argument that the existence of competition is a
16 special circumstance?

17 MR. CARPENTER: There's no doubt that the
18 existence of competition is an extremely significant fact
19 in this regulatory scheme. As we have said, in trying to
20 get deregulation for ourselves, it justifies modifications
21 of the rate-filing requirements, it justifies elimination
22 of cost-support requirements with the filings, it
23 eliminates -- it justifies eliminating active forms of
24 cost-of-service regulation, shortening the notice period
25 to as little as 1 day.

1 So it's a very significant fact, but the statute
2 says you can modify in particular circumstances, not
3 exempt, and all -- all competition allows within -- under
4 203 is the sorts of streamlined regulation that we are
5 seeking in this petition that we filed that people keep
6 misquoting. So competition is very significant, but it
7 doesn't eliminate the need for the rate-filing
8 requirements for the reasons that I said earlier, because
9 you'll have price differences even in competitive markets.

10
11 They're not anticompetitive, but they are price
12 differences that Congress sought to eliminate. Congress
13 wanted equal rates for similarly situated customers, and
14 decided the way to achieve that is making everyone file
15 rates so that all customers would know what they were and
16 could demand them.

17 QUESTION: Does the FCC have a developed body of
18 law to define what is a dominant participant in an
19 industry, or is this a category -- a juridical category
20 that is new for this regulation only?

21 MR. CARPENTER: The FCC has had this
22 classification for a number of years, I believe it dated
23 from the early 1980's, and they define dominant carriers
24 as carriers possessing market power, and it has
25 significance for tarrifying requirements and for other

1 provisions, because dominant carriers are subject to some
2 FCC regulations, I believe, that others --

3 QUESTION: Is there support in the statute for
4 that category in these areas where the FCC has been
5 applying it?

6 MR. CARPENTER: We, I don't believe, have ever
7 argued that the FCC doesn't have the authority to make
8 that distinction for some purposes. Our point here -- and
9 I -- our point here is only that whatever the significant
10 of that distinction for other purposes, you can't be -- it
11 can't be a basis to exempt carriers from what the statute
12 unambiguously requires that all do, which is to charge
13 only filed rates.

14 As I've said, that we think this case, even if
15 you were to disagree with us that the statute is
16 susceptible to the FCC's interpretation, we think this
17 case is controlled by the decision in Maislin. Because it
18 establishes, as, you know, many prior cases had, that
19 rate-filing requirements are so central to the statutory
20 scheme that even broad and facially applicable provisions
21 of the law, like the ban on unreasonable practices at
22 issue there, can't be construed to authorize exceptions to
23 the great filing requirement unless Congress has
24 explicitly so provided.

25 I believe today, and certainly in the reply

1 belief, that Mr. Verrilli tried to distinguish Maislin by
2 saying that it didn't involve the requirement that rates
3 be filed, but only a requirement -- which is a requirement
4 of section 203(a) of the statute -- that involved only a
5 requirement that carriers follow whatever tariffs they've
6 filed and that they not charge rates that are different
7 from those that are set forth in the tariff. And they say
8 there's a fundamental distinction in the statute between
9 the two.

10 Now, even if that were true it wouldn't do these
11 petitioners any good, because they're doing exactly what
12 they say what Maislin said they couldn't do, they're
13 charging lower rates than those set forth in the tariff.
14 That's what MCI did in the underlying litigation that led
15 to this; it was negotiating discounts of 5 to 10 percent
16 below its generally applicable tariff rates.

17 And the FCC and MCI each explain in their brief
18 that the consequence of their position is that carriers
19 can go off and cut secret deals, rebates, all the things
20 that 203(c) of the statute prohibit. So even if there
21 were the distinction that they're positing, it wouldn't do
22 them any good here because this order allows exactly what
23 Maislin prohibits.

24 But the more fundamental point is that there's
25 no distinction in the statute between merely filing rates,

1 which they say is a 203 obligation, and merely following
2 tariffs, which they say is the 203(c) duty. The two
3 obligations are absolutely parallel. They're just
4 different ways of saying the same thing; they're opposite
5 sides of the same coin.

6 If you charge a customer a rate that's lower
7 than that set forth in your tariff and don't file the
8 lower negotiated rate, you're violating both section 203
9 and 20 -- both section 203(a) and section 203(c). You're
10 violating 203(a) because you're not filing all your
11 charges. You're violating 203(c) because you're charging
12 a customer a rate that's not filed. The two obligations
13 are parallel and they overlap and there's a violation of
14 each, and for that reason Maislin relied both on the duty
15 to file and on the duty to follow.

16 At page 126 of the opinion, 497 U.S. at 126, the
17 Court said that the negotiated rates policy was
18 inconsistent with both, quote, the duty to file rates with
19 the Commission, citing the counterpart to 203(a), and the
20 obligation to charge only those rates, citing the
21 counterpart to 203(c).

22 So what this case ultimately boils down this --
23 and this is, you know, really more in the reply briefs
24 than the argument today -- is they're arguing that you
25 shouldn't follow the Maislin precedent here because the

1 case involves, they say, a different industry and a
2 different statute. And in arguing that, they're asking
3 you to overrule another line of cases which says that
4 statutes that are modeled on the Interstate Commerce Act
5 are to be construed the same way unless there's material
6 differences.

