

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: AMERICAN TELEPHONE AND TELEGRAPH CO.,
Petitioner v. CENTRAL OFFICE TELEPHONE, INC.

CASE NO: 97-679 c.)

PLACE: Washington, D.C.

DATE: Monday, March 23, 1998

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 AMERICAN TELEPHONE AND :

4 TELEGRAPH CO., :

5 Petitioner :

6 v. : No. 97-679

7 CENTRAL OFFICE TELEPHONE, :

8 INC. :

9 - - - - -X

10 Washington, D.C.

11 Monday, March 23, 1998

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 1:00 p.m.

15 APPEARANCES:

16 DAVID W. CARPENTER, ESQ., Chicago, Illinois; on behalf of
17 the Petitioner.

18 BRUCE M. HALL, ESQ., Portland, Oregon; on behalf of the
19 Respondent.

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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: We'll hear argument
4 now in Number 97-679, American Telephone and Telegraph
5 Company v. Central Office Telephone, Incorporated.

6 Mr. Carpenter.

7 ORAL ARGUMENT OF DAVID W. CARPENTER

8 ON BEHALF OF THE PETITIONER

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

11 The question in this case is whether the Ninth
12 Circuit correctly held that the statutory filed tariff
13 requirements, here codified in section 203 of the
14 Communications Act, apply only to rates and not to the
15 services provided in exchange for those rates.

16 The answer to this question is that the holding
17 is simply wrong. The statutory terms are not limited to
18 rates, but they also prohibit, among other things, any
19 untariffed privilege or facility in communication and any
20 form of rebate, and this Court has held many times that
21 it's an unlawful rebate and preference in violation of
22 these prohibitions for a carrier to provide a service or
23 to enforce a service guarantee that is not covered by the
24 carrier's tariff.

25 And this case also lacks the element that made

1 the recent Maislin and MCI v. ATT cases close questions in
2 this Court, for no Federal agency responsible for the
3 administration of these requirements has ever suggested
4 the Ninth Circuit's interpretation, much less endorsed it
5 as advancing some other legitimate statutory goal.

6 The reality is, is that in situations where
7 tariffing requirements have applied and should continue to
8 apply, and the Federal agencies have found that there are
9 many, the Ninth Circuit's holding would create the very
10 discrimination in rates that everyone, even our opponent,
11 concedes to be the purpose of this requirement.

12 Under the holding, carriers could evade the
13 prohibitions not by misquoting the rates, but by
14 misquoting the service, making service guarantees that
15 aren't in the tariff, and when they're breached excusing
16 the carrier from paying tariff charges and paying an
17 amount of money that would represent the damages for the
18 breach.

19 QUESTION: Do we take the case as if there had
20 been no violation of the Federal statute 201 through 207?

21 MR. CARPENTER: Yes, Your Honor. There was no
22 claim litigated there is any violation of those
23 provisions. The only claims that were litigated is that
24 it was a State law breach of contract, an intentional
25 interference with tortious relationships, with business

1 relationships for ATT to fail to provide COT with the
2 quality of regulated long distance service that COT
3 claimed it had been promised.

4 QUESTION: Are there cases which tell us that a
5 State law, the State law of torts, say, inform the
6 construction of reasonableness under the Federal statute?
7 That is to say, if there were an interference with an
8 advantageous business relation, that this would carry over
9 to show that this is an unreasonable implementation of the
10 tariffs under the Federal statute?

11 MR. CARPENTER: There's no limitation on the
12 things that the FCC can consider in deciding whether a
13 difference in treatment is unjust and unreasonable, for
14 example, for purposes of the prohibition of section 202(a)
15 of the Communications Act.

16 Similarly, I don't think there would be any
17 limitation on the factors that it could consider in
18 deciding whether something's unjust and unreasonable --

19 QUESTION: You're saying that AT&T, then, is
20 immune from any sort of intentional interference with
21 business relationship action brought against it by anyone
22 who it had a contractual relationship with. That seems
23 extreme.

24 MR. CARPENTER: No, that's not -- that is not
25 our position.

1 First, there are a whole range of intentional
2 and nonintentional torts that don't arise out of the
3 carrier-customer relationship and the fortuity that
4 someone happens to be our customer wouldn't immunize us
5 from a tort action if that -- if a customer were a victim
6 of such a tort.

7 Second, with respect to things that arise out of
8 the customer-carrier relationship, we are under a series
9 of duties under the Communications Act.

10 QUESTION: I realize that, but you would be
11 immune in many respects from an ordinary suit, say in
12 State court based on State court tort law.

13 MR. CARPENTER: Absolutely, if it involved the
14 rates that we charge for our communications service or the
15 obligations that we incur in exchange for the receipt of
16 those payments.

17 QUESTION: Well, I was asking because I --

18 MR. CARPENTER: Yes.

19 QUESTION: -- I have some of the concerns
20 indicated by the Chief Justice's question, whether or not
21 in interpreting what is reasonable under the Federal
22 statute, lower courts or the agency has said, well, this
23 is an interference with an advantageous business
24 relationship under State tort law, and that informs our
25 judgment as to what is unreasonable.

1 MR. CARPENTER: That's -- that would be entirely
2 legitimate, but, of course, the Federal statute has to be
3 interpreted uniformly.

4 Let me maybe put some of these questions to rest
5 right now. If AT&T had deliberately provided COT, other
6 resellers with service that was inferior in quality to
7 that that the commercial customers had received, we would
8 have violated 202 of the Communications Act and we would
9 have been liable to it for the damages we caused.

10 Now, those damages would have been determined
11 under the Federal standards of the act.

12 QUESTION: In a Federal court, or by the FCC?

13 MR. CARPENTER: Either place. Obviously, the
14 suits can be brought either place. If they're a question
15 of the dispute over the scope of the duty it could be
16 referred to the FCC under primary jurisdiction, but those
17 suits can be brought in either the Federal district court
18 or at the FCC.

19 QUESTION: What if the -- what if AT&T decides
20 that Central Telephone is not simply a customer but a
21 competitor?

22 MR. CARPENTER: Central Telephone is a
23 competitor.

24 QUESTION: And then decides simply to drive it
25 out of business?

1 MR. CARPENTER: If we had done that and did it
2 by providing it with worse service than it was entitled to
3 under the tariff, under 201 of the Communications Act, or
4 202, it has a Federal damages remedy, but that -- that --

5 QUESTION: But it has no State law --

6 MR. CARPENTER: It has no State law remedy.

7 It might have a Federal antitrust remedy in some
8 circumstance, but it has no State law remedy because the
9 effect of that is to give them a preference over other
10 customers.

11 QUESTION: Well, that really is pushing one
12 principle to the very limit of its logic.

13 MR. CARPENTER: Let me suggest something for
14 your consideration. In the Abilene case, in 1907,
15 landmark --

16 QUESTION: I've read that, yes.

17 MR. CARPENTER: -- Abilene case, the question
18 there was whether a State law that had the identical
19 substantive prohibitions as the Federal statute could
20 be -- could be applied to define the regulated carrier's
21 obligation to its customer.

22 The Court said, even if the substantive
23 standards are the same it's inevitable that different
24 States will apply those substantive standards in different
25 ways, and that would defeat the uniformity that is the

1 purpose of the statute.

2 A later case said that this was one of the rare
3 cases of field preemption, where --

4 QUESTION: What was the kind of action that was
5 sought to be brought in the --

6 MR. CARPENTER: It was a case involving whether
7 the rates were just and reasonable.

8 QUESTION: So --

9 MR. CARPENTER: There was a common law right to
10 be charged only a reasonable rate.

11 QUESTION: But that was certainly a much less of
12 an expansive preemption than you're arguing for here.

13 MR. CARPENTER: Well --

14 QUESTION: You say an intentional tort is
15 preempted.

16 MR. CARPENTER: Your Honor, an intentional tort
17 is preempted only if the predicate for it is, is that the
18 customer didn't receive the quality of service that it was
19 entitled to in exchange for the payment of the tariffed
20 rate.

