SUPREME COURT OF THE UNITED STATES

Nos. 93–356 AND 93–521

MCI TELECOMMUNICATIONS CORPORATION, PETITIONER
93–356 *v.*
AMERICAN TELEPHONE AND TELEGRAPH COMPANY

UNITED STATES, ET AL., PETITIONERS
93–521 *v.*
AMERICAN TELEPHONE AND TELEGRAPH COMPANY ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 17, 1994]

JUSTICE STEVENS, with whom JUSTICE BLACKMUN and JUSTICE SOUTER join, dissenting.

The communications industry has an unusually dynamic character. In 1934, Congress authorized the Federal Communications Commission (FCC) to regulate "a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding." *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 219 (1943). The Communications Act (the Act) gives the FCC unusually broad discretion to meet new and unanticipated problems in order to fulfill its sweeping mandate "to make available, as far as possible, to all the people of the United States, a rapid, efficient, Nationwide and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U. S. C. §151. This Court's consistent interpretation of the Act has afforded the Commission ample leeway to interpret and apply its statutory powers and responsibilities. See, *e.g.*, *United States* v. *Southwestern Cable Co.*, 392 U. S. 157, 172–173 (1968); *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940). The

Court today abandons that approach in favor of a rigid literalism that deprives the FCC of the flexibility Congress meant it to have in order to implement the core policies of the Act in rapidly changing conditions.

At the time the Communications Act was passed, the telephone industry was dominated by the American Telephone & Telegraph Company and its affiliates. Title II of the Act, which establishes the framework for FCC regulation of common carriers by wire, was clearly a response to that dominance. As the Senate Report explained, "[u]nder existing provisions of the Interstate Commerce Act the regulation of the telephone monopoly has been practically nil. This vast monopoly which so immediately serves the needs of the people in their daily and social life must be effectively regulated." S. Rep. No. 781, 73d Cong., 2d Sess., 2 (1934).[1]

The wire communications provisions of the Act address problems distinctly associated with monopoly. Section 201 requires telephone carriers to "furnish . . . communication service upon reasonable request therefor," and mandates that their "charges, practices, classifications, and regulations" be "just and reasonable." 47 U. S. C. §201. Section 202 forbids carriers to "make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services . . . or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality." 47 U. S. C. §202(a). The Commission, upon complaint or its own motion, may hold hearings upon and

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[1]See Investigation of the Telephone Industry in the United States, H. R. Doc. No. 340, 76th Cong., 1st Sess. 145–146 (1939) (chronicling Bell System's development of a "Nation-wide, unified system to monopolize the telephone part of the national communication field" through the "prevention and elimination of effective competition"). See also H. R. Rep. No. 1273, 73d Cong., 2d Sess., XXXI (1934) ("Telephone business is a monopoly—it is supposed to be regulated").

declare the lawfulness of proposed rate increases, §204, and may prescribe just and reasonable charges upon a finding that a carriers actual or proposed charges are illegal, §205. Persons damaged by a carrier's violation of the statute have a right to damages, §§206–207, and any person may file with the Commission a complaint of violation of the Act, §208.

Section 203, modeled upon the filed rate provisions of the Interstate Commerce Act, see 49 U. S. C. §§10761– 10762; S. Rep. No. 781, *supra,* at 4, requires that common carriers other than connecting carriers "file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers." 47 U. S. C. §203(a). A telephone carrier must allow a 120-day period of lead time before a tariff goes into effect, and, "unless otherwise provided by or under authority of this Act," may not provide communication services except according to a filed schedule, §§203(c), (d). The tariff-filing section of the Communications Act, however, contains a proviso that states:

> "(b) Changes in schedule; discretion of Commission to modify requirements.
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> . . . . .
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> "(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days." 47 U. S. C. §203(b)(2) (1988 ed., Supp. IV).

Congress doubtless viewed the filed rate provisions as an important mechanism to guard against abusive practices by wire communications monopolies. But it is quite wrong to suggest that the mere process of

filing rate schedules—rather than the substantive duty of reasonably priced and nondiscriminatory service—is the "the heart of the common-carrier section of the federal Communications Act." *Ante*, at 12.