7 That principle dates back at least to the 1932
8 U.S. Navigation case, which we cite in our brief, and it
9 was the basis for Maislin. Because in the --

10 QUESTION: But Mr. Verrilli said that our guide
11 should be Permian Basin and not Maislin.

12 MR. CARPENTER: Yes, he did. Now, that's a
13 curious citation, because Permian Basin didn't involve
14 exceptions to rate-filing requirements, but there was a
15 subsequent followup to Permian Basin that did, and that's
16 the FTC v. Texaco case, 417 U.S. 380, and that involved
17 the kind of modifications of the rate-filing requirements
18 that we say are permissible, that involved small gas
19 producers who didn't deal with ultimate consumers and sold
20 their output exclusively to pipelines whose rates were
21 regulated.

22 And the Court didn't exempt the filing of those
23 rates. It allowed the large -- the pipeline with whom the
24 small producers sold to file the rates, and the Court said
25 that that would be consistent with the statute if it were

1 the case -- and it was a remand, but if were the case that
2 in regulating the rates of the large producer, it could be
3 assured that the small producers' rates were just and
4 reasonable. No issue of discrimination there because it
5 dealt -- the small producers dealt only with the
6 pipelines.

7 QUESTION: They didn't file at all. The small
8 producers did not file.

9 MR. CARPENTER: The small producers did not
10 file. The rates were filed by the pipelines that each
11 sold its output to exclusively. The small producers
12 didn't deal with ultimate consumers at all.

13 QUESTION: And that's okay, you think?

14 MR. CARPENTER: I think if you could ever have a
15 situation like that, comparable to that in the
16 telecommunications industry -- which I can't imagine, but
17 if you ever could it would okay because the rates would be
18 on file and the Commission would be in a position to
19 assure that the rates were lawful. So I don't think --
20 and the Texaco case that they cite says that the
21 Commission cannot exempt carriers. It says they cannot be
22 exempt, carriers, from the requirements of section 204,
23 which is where the rate-filing requirement lives. So it's
24 a curious citation.

25 So I think their position ultimately boils down

1 to an argument that you shouldn't follow the Interstate
2 Commerce Act precedents because this case involves a
3 different statute. But Maislin rejected that, because
4 there the Court applied pre-1935 decisions under the
5 original Interstate Commerce Act, which applied only to
6 railroads, and they applied it to motor carriers who were
7 operating under a statute which to them was a successor to
8 the 1935 Motor Carrier Act.

9 And in this situation, the Interstate Commerce
10 Act precedents absolutely should apply because the statute
11 was -- the provisions we're dealing with here, sections
12 201 to 210, were copied almost verbatim from those in the
13 Interstate Commerce Act, and this is a case like *Laurilar*
14 *v. Ponds* where Congress exhibited, you know, detailed
15 knowledge of the provisions of another statute, copied
16 those provisions it wanted to follow, and then departed
17 from other provisions it didn't want to follow.

18 Sections 201 to 210 of the Communications Act
19 were copied from those of the Interstate Commerce Act, and
20 then they didn't want to allow the FCC to preempt State
21 regulation in the ways that the ICC had been allowed to do
22 under an earlier precedent of this Court that was at issue
23 in the 1986 *Louisiana v. FCC* case, so they put other
24 provisions in the statute to make sure that the FCC
25 wouldn't in those limited respects have the same powers

1 the ICC had and wouldn't be subject to the same
2 restrictions.

3 QUESTION: Mr. Carpenter, I'm a little troubled
4 about TOCSIA. Do we use an acronym for that?

5 MR. CARPENTER: Yeah, that's our acronym.

6 QUESTION: Telephone TOCSIA.

7 MR. CARPENTER: Yes.

8 QUESTION: It seems to me that that legislation
9 did assume that there was no filing requirement. Do you
10 contest that?

11 MR. CARPENTER: No, I do contest that. In the
12 first place, there -- it's argued that that was assuming
13 an FCC rule was valid, but as the court of appeals held
14 here, it wasn't until 1992 that the FCC even said that
15 this -- that it had adopted a rule that it relieved
16 carriers from the rate-filing requirement. And the only
17 interpretations of the statute that were in existence in
18 the time -- at the time that was enacted was the 1985
19 decision of the D.C. Circuit which says that carriers
20 couldn't be exempted.

21 QUESTION: But why did the legislation make any
22 sense, then --

23 MR. CARPENTER: The legislation --

24 QUESTION: -- If there was a filing requirement?

25 MR. CARPENTER: The legislation made absolute

1 sense. The problem the statute addressed -- it didn't
2 have anything to do with whether rates were filed or not.
3 The problem was that a new sort of cottage industry had
4 arose which involved both entities that weren't common
5 carriers and weren't subject to the filing requirement and
6 entities like AT&T -- in theory like AT&T and MCI, that
7 were.