21 QUESTION: Well, why couldn't it -- can it be
22 brought, then -- could the claims of intentional
23 interference and the claims of wilful breach have been
24 brought under the tariff as in effect claims that the --
25 that AT&T had not used what I think the tariff called its

1 best efforts to provide the services they had contracted
2 for by the time they contracted to provide it, so that at
3 least with respect to these two State causes of action
4 there would have been a Federal remedy?

5 MR. CARPENTER: Absolutely, Your Honor. They
6 could have sued us for violation of the tariff. I think
7 if they had sued us on that basis we would have gotten
8 summary judgment. If there had been a close question --

9 QUESTION: Of the claims -- I take it you're
10 conceding that they would have stated claims under the
11 tariff --

12 MR. CARPENTER: Absolutely.

13 QUESTION: -- if they had been brought under the
14 tariff.

15 MR. CARPENTER: Absolutely. I don't think it's
16 the case that the tariff could have been invoked, because
17 our only duty is to make reasonable effort at the due date
18 we meet and not to -- and to allow them to cancel if we
19 miss it by more than 45 days, but they certainly can sue
20 us whenever we make a service guarantee in a tariff and
21 breach it. That --

22 QUESTION: Mr. Carpenter, is it possible that
23 you can make a service guarantee that was not covered by a
24 tariff?

25 MR. CARPENTER: If you make a guarantee

1 involving the tariffed service it's not covered by the
2 tariff. It's invalid.

3 QUESTION: Well, you -- in your briefs you
4 describe network billing and multilocation billing --

5 MR. CARPENTER: Yes.

6 QUESTION: -- as not covered by the tariffs.

7 MR. CARPENTER: There's a terminological issue
8 there. Multilocation billing and network billing are two
9 different options that we give customers. They are
10 different ways --

11 QUESTION: And the tariff doesn't require them
12 to select either one.

13 MR. CARPENTER: The tariff -- the tariff doesn't
14 even discuss -- what the tariff does --

15 QUESTION: Well, does that mean the tariff
16 doesn't require them to select either one?

17 MR. CARPENTER: The tariff obviously requires us
18 to bill them, and it defines our obligations in billing
19 them.

20 QUESTION: What if you made a contract to give
21 them one option rather than the other? Would you have to
22 obey that contract?

23 MR. CARPENTER: Our position -- it's our
24 position that we have to give them a choice of one of
25 those two. Our order forms gives them a choice, and we

1 think --

2 QUESTION: Well, that's not my question. My
3 question is, you give them a choice and they say, we'll
4 take network billing, and you say, we will agree to give
5 it to you --

6 MR. CARPENTER: Yes.

7 QUESTION: -- but we're not putting it -- we're
8 not modifying any tariff.

9 MR. CARPENTER: Right.

10 QUESTION: Would you have to honor that
11 contract?

12 MR. CARPENTER: Under that set of facts I would
13 read the obligation to provide multilocation billing or
14 network billing into the tariff, and if we violated the
15 obligation --

16 QUESTION: In other words, the tariff
17 silently --

18 MR. CARPENTER: -- as defined by the tariff we'd
19 be liable to them in damages. In this instance --

20 QUESTION: Well, if you failed to use your best
21 efforts to provide that billing service as you contracted
22 to do, that would be a violation of the tariff, the best
23 effort provision of the tariff, wouldn't it?

24 MR. CARPENTER: If we fail to provide it, it is
25 our best efforts, that could be a -- that could be a

1 violation --

2 QUESTION: That would state a violation, would
3 it?

4 MR. CARPENTER: It would state a violation of
5 the tariff, and then the question, you know, would be
6 under the limitation liability clause, whether it was
7 wilful.

8 This -- it so happens in this case our tariff
9 disclaims any responsibility for the billing obligation
10 that they want to read into the tariff, so it's -- it's
11 answering a hypothetical question.

12 In this case, our tariff says we won't do what
13 they said we should have done.

14 QUESTION: But in the hypothetical question --

15 MR. CARPENTER: Yes.

16 QUESTION: -- I take it you -- under Justice
17 Stevens' hypothetical you would have had the option to
18 file that as a tariff, if you'd made that arrangement?

19 MR. CARPENTER: Just let me clarify one thing
20 about multilocation billing. Our tariff doesn't describe
21 any of the details about how we bill service or provision
22 service. It defines our obligations in doing it and says
23 what they aren't.

24 Our obligations aren't to allocate charges among
25 locations, which is what they wanted us to do.

1 Our -- and we have -- there's not an obligation
2 that we actually render accurate bills.

3 Obviously, they only pay us what's due, but if
4 we render an inaccurate bill it doesn't excuse anybody
5 from paying the rates, and it doesn't give anybody a right
6 to damages, and it's our -- we have implemented this
7 obligation by giving customers a choice between two
8 different ways of billing the service, and it's our view
9 that we have to -- we honor the choice.

10 QUESTION: But in the hypothetical case --

11 MR. CARPENTER: Yes.

12 QUESTION: -- suppose that you had agreed to
13 provide the MOL billing. Would that have been subject to
14 filing as a -- could you have filed that as a tariff if
15 you had chosen to do so?

16 MR. CARPENTER: We could have certainly put in
17 the tariff that the customer has two billing options,
18 multilocation billing and network billing, and we think
19 actually our tariff should be construed, given that we
20 have these order forms that give people that choice, as
21 imposing that obligation anyway.

22 QUESTION: But didn't you just say your tariff
23 prevents -- I'm really confused about your billing
24 position, because I thought you had just said that your
25 tariff says you will not allocate.

1 MR. CARPENTER: That's right.

2 QUESTION: So --

3 MR. CARPENTER: So whatever multilocation
4 billing is or isn't, it is not a case where we are
5 assuming the obligation to allocate charges among
6 locations.

7 QUESTION: But yet you did agree -- you had a
8 box to check off, and you agreed to provide this service
9 for which the tariff didn't provide, is that correct?

10 MR. CARPENTER: I suppose there would be two
11 ways to look at this, and I'm -- the first, which I'm not
12 going to advocate, is that the service wasn't authorized
13 by the tariff. It was therefore invalid. That's not our
14 position.

15 Our position is that it was permitted under the
16 tariff so long as it didn't constitute an allocation of
17 charges that gave them a right not to pay us, or to sue us
18 for damages if we didn't do it accurately, and that's
19 their claim here.

20 One thing to remember --

21 QUESTION: Well, wasn't -- their claim is
22 that -- oh, that you --

23 MR. CARPENTER: Their claim is that we didn't
24 accurately bill their customers on their behalf. The
25 tariff said we won't accurately bill your customers on

1 your behalf, and the FCC regulations say that that is a
2 service that we can't provide in exchange for payment of
3 the tariffed rate. The FCC has defined that as outside
4 the scope of the regulated common carrier service that we
5 offer. That's something that's been deregulated.

6 So that -- this is a situation where our tariff
7 didn't assume the obligation that they're claiming, and in
8 which the FCC's regulations would have prevented us from
9 trying to put the service that they're claiming into the
10 tariff.

11 QUESTION: But would it have prevented you from
12 making a contract to do that?

13 MR. CARPENTER: No. It would not have prevented
14 that, but it would have had to be a separate contract for
15 a separate consideration.