In response to new conditions in the communications industry, including stirrings of competition in the long- distance telephone market, the FCC in 1979 began re-examining its regulatory scheme. The Commission tentatively concluded that costly tariff-filing requirements were unnecessary and actually counterproductive as applied to nondominant carriers, *i.e.*, those whose lack of market power leaves them unable to extract supra-competitive or discriminatory rates from customers. See *Competitive Carrier Rulemaking,* 77 F. C. C. 2d 308 (1979). Relaxing the regulatory burdens upon new entrants would foster competition into the telecommunications markets; at the same time, the forces of competition would ensure that firms without monopoly power would comply with the Act's prohibitions on "unreasonable rates" and price discrimination. See *id.*, at 334–338. As the Commission explained in 1981, tariff-filing obligations for nondominant firms were simultaneously "superfluous as a consumer protection device, since competition circumscribes the prices and practices of these companies" and inimical to "price competition and service and marketing innovation." *Deregulation of Telecommunications Services,* 84 F. C. C. 2d 445, 478–479 (1981). Accordingly, in a series of rulings in the early 1980s, the Commission issued orders progressively exempting specified classes of nondominant carriers from the obligation to file tariff schedules. See, *Second Report and Order, e.g.*, 91 F. C. C. 2d 59 (1982); *Third Report and Order,* 48 Fed. Reg. 46791 (1983). The Commission's *Fourth Report*

and Order, 95 F. C. C. 2d 554 (1983), extended and reaffirmed its "permissive detariffing" policy, under which dominant long-distance carriers must file tariff schedules whereas nondominant carriers, although subject to the Act's prohibitions on unreasonable rates and price discrimination, may but need not file them.

In the instant *November 25 Report and Order*, 7 F. C. C. Rcd 8072 (1992), the FCC adhered to its policy of excusing nondominant providers of long-distance telephone service from the §203 filing requirement, and codified that longstanding forbearance policy. The Commission reaffirmed its commitment to "adapt . . . regulation of telecommunications common carriers to the changed circumstances of competition and to develop a regulatory approach that furthers the purposes of the Act while fostering innovation and the efficient development of the telecommunications industry," *id.,* at 8079, and explained once again why, in its view, permissive detariffing furthered these goals, *id.*, at 8079–8080. As it had since its initial stages of detariffing, see 84 F. C. C. 2d, at 479–480, the Commission found principal statutory authority for detariffing in the "modify any requirement" language of §203(b)(2). 7 F. C. C. Rcd, at 8074–8075. "[A]ctual experience under permissive detariffing," including an increase in the number of long-distance carriers from 12 in 1982 to 482 a decade later, "further confirm[ed] the success of [the FCC's] approach in furthering the statutory goals of the Communications Act." *Id.,* at 8079–8080.

Although the majority observes that further relaxation of tariff-filing requirements might more effectively enhance competition, *ante*, at 15, it does not take issue with the Commission's conclusions that mandatory filing of tariff schedules serves no useful purpose and is actually counterproductive in the case

of carriers who lack market power. As it had in its prior detariffing orders, see 84 F. C. C. 2d, at 479–480, if a nondominant carrier sought to charge inflated rates, "customers would simply move to other carriers." 7 F. C. C. Rcd, at 8079. Moreover, an absence of market power will ordinarily preclude firms of any kind from engaging in price discrimination. See, *e.g.*, L. Sullivan, Law of Antitrust 89 (1977) ("A firm will not discriminate unless it has market power"); 9 P. Areeda, Antitrust Law ¶1711a pp. 119–120 (1991). The Commission plausibly concluded that any slight enforcement benefits a tariff-filing requirement might offer were outweighed by the burdens it would put on new entrants and consumers. Thus, the sole question for us is whether the FCC's policy, however sensible, is nonetheless inconsistent with the Act.

In my view, each of the Commission's detariffing orders was squarely within its power to "modify any requirement" of §203. Subsection 203(b)(2) plainly confers at least some discretion to modify the general rule that carriers file tariffs, for it speaks of "*any* requirement."[2] Subsection 203(c) of the Act, ignored by the Court, squarely supports the FCC's position; it prohibits carriers from providing service without a tariff "*unless otherwise provided by or under authority of this Act*." Subsection 203(b)(2) is plainly one provision that "otherwise provides" and thereby authorizes service without a filed schedule. The FCC's authority to modify §203's requirements in "particular instances" or by "general order applicable to special circumstances or conditions" emphasizes the expansive character of the Commission's authority: modifications may be narrow or broad, depending upon the Commission's appraisal of

[2]Subsection 203(b)(2) must do more than merely allow the Commission to dictate the form and contents of tariff filings, for §203(b)(1) separately grants it that authority.

current conditions. From the vantage of a Congress seeking to regulate an almost completely monopolized industry, the advent of competition is surely a "special circumstance or condition" that might legitimately call for different regulatory treatment.