8 And what Congress did in that statute was it
9 made everybody who provided operator services -- including
10 those who weren't carriers and weren't subject to the
11 statute, made everybody file information. Some of it was
12 information required by 203, rates, and some of it was
13 other information that wasn't required by 203 --

14 QUESTION: And you'd say the carriers would have
15 had to -- in addition to that, although it overlapped,
16 would have to comply in it -- with 203 generally?

17 MR. CARPENTER: Oh, absolutely, absolutely. It
18 imposed additional obligations. It imposed obligations on
19 carriers because it made them file information that wasn't
20 required by 203, i.e. commissions, and it imposed
21 obligations on noncarriers who weren't subject to any
22 requirement at all.

23 QUESTION: Noncarriers.

24 MR. CARPENTER: And the problem that led to the
25 statute wasn't that the FCC wasn't receiving rate filings.

1 The problem was the FCC wasn't doing anything at all to
2 combat something that had become a massive problem, which
3 was the sort of new fly-by-night companies cutting deals
4 with hotels and ending up charging people rates that were
5 two or three times those that AT&T and MCI charged. So
6 that's what that statute addressed, and the statute
7 explicitly said that nothing in it could be construed as
8 altering the obligations of any provision in the statute.
9 And given that at the time 203 was construed --

10 QUESTION: Thank you, Mr. Carpenter.

11 MR. CARPENTER: Thank you.

12 QUESTION: Mr. Verrilli, you have 4 -- or Mr.
13 Wright or Mr. Verrilli, whoever wants to take the rebuttal
14 time, you have 4 minutes left.

15 REBUTTAL ARGUMENT OF CHRISTOPHER J. WRIGHT

16 ON BEHALF OF THE FEDERAL PETITIONERS

17 MR. WRIGHT: Thank you, Mr. Chief Justice.

18 In response to AT&T's comments about Maislin and
19 the filed rate doctrine, it is true, as has been pointed
20 out, that that's a different issue arising under a
21 different statute. I'd also like to suggest that it's
22 instructive to consider what -- how -- what would happen
23 if the Communications Act said that the FCC may modify any
24 requirement, including the tariff-filing requirement. If
25 the statute said that, I think there'd be no doubt -- we

1 wouldn't be here today, it would be clear that we could
2 modify the tariff-filing requirement if the statute said
3 modify any requirement, including the tariff-filing
4 requirement.

5 Now, in this hypothetical statute, in that
6 circumstance what had been said in a different context
7 arising under a different statute wouldn't matter. In
8 fact, that phrase including the tariff-filing requirement
9 would be redundant. The statute says "modify any
10 requirement," and it would be a peculiar rule of statutory
11 construction that required Congress to be redundant.

12 Now, one thing that's clearly come out --

13 QUESTION: I don't think your opponent would
14 agree that that's -- I don't think your opponent would
15 agree that that statute would be -- you would be right
16 under that statute, because he says this is not a
17 modification requirement, including the filing
18 requirement.

19 MR. WRIGHT: Well, I was going to say one thing
20 that's come out is that AT&T clearly thinks that under no
21 circumstances at all can the FCC lift the tariff-filing
22 requirement.

23 QUESTION: No. Well, they would allow it to be
24 filed by somebody else, so long as it's out there
25 somewhere, and that's eliminating the tariff filing.

1 MR. WRIGHT: Well, the first requirement is that
2 they shall be filed, and AT&T says that we -- that the FCC
3 doesn't have that authority. We think that it's clear
4 that it therefore reads 203(b)(2) to say modify some
5 requirements, not any requirement, and that is what the
6 statute says.

7 One final point, if I may. You know, the --
8 it's been suggested that Congress would -- couldn't
9 imagine a detariffed world. Well, just last summer with
10 respect to commercial mobile carriers like cellular
11 carriers in section 332(c), Congress authorized -- what
12 Congress did was say that these cellular companies are
13 generally subject to the title II requirements we've been
14 discussing today, but it said that the Commission may
15 waive any requirement, including the tariff-filing
16 requirement, except for three that it specified: 201,
17 202, and 208. 202 is the one that prohibits unreasonable
18 discrimination. So Congress, as shown last year in its
19 enactment concerning cellular telephones, clearly
20 envisions that unreasonable discrimination may be
21 prohibited without tariffs.

22 QUESTION: Do you know if a provision like this
23 existed under the Civil Aeronautics Act?

24 MR. WRIGHT: I do not know that, Your Honor.

25 In any event, as I've also already pointed out,

1 there's really no answer to the fact that the Amtrak
2 case -- under the Amtrak case in the -- with different
3 dictionary definitions -- and I've been informed that in
4 APF Freight, the NLRB, this term the Court has applied
5 Chevron to an independent agency. The FCC ought to have
6 discretion to reasonably interpret "modify any
7 requirement" to mean what it says.

8 Thank you.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wright.

10 The case is submitted.

11 (Whereupon, at 2:00 p.m., the case in the
12 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

MCI TELECOMMUNICATIONS CORPORATION, Petitioner v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY and CONSOLIDATED UNITED STATES, ET AL. Petitioners v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.

CASE NO.'s: 93-356 AND 93-531

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

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