16 It's -- Judge Posner had a wonderful phrase --

17 QUESTION: And would -- and that would have been
18 enforceable in State court or in Federal court on a
19 diversity --

20 MR. CARPENTER: Yes, that would have been
21 enforceable in State court, because that would have been a
22 contract for an unregulated service declared by the FCC to
23 be outside the scope of common carrier communications
24 services.

25 That would be a like a -- if we had a separate

1 contract, to quote Judge Posner, to sell them ugly fruit
2 at a market price, that's outside the common carrier
3 relationship, just as it would be outside the common
4 carrier relationship if we committed an intentional tort
5 like libel, and the fact that someone happened to be our
6 customer wouldn't immunize us from a libel suit.

7 QUESTION: But the same doesn't obtain for
8 intentional interference with business relationships?

9 MR. CARPENTER: It does obtain if the
10 intentional interference doesn't arise out of a
11 relationship with them as our long distance customer, so
12 if we -- they mention something here called slamming,
13 which is when you change a long distance customer from
14 someone else's service to yours without authorization.

15 QUESTION: Yes.

16 MR. CARPENTER: That's a classic example of
17 something that is quite independent of the customer-
18 carrier relationship, but that wasn't the basis for this
19 judgment here.

20 QUESTION: But would slamming be -- would an
21 intentional interference with business relationships
22 manifested by slamming, would that be actionable in the
23 State court?

24 MR. CARPENTER: Yes. That would be actionable
25 in the State court. That would be actionable, but what's

1 not actionable in the State court are claims involving the
2 rates or the obligations the carrier incurs in exchange
3 for the rates. That's what's not actionable, and the
4 proposition --

5 QUESTION: I don't know why slamming -- we don't
6 have time to go into all the economics. I don't know why
7 slamming doesn't have anything to do with that, just as
8 I'm not quite sure I understand Nader, why overbooking
9 doesn't have to do with the rates the carrier --

10 MR. CARPENTER: All right. Well, let me respond
11 to both.

12 When slamming occurs, generally the carrier
13 that's the victim isn't your customer. MCI occasionally
14 changes our customers to it when they're not authorized,
15 so that's something that has nothing to do with the fact,
16 whether two carriers happen to be customers of one
17 another. It's entirely independent.

18 It's just fortuitous in this situation that in
19 the two incidents of slamming that occurred, but they
20 weren't the basis for this judgment, that COT happened to
21 also be our customer.

22 Now, with respect to Nader, that was a case,
23 there was no filed tariff claim, and that was a case where
24 the practice of disclosing overbooking or not --
25 overbooking or not was outside the CAB's definition of the

1 tariff transportation service. They had a regulation that
2 specifically authorized common law actions in the event
3 that there was nondisclosure of overbooking.

4 So the key thing is what's within the scope of
5 the agency's definition and the statute's definition of
6 the regulated service, and if a claim involves the rates
7 or the services to be provided in exchange for the rates,
8 then it's going to be governed exclusively by Federal law
9 and Federal standards, and State law can't be applied.

10 QUESTION: How can you tell whether something is
11 being given in exchange for the rates? I mean, even the
12 contract for ugly fruit, you know, you could get a
13 sweetheart deal on ugly fruit because of the fact that
14 you're paying more for the rates. It's very hard to know
15 what's -- you know, what is getting the benefit of the
16 rates and what isn't.

17 MR. CARPENTER: Well, that's true, but there's
18 always going to be questions of law application in a case
19 like that. Posner suggested he'd have to prove that the
20 ugly fruit was provided at a market rate.

21 In this case it's easy, because the only
22 relationship we had with COT is that they were our long
23 distance customer. The only thing we provided them was
24 regulated long distance service, and the only thing they
25 paid us was the tariffed rate, and this is a situation

1 where the guarantees that they're seeking, the provision
2 in billing guarantees, weren't in the tariff, so --

3 QUESTION: So if you did this for them, the only
4 reason you would have done it was because of the rates
5 that you got.

6 MR. CARPENTER: That was our -- yes, that's
7 right.

8 QUESTION: I thought there was a whole doctrine
9 of law designed to answer that question, which I didn't
10 see here. I mean, if in fact you have a generalized
11 statutory framework like tort law or something, and
12 Congress may have created an exception for certain
13 activities that fall within the jurisdiction of an agency,
14 and you have a tariff that may or may not cover those
15 activities, and the court is uncertain about the extent to
16 which this particular kind of activity does or does not
17 fall within the tariff, or fall within the statutorily
18 implied exemption, I thought there was a doctrine of law
19 designed to cover that.

20 MR. CARPENTER: Primary jurisdiction.

21 QUESTION: Yes, exactly.

22 MR. CARPENTER: Yes, absolutely. Absolutely.

23 QUESTION: Primary jurisdiction.

24 MR. CARPENTER: And if this case --

25 QUESTION: But nobody asked for primary -- I

1 mean, what are we supposed to do about that?

2 MR. CARPENTER: Well, in this case there was no
3 occasion to ask for a primary jurisdiction referral
4 because the --

5 QUESTION: Because it's obvious that it's within
6 the statutory exemption, implied.

7 MR. CARPENTER: Your Honor, if they had brought
8 this case under the --

9 QUESTION: I didn't mean to cut you off. You
10 were just giving an answer. Say what you said. Say what
11 you --

12 MR. CARPENTER: Well, let me answer --

13 QUESTION: Yes.

14 MR. CARPENTER: -- what I was trying to say.
15 They brought this case under the tariff. They didn't
16 bring this case under the tariff. They brought it under
17 State law, the State law standards. If they'd brought it
18 under the tariff we would have sought summary judgment on
19 the ground that what we did didn't violate the tariff. If
20 there'd been a close question there, it would have been
21 referred to the FCC under primary jurisdiction.

22 We raised a Federal defense to their State law
23 claims here, and it was rejected on the ground that the
24 doctrine only applies to rates, so we didn't -- there
25 wasn't any occasion for a primary jurisdiction referral on

1 the validity of the defense we asserted.

2 The -- this is a situation where the Court could
3 simply say the Ninth Circuit is wrong, that the doctrine
4 applies only to rates, and send it back to the Ninth
5 Circuit to let it review the trial court's judgment again.

6 QUESTION: Mr. Carpenter, before you leave the
7 billing aspect of this claim, maybe you can clarify my
8 confusion.

9 As I understand that claim, it is that you
10 billed the customers directly, as was requested, the
11 multilocation, but you gave the customers the full
12 discount, which meant that the resellers lost the only
13 thing that they were in the business for, that is --

14 MR. CARPENTER: That's right.

15 QUESTION: And you then said here that you could
16 have an agreement outside the tariff with regard to the
17 billing options, so if you can have an agreement outside
18 the tariff for the billing options, then why wouldn't the
19 breach of that agreement be a proper lawsuit for State
20 court?

21 MR. CARPENTER: It would be an unlawful
22 preference under the Wabash Rail and other decisions of
23 this Court if we had given them a service outside the
24 scope of the tariff at no extra charge.

25 The only way we could --

1 QUESTION: Oh, I see. You say you could do it
2 outside --

3 MR. CARPENTER: Right, yes.

4 QUESTION: -- but it has to be for an extra
5 charge. I understand.

6 MR. CARPENTER: And just -- everyone's very
7 interested in multilocation billing. It's really only the
8 basis for the decision that we weren't entitled to recover
9 the unpaid charges. I don't -- couldn't possibly support
10 the lost profits award.

11 But with respect to that, remember, this is a
12 service that we designed for large corporate customers
13 that have locations in multiple cities Any reseller, any
14 customer is entitled to get the service on the same terms
15 as everybody else. All the terms of the service reflect
16 the needs of those customers.

17 These are customers that like multilocation
18 billing because it allows them to do internal -- some of
19 them like it because it allows internal cost allocations.