The only statutory exception to the Commission's modification authority provides that it may not extend the 120-day notice period set out in §203(b)(1). See §203(b)(2). The Act thus imposes a specific limit on the Commission's authority to *stiffen* that regulatory imposition on carriers, but does not confine the Commission's authority to *relax* it. It was no stretch for the FCC to draw from this single, unidirectional statutory limitation on its modification authority the inference that its authority is otherwise unlimited. See 7 F. C. C. Rcd, at 8075.

According to the Court, the term "modify," as explicated in all but the most unreliable dictionaries, *ante*, at 9–10, and n. 3, rules out the Commission's claimed authority to relieve nondominant carriers of the basic obligation to file tariffs. Dictionaries can be useful aides in statutory interpretation, but they are no substitute for close analysis of what words mean as used in a particular statutory context. Cf. *Cabell* v. *Markham*, 148 F. 2d 737, 739 (CA2 1945) (Hand, J.). Even if the sole possible meaning of "modify" were to make "minor" changes, *ante*, at 7,[3] further elaboration is needed to show why the detariffing policy should fail. The Commission came to its present policy through a series of rulings that gradually relaxed the filing requirements for nondominant carriers. Whether the current policy should count as a cataclysmic or merely an

[3]As petitioner MCI points out, the revolutionary consent decree providing for the breakup of the Bell System was, per AT&T's own proposal, entitled "Modification of Final Judgment." See *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.C. 1982), aff'd, 460 U. S. 1001 (1983).

incremental departure from the §203(a) baseline depends on whether one focuses on particular carriers' obligations to file (in which case the Commission's policy arguably works a major shift)[4] or on the statutory policies behind the tariff-filing requirement (which remain satisfied because market constraints on nondominant carriers obviate the need for rate-filing). When §203 is viewed as part of a statute whose aim is to constrain monopoly power, the Commission's decision to exempt nondominant carriers is a rational and "measured" adjustment to novel circumstances—one that remains faithful to the core purpose of the tariff-filing section. See Black's Law Dictionary 1198 (3d ed. 1933) (defining "modification" as "A change; an alteration which introduces new elements into the details, or cancels some of them, but leaves *the general purpose and effect of the subject-matter* intact").

The Court seizes upon a particular sense of the word "modify" at the expense of another, long-established meaning that fully supports the Commission's position. That word is first defined in Webster's Collegiate Dictionary 628 (4th ed. 1934) as meaning "to limit or reduce in extent or degree."[5]

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[4]Because the statute imposes no limit on the Commission's authority to shorten the interval between filing a tariff and bringing it into effect, and because there is no sign that anyone actually pays attention to tariffs filed by nondominant carriers, the additional step of eliminating the filing requirement is less important than the Court would have it. Even the Court appears to recognize that the Commission could sometimes excuse carriers from filing tariffs. See *ante*, at 17.

[5]See also 9 Oxford English Dictionary 952 (2d ed. 1989) ("2. To alter in the direction of moderation or lenity; to make less severe, rigorous, or decided; to qualify, tone down . . . . 1610 Donne *Pseudo-martyr* 184 `For so Mariana modefies his Doctrine, that the Prince should not

The Commission's permissive detariffing policy fits comfortably within this common understanding of the term. The F. C. C. has in effect adopted a general rule stating that "if you are dominant you must file, but if you are nondominant you need not." The Commission's partial detariffing policy—which excuses nondominant carriers from filing *on condition that* they remain nondominant—is simply a relaxation of a costly regulatory requirement that recent developments had rendered pointless and counterproductive in a certain class of cases.

A modification pursuant to §203(b)(1), like any other order issued under the Act, must of course be consistent with the purposes of the statute. On this point, the Court asserts that the Act's prohibition against unreasonable and discriminatory rates "would not be susceptible of effective enforcement if rates were not publicly filed." *Ante*, at 13. That determination, of course, is for the Commission to make in the first instance. But the Commission has repeatedly explained that (i) a carrier that lacks

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execute any Clergy man, though hee deser[v]e it.'"); Random House Dictionary of the English Language 1236 (2d ed. 1987) ("5. to reduce or lessen in degree or extent; moderate; soften; *to modify one's demands*"); Webster's Third New International Dictionary 1452 (1981) ("1: to make more temperate and less extreme: lessen the severity of; . . . `traffic rules were *modified* to let him pass'"); Webster's New Collegiate Dictionary 739 (1973) ("1. to make less extreme; MODERATE"); Webster's Seventh New Collegiate Dictionary 544 (1963) (same); Webster's New International Dictionary 1577 (2d ed. 1934) ("2. To reduce in extent or degree; to moderate; qualify; lower; as, to *modify* heat, pain, punishment"); N. Webster, American Dictionary of the English Language (1828) ("To moderate; to qualify; to reduce in extent or degree. Of his grace\ He *modifies* his first severe decree. *Dryden*").