20 If we make mistakes when we're sending a bill to
21 the customers for whom it's designed, it doesn't have any
22 big consequences. It's just an internal cost allocation.

23 Now, it's certainly true -- I mean, I accept
24 their claims that it does have consequences for resellers,
25 but their right is to get the service on -- you know, the

1 service on the terms set forth in the tariff, containing
2 only the service guarantees set forth in the tariff.

3 This service doesn't have a guarantee they're
4 going to accurately bill locations every month because the
5 large customers didn't -- you know, we didn't think they
6 cared enough about it to want to pay extra for it.

7 It's important to these people. I accept that.
8 Their way of getting it under this tariff and under the
9 FCC's regulations would have been to contract separately
10 with us to provide that billing service at an extra market
11 rate, and we do that all the time for resellers and other
12 customers.

13 QUESTION: Mr. Carpenter, I lost part of your
14 explanation. You said that the choice between network
15 billing and multilocation billing was available to them at
16 no extra charge, as I understand --

17 MR. CARPENTER: Yes, that's right.

18 QUESTION: So why should they have to pay extra
19 for it to have a binding agreement to take one rather than
20 the other.

21 QUESTION: They only have to pay extra to get it
22 done right.

23 MR. CARPENTER: No --

24 (Laughter.)

25 QUESTION: Yes.

1 MR. CARPENTER: That's a very --

2 QUESTION: Well, it's a tendentious way to put
3 it, but --

4 MR. CARPENTER: It's a very -- I think it
5 actually -- it does boil down to that.

6 If we were going to guarantee that we were going
7 to accurately do that every month, we would be charging
8 more. There's no such guarantee in our tariff, and we
9 don't ever guarantee -- well, we guarantee some tariffs
10 accurate billing, but it's something that people pay extra
11 for. In this service, the customers for whom it's
12 designed didn't care enough about this to want to pay
13 extra.

14 QUESTION: Isn't it -- this -- I thought the
15 answer to Justice Stevens' question -- correct me if I'm
16 wrong, because I think it's important -- is that there are
17 certain services that AT&T in our odd, sort of half-slave,
18 half-free world that we have at the moment, provides on
19 the free side and the FCC has a tariff, or has a rule,
20 rather, that says certain kinds of areas don't fall within
21 the tariffs.

22 MR. CARPENTER: That's right.

23 QUESTION: And it's because of that rule, not
24 because of any fairness or anything else in the situation,
25 it's because of that rule that you operate now in the

1 nonregulated world, and once you're in the nonregulated
2 world, of course, contract law, tort law and every other
3 law governs.

4 MR. CARPENTER: Right.

5 QUESTION: And that's why, not because of the
6 fairness of the situation or anything else, that had they
7 paid for it they would have taken themselves within the
8 scope of that rule --

9 MR. CARPENTER: That's right.

10 QUESTION: -- and thereby removed themselves
11 from the tariff-regulated world.

12 MR. CARPENTER: Right.

13 QUESTION: Is that right?

14 MR. CARPENTER: Right.

15 QUESTION: All right.

16 MR. CARPENTER: And it would have been an
17 unlawful rebate --

18 QUESTION: Yes.

19 MR. CARPENTER: -- if we'd given them that
20 unregulated billing service --

21 QUESTION: If you're in the regulated world.

22 MR. CARPENTER: -- for nothing.

23 QUESTION: If -- as long -- if they don't pay
24 for it, they're in the regulated world defined by the FCC
25 tariff -- the FCC rule. Am I right?

1 MR. CARPENTER: If all they --

2 QUESTION: Am I right?

3 MR. CARPENTER: -- pay for is -- if all they pay
4 us is the tariff rate --

5 QUESTION: Yes.

6 MR. CARPENTER: -- all they're entitled to are
7 services that are authorized by the tariff, and under the
8 FCC's rule the particular kind of billing service they
9 want has to be provided outside the tariff in the
10 deregulated world.

11 QUESTION: And the reason you said what you just
12 said -- I want you -- I want to be sure I'm thinking about
13 this right -- is because when they don't pay for it under
14 a particular FCC interpretation of a statute or something,
15 they fall within the regulated world.

16 MR. CARPENTER: I wouldn't put it quite that
17 way.

18 QUESTION: Well, how would you put it?

19 MR. CARPENTER: The way I would put it is that
20 they're entitled, in exchange for payment of the tariffed
21 rate, to get services that are within the scope of the
22 tariff. If we give them something extra, that's outside
23 the scope of the tariff, whether it's a regulated
24 something extra, or an unregulated something extra, that's
25 a rebate and a preference.

1 This case is easy, because the something extra
2 is unregulated and can only be provided in contracts and
3 can't be provided as part of the tariff service.

4 QUESTION: Well, is the option regulated or
5 unregulated?

6 MR. CARPENTER: The --

7 QUESTION: When you give them an option, is that
8 regulated or un --

9 MR. CARPENTER: The option is regulated, because
10 the option doesn't encompass the things that would make it
11 an unregulated service.

12 Unregulated is when we provide a -- what's
13 unregulated is if we basically provide a service in which
14 we were going to bill not our customer, but the customers
15 of our customers.

16 Now, they say they're a carrier.

17 QUESTION: But as I understand it, you've told
18 them that for no extra charge you will do that.

19 MR. CARPENTER: No. For no extra charge, we
20 have told them that we will send bills to whatever
21 locations that they designate that will show on the bill a
22 portion of the volume discount.

23 QUESTION: Bills to them, as distinct from bills
24 to their customer? Who are you billing when you --

25 MR. CARPENTER: This is the way in which we bill

1 our customer.

2 QUESTION: Right, so the bill is going to read,
3 you, customer, pay so much for service at this location,
4 as opposed to your -- you, customer's customer, pay this?

5 MR. CARPENTER: Right.

6 QUESTION: Okay.

7 MR. CARPENTER: That's right. That's right.
8 That's all we can do under the -- the tariff governs the
9 billing relationship between us and our customers.

10 If somebody wants a service in which we're going
11 to help our customers recover money for long distance
12 service from their customer --

13 QUESTION: But as I understand it, the tariff
14 doesn't require you to do either of those options.

15 MR. CARPENTER: What the tariff does is, it
16 prohibits us from providing the service that they want.

17 QUESTION: It prohibits you from giving that
18 option to the customer, because I thought you did give
19 that option to the customer.

20 MR. CARPENTER: No, Your Honor. We give the
21 customer a choice between two ways of getting bills,
22 neither of which can, under the tariff, constitute the
23 allocation of charges.

24 The reason these services can be lawfully
25 offered under the tariff and the customers can be lawfully

1 given this option is that the billing service we offer
2 doesn't --

3 QUESTION: What you're saying, as I understand
4 it, is you can give the option pursuant to the tariff, but
5 if you guarantee the option, they have to pay extra.

6 MR. CARPENTER: If -- they would have to pay
7 extra if we guarantee we do it right, but the other
8 additional factor is, is if we're assuming an obligation
9 for billing their customers, which is what they're
10 claiming, then it's in the deregulated world that Justice
11 Breyer referred to, and we can only do it by contract.

12 QUESTION: All right. The part that I don't
13 understand is -- I understand your last statement that if
14 you're going to bill the customer's customer, that's in
15 the deregulated world. You can only do it by separate
16 contract, separate consideration.

17 What about the situation in which you bill your
18 customer? I thought you could not make a separate
19 contract to bill your customer accurately for separate
20 consideration because that would be at variance with the
21 tariff.

22 MR. CARPENTER: That's correct. That's correct.

23 QUESTION: That is correct, okay.

24 MR. CARPENTER: That's correct. That's correct.

25 Now, you know, people could argue that the

1 tariff should be construed as requiring us to do that,
2 but basically the only service guarantees that are
3 enforced against us are those that are expressed in the
4 tariff. That was what this Court held in the Kirby and
5 the Davis and Robertson cases.

6 QUESTION: Well, I think in -- perhaps in
7 kidding around with one of the questions earlier you may
8 have conceded too much, because I thought you were
9 conceding that if the customer wanted the tariff service
10 of multilocation billing done accurately, and wanted to be
11 able to enforce it as an obligation to do it accurately,
12 the customer would have to pay extra for it, separate
13 consideration, and I think your answer is no, the
14 customer -- we simply cannot do that and the customer
15 cannot do it.

16 The only thing we can do which adds or is
17 different from what is in the tariff is to provide the
18 entirely separate service of billing the customer's
19 customer. That's unregulated. That, we can do it, that
20 they can enforce by contract.

21 MR. CARPENTER: That's correct, Your Honor.

22 QUESTION: Thank you, Mr. Carpenter.

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

24 ORAL ARGUMENT OF BRUCE M. HALL

25 ON BEHALF OF THE RESPONDENT

1 QUESTION: Would you tell us what was the basis
2 for Federal jurisdiction in the district court here, Mr.
3 Hall?

4 MR. HALL: Yes, Your Honor. We sued under
5 diversity.

6 May it please the Court -- Mr. Chief Justice,
7 may it please the Court:

8 We say that the Ninth Circuit should be affirmed
9 on three separate grounds, one of which is the competitive
10 relationships between the two companies under which the
11 inter -- pardon me, the intentional interference claim was
12 filed, and the second one is that the Savings Clause in
13 the Federal Communications Act saves the interference
14 claim and saves our claim for wilful misconduct.

15 And our third reason, argument is that the
16 tariff itself expressly provides for the action that we
17 brought. That particular section has not been mentioned
18 so far in the discussions. The competitor claims --

19 QUESTION: Just on the last point, because I
20 think it follows from what we've just been discussing with
21 petitioner's counsel, if the service is provided by the
22 tariff then you should have sued under the Federal law
23 sections 201 through 207 for violation of the terms of the
24 tariff, or unreasonable provision of services in violation
25 of the tariff, and you didn't do that.

1 MR. HALL: That is not raised here as an issue,
2 Your Honor, but --

3 QUESTION: Well, but it's important because
4 we're trying to ask if there is a cause of action and, if
5 so, what it is.

6 MR. HALL: Well, there are two causes of action
7 here, Your Honor. One of them, the intentional
8 interference, is simply totally outside of the tariff and
9 is preserved by the savings clause and then separately
10 from that it's simply not within the cognizance of the
11 Communications Act, the relationships between these two
12 competitors.

13 QUESTION: Well, if you're right --

14 QUESTION: But your case is -- it seems to me
15 it's very important for us to understand whether or not
16 you would have had a cause of action under this third
17 argument that you mentioned that the tariffs did, in fact,
18 provide this and it wasn't being given. It seems to me
19 the answer to that is to sue under the Federal law.

20 MR. HALL: Your Honor, we have made the
21 assumption, and I believe that AT&T has made the statement
22 to the FCC to the same effect, that wilful misconduct is
23 fully -- can be sued under, and it is 2.3.1 of the tariff.
24 It is the section -- it is the lead section of the tariff.

25 QUESTION: But surely a person cannot, by

1 tariff, change the meaning of the Federal statute.

2 MR. HALL: Well, this has been --

3 QUESTION: So your argument is that -- in fact,
4 your claim -- your claim, this kind of a claim, when we
5 read the communications statute, the communications
6 statute does not mean to preempt this kind of claim.

7 MR. HALL: That is true, Your Honor.

8 QUESTION: All right. Fine. Either your
9 argument arises under the tariff, or it doesn't.

10 MR. HALL: Yes.

11 QUESTION: If it does, Justice Kennedy says go
12 to the commission.

13 MR. HALL: Our third --

14 QUESTION: If it doesn't, I say don't the courts
15 continuously -- hasn't this Court continuously, where it's
16 a close question, in the antitrust area, for example, said
17 where the claim is, Judge, the communications statute, the
18 regulatory statute isn't meant to preempt this kind of
19 claim.

20 Where that's a close question, hasn't this Court
21 always said go first to the commission and see what they
22 think? Go first, get the interpretation of the tariff,
23 get the interpretation of the statute, get their views on
24 whether that's so or not, and then come to court.

25 MR. HALL: Well, on this instance, as counsel

1 mentioned to Your Honor, they did not ask for a referral.

2 QUESTION: Maybe they didn't, but what's the
3 judge supposed to do if he wants to follow the law?

4 MR. HALL: Well, I think the judge felt that the
5 common law claims were well within his cognizance and the
6 wilfulness conduct claim which we say is under the filed
7 tariff itself, it is authorized by 203(a), which as the
8 filing of the tariff becomes the law, 201 -- pardon me,
9 2.3.1, which is the wilful misconduct cause of action, if
10 you will --

11 QUESTION: Now, wait, do you read that as saying
12 any State cause of action for wilful misconduct will lie?
13 I read it as saying that the limitations which the tariff
14 has on liability, those limitations contained in the
15 tariff do not apply in the case of wilful misconduct. For
16 example, (b) says -- all of this is on page 10a of your
17 brief, the blue brief. I'm sorry, the petitioner's brief.

18 (b) says the company is not liable for damages
19 associated with service channels or equipment which it
20 does not furnish. Well, I suppose that if they
21 intentionally somehow got you assigned somebody else's
22 equipment that was inferior, this wilful misconduct
23 provision would eliminate that, that exemption.

24 MR. HALL: Well, wilful --

25 QUESTION: But I don't read it as saying that so

1 long as it's wilful you can bring suit for over -- I mean,
2 for charging you too much. You think --

3 MR. HALL: Definitely not that, Your Honor.
4 That would be rate, or rate-affecting, and we -- our
5 lawsuit --

6 QUESTION: Okay.

7 MR. HALL: -- is not rate or rate-affecting.

8 QUESTION: Okay. So you ultimately have to get
9 down to that argument. Wilful doesn't take you out of the
10 box if you have to prove --

11 MR. HALL: No. We read into that --

12 QUESTION: Okay.

13 MR. HALL: -- that it must not be rate-affecting
14 as well, because we know the cases like Marco, where you
15 had a collision between wilful misconduct and
16 misrepresentation of rates. This is not a
17 misrepresentation of rates case, or rate-related, in our
18 view, and counsel has mentioned, I believe, that the FCC
19 might perhaps give guidance on these nontariffed items.
20 It hasn't done so.

21 QUESTION: But don't you have the obligation to
22 ask them? That is, why isn't our problem, or is it -- we
23 say, of course, if it's a tariff violation or the tariff
24 was unreasonable under the statute, which you could also
25 argue, you should have gone to the commission.

1 MR. HALL: Well, Your Honor --

2 QUESTION: Now, on your argument, which is, all
3 that's irrelevant because the statute doesn't mean to
4 preempt State unfair competition law, you still should
5 have gone to the commission to get some determination
6 about that.

7 Now, if you ran into a statute of limitations
8 problem, maybe you file your case in the court and then
9 ask them under primary jurisdiction to hold it while you
10 go to the commission, but that would be your
11 responsibility. So why don't we end up saying, at least
12 it's a close question, therefore you didn't go to the
13 right place?

14 MR. HALL: Well, there's quite a body of, I
15 guess you'd call it negotiation in this area already, Your
16 Honor. I'm doing my arguments in reverse now, but in any
17 event, the amici for us have come in, the large users, and
18 put into their index a great number -- they can't, because
19 of confidentiality, go into the details of those
20 contracts, but they have put in a large number of subject
21 areas which are exactly the subject areas that we're
22 talking about in our particular case.