market power is entirely unlikely to charge unreasonable or discriminatory rates, (ii) the statutory bans on unreasonable charges and price discrimination apply with full force regardless of whether carriers have to file tariffs, (iii) any suspected violations by nondominant carriers can be addressed on the Commission's own motion or on a damages complaint filed pursuant to §206,[6] and (iv) the FCC can reimpose a tariff requirement should violations occur. See, *e.g.*, 7 F. C. C. Rcd, at 8078–8079. The Court does not adequately respond to the FCC's explanations, and gives no reason whatsoever to doubt the Commission's considered judgment that tariff-filing is altogether unnecessary in the case of competitive carriers, see, *e.g.*, 7 F. C. C. Rcd, at 8073, 8079; the majority's ineffective enforcement argument lacks any evidentiary or historical support.

The Court's argument is also demonstrably incorrect. A contemporary cousin of the Communications Act of 1934—the Robinson-Patman Price Discrimination Act, 15 U. S. C. §§13(a), 13a, 13b, enacted in 1936—contains a much broader prohibition against price discrimination than does the Communications Act. That statute has performed its mission for almost 60 years without any counterpart to the filed rate doctrine. Indeed, the substantive requirements of Title II of the Communications Act itself apply to "connecting carriers" even though §203(a) exempts such carriers from the §203 tariff filing provi-

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[6]The Court suggests that the Commission's detariffing policy disrupts the statutory scheme because 47 U. S. C. §415(g) defines recoverable "overcharges" by reference to filed tariffs. See *ante*, at 13. Overcharge suits, by definition, depend on the presence of tariffs, but they are not the only means for aggrieved telephone customers to recover. Section 206 allows them to recover damages from carriers who have violated the Act and does not turn on the existence of a tariff. See also §§208, 415(b).

sions. See 47 U. S. C. §152(b); *National Assn. of Regulatory Utility Commr's* v. *F. C. C.*, 737 F. 2d 1095, 1115, n. 23 (CADC 1984), cert. denied, 469 U. S. 1227 (1985). The small fraction of competitive carriers that existed in 1979 now represents about 40% of the market; this growth has occurred while the detariffing policy has been in effect without any indication that the absence of filed schedules has produced discriminatory or unreasonable pricing by nondominant carriers. Extolling the "enormous importance" of filed rates, *ante*, at 13, and resorting to dictionary definitions and colorful metaphors are unsatisfactory substitutes for a reasoned explanation of why the statute requires rate-filing even when the practice serves no useful purpose and actually harms consumers.

The filed tariff provisions of the Communications Act are not ends in themselves, but are merely one of several procedural *means* for the Commission to ensure that carriers do not charge unreasonable or discriminatory rates. See 84 F. C. C. 2d, at 483. The Commission has reasonably concluded that this particular means of enforcing the statute's substantive mandates will prove counterproductive in the case of nondominant long distance carriers. Even if the 1934 Congress did not define the scope of the Commission's modification authority with perfect scholarly precision, this is surely a paradigm case for judicial deference to the agency's interpretation, particularly in a statutory regime so obviously meant to maximize administrative flexibility.[7] Whatever the

[7]The majority considers it unlikely that Congress would have conferred power on the Commission to exempt carriers from the supposedly pivotal rate-filing obligation. See *ante*, at 13. But surely such a delegation is not out of place in a statute that also empowers the FCC, for example, to decide what the "public convenience, interest, or necessity" requires, see, *e.g.*, 47 U. S. C. §303,

best reading of §203(b)(2), the Commission's reading cannot in my view be termed unreasonable. It is informed (as ours is not) by a practical understanding of the role (or lack thereof) that filed tariffs play in the modern regulatory climate and in the telecommunications industry. Since 1979, the FCC has sought to adapt measures originally designed to control monopoly power to new market conditions. It has carefully and consistently explained that mandatory tariff-filing rules frustrate the core statutory interest in rate reasonableness. The Commission's use of the "discretion" expressly conferred by §203(b)(2) reflects "a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837, 865 (1984) (footnotes omitted). The FCC has permissibly interpreted its §203(b)(2) authority in service of the goals Congress set forth in the Communications Act. We should sustain its eminently sound, experience-tested, and uncommonly well explained judgment.

I respectfully dissent.

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and to "prescribe such rules and regulations as may be necessary in the public interest," §201(b); see also §154(i). The Court's rigid reading of §202(b)(2) is out of step with our prior recognition that the 1934 Act was meant to be a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940).