23 AT&T at page 35 of its opening brief went into
24 the same kind of listings of things that are associated
25 with tariff items, or a part of -- they called them the

1 details a minute ago, that are all part and parcel of it,
2 and as a matter of fact, we have in our own case where we
3 went back after the amicus brief and -- these are ER.

4 These are in the record, but they were not in my
5 briefing, and simply looked at what AT&T gave us when we
6 signed up for a software-defined network. This is all
7 part of what the court instructed was going to be part of
8 the contract for these people to -- the jury to work on.

9 QUESTION: But it's a classic case, isn't it, if
10 you're saying this is all too complicated, it's absurd to
11 think that people have to read all this, where you would
12 go to the commission and say, commission, the statute
13 requires reasonable rate services.

14 Their rate and services under a thing like that,
15 nobody can understand that, and therefore it's totally
16 unreasonable, and therefore it's outside the statute, and
17 moreover, we get reparations. Reparations, I take it, is
18 something the FCC can award, or not.

19 MR. HALL: Well, Your Honor, maybe if we had the
20 FCC guidelines type of situation with the Robinson-Patman
21 Act, but here we have -- the FCC doesn't even want the
22 filed tariff doctrine any more, and I don't think as a
23 practical matter we'd have much luck.

24 QUESTION: Well, your complaint, Mr. Hall, was
25 not of a violation of any provisions of the act, was it,

1 or was it?

2 MR. HALL: Yes, Your Honor. Under our -- under
3 2.3.1, that takes its direct authority from 202(a) as the
4 filing requirement, and 20 -- 2.3.1, which says the
5 liability, if any, of AT&T for its wilfulness conduct is
6 not limited by this tariff, and to us, that was extremely
7 clear language.

8 QUESTION: Well, then it seems to me your
9 response to Justice Breyer's question is not adequate,
10 because section 208 seems to say that if you're
11 complaining about a carrier's violation of the act you can
12 file a complaint with the commission and the commission
13 will adjudicate it.

14 MR. HALL: Yes, Your Honor, but this would
15 render obligatory the 2.3.1. It is a separate cause.

16 QUESTION: What is -- is that a regulation?

17 MR. HALL: That is part of the tariff, Your
18 Honor, which has the authority of 2. -- 203(a).

19 QUESTION: But how could a tariff repeal a part
20 of the statute?

21 MR. HALL: It didn't repeal it, Your Honor. It
22 simply gave, under the right of 203(a), wilful misconduct
23 to the customer as a way of seeking redress.

24 QUESTION: But why couldn't he -- why shouldn't
25 he, why mustn't he do it under the Federal statute?

1 MR. HALL: Well, again, Your Honor, we are
2 saying, and we have said --

3 QUESTION: It says the company's liability is
4 not limited by the tariff, as I assume the company has to
5 pay an amount that's not set forth in the tariff in the
6 event of wilful misconduct, but that is far different from
7 saying that it must look to State law and that the
8 customer can go to State law.

9 QUESTION: Your intentional tort, misconduct,
10 interference, now is that brought under the -- is that a
11 violation of the act, or is that a State law claim?

12 MR. HALL: That is a State law claim, Your
13 Honor, which was brought under the savings clause and --

14 QUESTION: Well then, then that you wouldn't --
15 even if we assume that you would have to go to the
16 commission to get adjudicated a claim that what AT&T did
17 was in violation of the act, if you're not claiming a
18 violation of the act, then presumably that would not apply
19 and you wouldn't have to go the commission.

20 MR. HALL: Well, Your Honor, we are saying two
21 things about our intentional claim. First of all, we're
22 saying intentional claim is separate from the
23 Communications Act. It's simply not within its purview.
24 It's not the kind of a thing, the customer relationship,
25 that the Communications Act addresses.

1 This is between competitors. This -- the -- I
2 believe the Court has probably seen in our opening brief
3 where we had to state our position of facts quite
4 differently from AT&T, is that we had a very classic
5 intentional interference claim where they wished to put us
6 out of business, and where --

7 QUESTION: Well, suppose they try to put you out
8 of business by charging too much, charging more than their
9 filed tariff allows for this service.

10 MR. HALL: Well --

11 QUESTION: Would you have a separate State cause
12 of action?

13 MR. HALL: Your Honor, that one, we cited to you
14 some antitrust cases, and two of those antitrust cases
15 that we cited -- these are in the circuits -- City of
16 Kirkwood and City of Groton, were ones where there were
17 price squeezes, where the municipality had its price
18 squeezed by the --

19 QUESTION: The prices charged were the tariff
20 prices. They were complaining that the tariff prices were
21 set at such a level that there was a squeeze between what
22 it cost them to provide the service and what they had to
23 pay to the carrier.

24 MR. HALL: I was trying to answer your question,
25 Your Honor, only to say that the -- that those issues have

1 been considered. That is not in our case, however.

2 QUESTION: Just answer my question. Suppose you
3 claimed that the way they were trying to harm you as a
4 competitor was by charging you more than the tariff
5 allowed, would you have a private cause of action for that
6 either under 2.3.1 or anywhere else?

7 MR. HALL: I don't think we would win, Your
8 Honor, but we would certainly cite those two cases I just
9 mentioned to you, because they do tend to support our
10 position.

11 QUESTION: You see, I thought you had conceded
12 that point. In answer to my question earlier, when we
13 were talking about wilful misconduct, I thought the
14 position you took was that all that wilful misconduct
15 applies to is wilful misconduct with regard to matters
16 other than the tariffed items, but you're now saying that
17 it includes wilful misconduct even regarding the matters
18 covered in the tariff.

19 MR. HALL: Both. Yes, Your Honor.

20 QUESTION: Okay.

21 QUESTION: They can I -- I'm trying to be
22 helpful to you on this first part of the question. I'm
23 going back to the Chief Justice's question, which was the
24 question of let's focus, forgetting all the tariff stuff,
25 forgetting everything but your State claim, which you say

1 was saved from the statute by the savings clause.

2 MR. HALL: Yes.

3 QUESTION: That's, I take it, another way of
4 saying that this statute, the Communications Act, does not
5 mean to displace State law here.

6 MR. HALL: That is right, Your Honor.

7 QUESTION: All right. Now, the case that's most
8 in your favor I think is Nader, isn't it?

9 MR. HALL: It -- I think it is also supported by
10 Morales --

11 QUESTION: All right.

12 MR. HALL: -- v. TWA.

13 QUESTION: All right. If I think of Nader, I
14 think of a case where this Court thought that the law, the
15 State law was clear enough, given a decision by the agency
16 that we want nothing to do with overbooking. That's a
17 matter of State tort law. In light of that, it's clear
18 enough that you can proceed in court without ever going to
19 the FCC or the agency.

20 MR. HALL: Under --

21 QUESTION: All the antitrust cases say, it's not
22 at all clear. We don't know what this means, or whether
23 Congress did or did not want to displace the Federal
24 system of antitrust law, so go to the agency first. We
25 want their advice.

1 Now, why does your case fall within the first
2 and not the second?

3 MR. HALL: Well, Your Honor --

4 QUESTION: Why -- in other words, my first take
5 on it would be, of course Congress wanted to displace
6 State unfair competition law. At least it's unclear.

7 Now, why is my initial take on that wrong?

8 MR. HALL: Well, if I understood your
9 correction -- your question correctly, Your Honor, the
10 antitrust claims that we cited did survive the
11 Communications Act and filed rate doctrine objections.
12 These were Communications Act cases in one instance.

13 The other kinds of claims that are -- that
14 involve us also go under 414. They go under the general
15 competition viewpoint that let those antitrust cases go
16 because they were not within the purview of the
17 Communications Act, and we believe that's a strong
18 separate basis.

19 In the Ninth Circuit there was a cooperative
20 communications case mentioned by both the dissent and the
21 majority. That one was one in which the minority praised
22 the case, or the result, which was under the -- 414 and
23 also because it was an independent competitor claim.
24 Under both instances it was free from the filed rate
25 doctrine and the problems that we had in the court below.

1 But what had happened was, it didn't -- the
2 dissent did not recognize that we, too, are a competitor
3 just as counsel advised the Court just a moment ago.
4 We're a competitor just as much as the cooperative
5 communication case that the dissent approved.

6 We have under 414 -- you were mentioning Nader.
7 In the later case of TWA v. Morales, in that particular
8 case there was an amendment, the Airline Deregulation Act,
9 to the FAA, and under that one the Court found a very
10 strong preemption and strong related-to language. Under
11 both of those approaches, the State AG's efforts to
12 regulate went out the window, and the Court said in that
13 particular case in citing Nader that the pre-1978 FAA,
14 Nader -- pardon me, the State AG's would have been able to
15 do exactly what they did do, or tried to do, I should have
16 said.

17 And also, they added on that the States could
18 have regulated intrastate rates of these carriers, and
19 even the rates of interstate carriers that were
20 intrastate, so that was a very strong case, and they
21 relied upon the savings clause of the prior act, of the
22 FAA act. That savings clause is word-for-word the same
23 clause that we have in the Federal Communications Act.

24 QUESTION: Well, the response that AT&T makes to
25 that, of course, is that how -- you can't possibly

1 interpret a savings clause, unless you're going to gut the
2 Federal legislation, to save State law that positively
3 contradicts the Federal law. I mean, that's interpreting
4 it so much so that there's nothing left of the Federal
5 law.

6 MR. HALL: Well, there, Your Honor, I guess our
7 answer to that has been that we can't understand how
8 attempting to put somebody out of business and wilful
9 misconduct which included a mess of dirty tricks relates
10 to the purposes of the Communications Act.

11 QUESTION: It depends. If you try to -- if your
12 claim is that they tried to put you out of business by
13 committing a violation of the Federal Communications Act,
14 then you're simply contradicting the Communications Act if
15 you're asserting that they should have provided you off-
16 tariff services which the tariff -- which the act does not
17 permit them to provide.

18 MR. HALL: Well, again, Your Honor --

19 QUESTION: If that's your business claim you're
20 contradicting the act.

21 MR. HALL: We go back to the really quite a
22 large body of work we have in this particular case where
23 we have the -- our amici, AT&T itself at various parts of
24 its brief, in the materials I indicated to the Court that
25 we received, we have a large body of, if not law, of

1 business practice occurring now where a huge amount is not
2 under the direct tariff language.

3 Nobody can tell a carrier what it puts into the
4 tariff. They may put in nonrate-affecting materials in
5 there, so you have to look at everything to see whether
6 they are or are not rate-affecting, and --

7 QUESTION: May I just --

8 MR. HALL: Pardon me.

9 QUESTION: I'm sorry, I didn't want to -- I
10 thought you'd finished your answer.

11 MR. HALL: Excuse me, Justice Stevens.

12 QUESTION: I just want to get two things
13 straight on the record for my own information. Until
14 Justice Breyer raised this question about primary
15 jurisdiction, had the AT&T ever, or the district court or
16 anybody else suggested that there was a primary
17 jurisdiction issue in the case?

18 MR. HALL: No.

19 QUESTION: And the second question I have is,
20 has the FCC -- have they filed an amicus brief at any
21 stage of these proceedings?

22 MR. HALL: No, Your Honor.

23 QUESTION: It seems unusual.

24 MR. HALL: We suggested they do, but they didn't
25 respond.

1 QUESTION: I see. And the third -- I guess my
2 third question is, is it your claim that the matters of
3 which you complain are outside the tariff or within the
4 tariff?

5 MR. HALL: Your Honor, they are -- it's a
6 strange mix, and I will tell you one of the reasons why,
7 is that at the trial the AT&T tariff expert said that
8 provisioning and billing, which are a large part of what
9 we're talking about here, are not in the tariff, and that
10 has not helped us make a -- this fine distinction here.

11 We have -- in our pretrial order we listed the
12 kinds of acts, and that's in the J.A. We listed the kinds
13 of acts that we're complaining about, many of which would
14 square off against tariff provisions and many of which
15 would not.

16 A suppressed billing would not. Deliberately
17 trying to keep us from getting any cash would not.
18 Slamming, counsel just agreed, would not.
19 Misappropriation of our customers would not.

20 So we felt that the wilfulness misconduct meant
21 a lot more than going down the line of individual numbers
22 below that to see what the breaches were. We felt that
23 wilful misconduct, under State law, which is the usual
24 referral, meant a lot more than that just as intentional
25 interference does.

1 QUESTION: What's wilful --

2 MR. HALL: Some of these were much more, what
3 would be commonly called intentional interference type
4 actions.

5 QUESTION: What is the difference between --
6 let's imagine in Maislin we have a trucking firm, and the
7 trucking firm charges lower than tariff rates to a whole
8 lot of shippers, a lot of them, and then later on they all
9 go out of business when the trucking firm comes along and
10 has to raise the rates.

11 Well, I mean, is that a matter not for the ICC?

12 MR. HALL: My --

13 QUESTION: Is that a matter -- I mean, what's
14 the -- there's a filed rate. The filed rate says you have
15 to charge \$1. They charge 50 cents. It was all in very
16 good faith and so forth, and nonetheless the tariff said
17 \$1, so lo and behold they had to pay \$1. They all went
18 out of business. I mean, who knows what happened to them.

19 MR. HALL: Well, we know that we're all presumed
20 to know the tariff, even though we don't, and that was
21 another --

22 QUESTION: How does your case differ from that,
23 because what they're saying as well, at worst, you know --
24 at worst, accepting everything you say --

25 MR. HALL: We --

1 QUESTION: This is an instance where they filed
2 tariffs as to services. They say what it is. Perhaps
3 wrongly, AT&T goes and gives some different services, or
4 it doesn't do what it said in the tariff, or whatever,
5 just like those trucks in Maislin, and now you're hurt,
6 but we said in Maislin, follow the rate --

7 MR. HALL: Well, Your Honor --

8 QUESTION: -- follow the tariff. Follow the
9 file. What's the difference?

10 MR. HALL: We -- we're paying the rate. There's
11 no question about that.

12 QUESTION: The rates and services are treated
13 alike, aren't they? It's rates, service --

14 MR. HALL: Rates affecting -- I mean, services
15 affecting rates under the Federal Communications Act,
16 which makes a big difference, and there were a lot that
17 AT&T says in this courtroom and has said in its briefing,
18 and the amici have said, do not affect rates, and most of
19 what we are talking about here, that we are certain does
20 not affect rates and it's been mentioned before about this
21 MLB LABO network comment in the AT&T brief, where they
22 said that while these may have value there's no charge for
23 them.

24 QUESTION: Well, I -- you know, I think it's
25 easy to say that selecting between, what is it, multiple

1 location billing and the other billing, selecting between
2 one or the other doesn't affect rates. They're willing to
3 give you the option. It apparently cost them no more to
4 do the one than the other.

5 But selecting between multiple location billing
6 in which they make sure that what's billed to that
7 location is only the stuff that's been charged to it, and
8 whatever else, that is something that affects rates,
9 because the tariff says you're not going to get that, and
10 because it does take a lot more expenditure on their part
11 and they're not willing to provide it without more money.
12 How can you say that that doesn't affect rates?

13 MR. HALL: Well, that, Your Honor, leads to
14 another conundrum within this language we have here. AT&T
15 said in its tariff that LABO was available. That's
16 another one of these accounts, location account billing,
17 and lo and behold we, when we went into contract with
18 them, were put on LABO, not MLB and not network. We were
19 put on LABO. LABO, under their tariff, is impermissible
20 to us. It's for franchised operations where there's
21 common ownership.

22 They stuck us into LABO and that, I think
23 Justice Ginsburg mentioned, all the funds then went to our
24 end users and left us to fight it out with them, one of
25 the many reasons we lost all of our accounts.

1 QUESTION: Now, that was a violation of the
2 tariff, you say, because --

3 MR. HALL: That was a violation of the tariff.
4 At the same time --

5 QUESTION: And you'd have a remedy for that at
6 the Communications Commission, right?

7 MR. HALL: You could, but it's also a part of
8 wilful misconduct if it's intentional and if it's a part
9 of all of these other things I've been mentioning.

10 QUESTION: So any intentional violation of a
11 tariff you can go under State law.

12 MR. HALL: Your Honor, I think that any -- you
13 have to prove wilful misconduct, but it's a separate
14 matter and it has equal dignity. We've mentioned the
15 Primrose case from this Court in 1894, where this Court
16 said you have to -- you, utilities, have to provide for
17 liability for --

18 QUESTION: Do I have to agree with you on that
19 in order for you to win the case, because I find that an
20 extraordinary proposition, that even for the most clear
21 tariff violations you can sue under State law, so long as
22 they have been wilful. It just --

23 MR. HALL: And so long as they are not rate-
24 affecting. I'm ready to --

25 QUESTION: Ah. Ah.

1 MR. HALL: -- can certainly concede that.

2 QUESTION: I see.

3 MR. HALL: That's -- we've always said that,
4 Your Honor.

5 QUESTION: And so long as they are not rate-
6 affecting.

7 MR. HALL: Yes. We have to make that analysis
8 of it, and I'm sorry if I didn't say it correctly, Your
9 Honor.

10 QUESTION: Well, is there anything in the tariff
11 that is not rate-affecting?

12 MR. HALL: Yes. There are many things that
13 were -- that are not rate-affecting in a tariff. The
14 tariff -- they are required to put what is rate-affecting
15 in the tariff, but they go down and file thousands of
16 tariffs. They can put nonrate-affecting things in there
17 just as easily as rate-affecting if it serves their
18 purposes.

19 QUESTION: I see. I see, and what -- okay.

20 QUESTION: But that -- doesn't that get you
21 right back into the preference that was the whole purpose
22 of the filed rate doctrine?

23 I thought the filed rate doctrine said you put
24 everything in your tariff and these are the terms. All
25 takers get the same thing. But if you then say there are

1 some things that are not rate-affecting, that you put
2 those outside the tariff, it seems to defeat the whole
3 purpose of what the filed rate doctrine -- which may be
4 passe, but that's another matter.

5 MR. HALL: Well, Justice Ginsburg, again I have
6 to -- the real world that has been shown here in the
7 evidence by both sides, I've cited page 35 of their
8 opening brief and 13 and 14 of their closing brief, all
9 the materials that were submitted by the amici, and those
10 of our own, in the actual working world they all accept
11 these as part of -- gap-fillers, as they call them, or
12 details, as it was called by counsel, as part of the
13 tariff. Those are not antithetical with it. They're
14 consistent with the tariff.

15 QUESTION: No, but Justice Ginsburg was talking
16 about matters set forth in the tariff, not these side
17 agreements.

18 MR. HALL: Okay. Yes, Your Honor.

19 QUESTION: Your position is that even some
20 things set forth in the tariff don't affect the rates, and
21 you can sue for failure to provide those provisions under
22 State law so long as they're not rate-affecting, and I
23 just find that a difficult problem.

24 MR. HALL: Well, Your Honor, AT&T made no effort
25 at trial to make any such distinctions. I'll come back to

1 that in just a second, because I also want to say that
2 AT&T at trial made no such arguments as they're making
3 here today that there were preferences, that there were
4 rebates and so forth.

5 There's an absolutely silent record on that. In
6 the intentional interference claim that we filed, if --
7 the pre-trial order is in the J.A., and in that, Your
8 Honor, you will find that they raise the defense of
9 commercial privilege or comparative privilege alone, no
10 such thing as filed rate doctrine defense.

11 When they requested instructions for the judge
12 to give, they did not ask for any instruction that the
13 filed rate doctrine opposed the intentional interference
14 claim. It doesn't.

15 QUESTION: But the Ninth Circuit passed on that
16 question.

17 MR. HALL: The united -- the Ninth Circuit said
18 more than it should have there, Your Honor, because it
19 simply overlooked our position.

20 QUESTION: Your view is they waived it, is that
21 right? You're saying they waived it, that they -- they
22 came in and brought an ordinary State law tort suit. You
23 won, they lost. Nobody says a word about tariffs to the
24 FCC, and now you're saying nobody raised this till appeal,
25 so it's waived. Is that the point?

1 MR. HALL: At the trial, Your Honor -- I'm
2 merely pointing out that intentional interference --

3 QUESTION: Mr. Hall, at page 51 of the Joint
4 Appendix, the pretrial order, (g), first affirmative
5 defense, filed tariff doctrine.

6 MR. HALL: Is that under intentional
7 interference, Your Honor?

8 QUESTION: Well, it's their first affirmative
9 defense. I don't know if -- so they at least have talked
10 about --

11 QUESTION: All right, so --

12 MR. HALL: I may have misspoken myself, but I'm
13 awfully certain that under the intentional interference
14 claim they did not raise the filed rate doctrine.

15 QUESTION: If we're speaking practically, is
16 there anything impractical about the following: you file
17 your complaint in court to protect against the statute of
18 limitations. You then go to the commission and raise all
19 your claims having to do with the tariff.

20 You might win. If you lose, at least there's a
21 good chance there'll be something that comes out of the
22 commission that clarifies the remaining question, namely
23 the question of whether, if you lose everything within the
24 tariffs, nonetheless, nothing preempts the operation of
25 State law in this area.

1 Now, as a practical matter, is there anything
2 wrong with that, which is what I thought that -- you know,
3 there are quite a few cases that suggest that's the right
4 route.

5 MR. HALL: Well, reserving that, we thoroughly
6 believe we have the right to file an intentional
7 interference claim and if it weren't linked to this other
8 one we wouldn't even be here today, in our opinion.

9 But secondly, Your Honor, as a practical matter,
10 going to the -- taking the referral and coming to
11 Washington, D.C. from Portland, Oregon is a big financial
12 matter.

13 QUESTION: I take it the argument of AT&T is
14 that if you had been simply a competitor and not a
15 customer, there might have been a cause of action here,
16 but the customer relation trumps your standing as a
17 competitor. Is that their argument?

18 MR. HALL: That seems to be their argument.

19 QUESTION: Do you have some cases that refute
20 that?

21 MR. HALL: Well, I would simply say, Your Honor,
22 that the ones that we cite at the very beginning of our
23 case, of our answering brief, responding brief, suggest
24 that a number of these have gone forward despite the
25 Communications Act and filed rate doctrine.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hall.
2 The case is submitted.
3 (Whereupon, at 2:00 p.m., the case in the above-
4 entitled matter was submitted.)
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CERTIFICATION

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The United States in the Matter of:

AMERICAN TELEPHONE AND TELEGRAPH CO., Petitioner v. CENTRAL OFFICE
TELEPHONE, INC.

CASE NO: 97-679

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

BY Donna Marie Fedele-----

(REPORTER)