

1 mean, we are --

2 THE COURT: I didn't see any argument to  
3 that effect in your brief

4 MR. MCKENNA: We did not challenge the  
5 regulation, that's correct.

6 So the petitioners established a credit  
7 mechanism so that the customers of petitioners could  
8 come and take advantage of the Commission's ReadyLine  
9 ruling and get a credit to apply to their originating  
10 access. And this is right in the tariff. We cite the  
11 tariff in our reply brief, well one of the many  
12 tariffs which is representative.

13 Our difficulty comes -- is that the  
14 complainants involved in this case purchase services  
15 from AT&T, they purchase from AT&T and MCI -- for  
16 convenience I'll just use AT&T, I'm not meaning to  
17 pick on AT&T. And they claim petitioners violated the  
18 law by charging AT&T the tariffed rate for originating  
19 access. Complainants never sought, at least as far as  
20 we can determine, to utilize the established credit  
21 mechanism.

22 In fact, this is really critical, the  
23 complainants never established that AT&T passed on the  
24 disputed price to the complainants in any meaningful  
25 fashion. AT&T was never made a party, never was asked

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1 to explain its own practices

2 THE COURT: Is it your view that the  
3 resellers would be entitled to use the credit  
4 mechanism? In other words, as I understand it, and  
5 you make a certain point of this, they aren't your  
6 customers. You are apparently faulting them for not  
7 using the credit mechanism, but if under your view of  
8 the tariff they are not entitled to.

9 MR. MCKENNA: I think, Your Honor, had the  
10 resellers and AT&T joined hands and calculated the  
11 credit mechanism, and AT&T had put the credit  
12 mechanism in to us. In fact the petitioners, we just  
13 get a big list, we don't get anything detailed. Had  
14 they done that and AT&T submitted this as part of the  
15 credit mechanism, as part of a deal with the  
16 complainants, I think that it's very likely, in fact  
17 it's very probable, that they would have received it.

18 THE COURT: Let me play the hypothetical  
19 a little differently. Suppose that AT&T had never  
20 resold, that they had done everything themselves that  
21 the reseller did here, AT&T would be entitled then to  
22 the credit mechanism, right?

23 MR. MCKENNA: Yes, Your Honor, that's  
24 correct.

25 THE COURT: And your only objection is

1 that -- assume the they had done the and then the  
2 reseller comes into the picture -- I know it could  
3 happen that way temporarily, but assuming the  
4 underlying facts be what they are with reference to  
5 AT&T, the reseller comes in and the deal is made. Do  
6 you agree that the deal could be made at the table to  
7 give the reseller the benefit of the credit mechanism  
8 AT&T would be undoubtedly entitled to?

9 MR. MCKENNA: I think it's correct sir,  
10 certainly Your Honor.

11 THE COURT: So your objection is only that  
12 the transaction is collapsed by the reseller coming  
13 directly to claim the relief rather than AT&T getting  
14 it and passing it along.

15 MR. MCKENNA: Absolutely not Your Honor.  
16 The reseller never came to us, AT&T never came to us.  
17 Instead an adjudicatory proceeding was commenced. Our  
18 tariffs were found to be unlawful. We were held to be  
19 violating the Communications Act. That's our  
20 objection.

21 THE COURT: The terms of the holding are  
22 your objection and not the money involved?

23 MR. MCKENNA: No, the money bothered us.

24 THE COURT: Mostly when people say it's  
25 not the money it's principle, it is the money.

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1 MR. MCKENNA: Well, the money bothers us,  
2 Your Honor.

3 THE COURT: What is the refund liability?

4 MR. MCKENNA: Pardon me.

5 THE COURT: What is the refund liability?

6 MR. MCKENNA: It is very difficult to  
7 determine at this point. If the petitioners were to  
8 calculate it we would have it in the neighborhood of -  
9 - we've run some numbers and it's in the neighborhood  
10 of about two or three million dollars. I have a  
11 feeling that the complainants have a significantly  
12 higher number. Also the case at the U.S. District  
13 Court, should that be reopened and we are opposing  
14 that being reopened, is being filed as a class action.  
15 The class has not been certified.

16 THE COURT: In your brief you do express  
17 concern about the characterization of your clients as  
18 lawbreakers or violators. Does that have any tangible  
19 significance?

20 MR. MCKENNA: Yes, Your Honor, it does.  
21 This court has held on a variety of occasions, you  
22 know, an adjudication having violated the  
23 Communications Act begin to play in such things as  
24 radio licenses, common carrier licenses, presumably,  
25 although I hope not, it could affect those of us who

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1 are R box, which would be US WEST, Southwestern Bell,  
2 BellSouth.

3 THE COURT: The radio and TV licenses are  
4 always existing sort of at the will the Commission.  
5 But at least that has not been my perception of the  
6 ordinary telecommunications carriers.

7 MR. MCKENNA: Radio licenses, I am  
8 including all the common carrier licenses, the  
9 cellular licenses, the personal communication services  
10 licenses. The petitioners hold literally hundreds of  
11 what we call radio licenses. We don't use them for  
12 radio stations, we use them transmit our common  
13 carrier services. And those are subject to Title III.

14 THE COURT: These licenses have to be  
15 renewed every five years or something.

16 MR. MCKENNA: A number of them are still  
17 pending.

18 THE COURT: Pending, in what sense?

19 MR. MCKENNA: Which have not been granted  
20 yet. PCS type licenses. I'm not sure of the renewal  
21 terms on some of the companies.

22 THE COURT: Do you seriously think that  
23 you would be disadvantaged in a comparative setting or  
24 otherwise by this entirely technical dereliction? I  
25 mean you couldn't read the signal, you couldn't know

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1 whose title was.

2 MR. MCKENNA: I would certainly hope not  
3 Your Honor.

4 THE COURT: I didn't catch any sense of  
5 moral dudgeon in the FCC's opinion either.

6 MR. MCKENNA: My point, Your Honor is that  
7 --

8 THE COURT: At least not very high  
9 dudgeon.

10 MR. MCKENNA: Our point is that this is an  
11 adjudication. There were ways that this could have  
12 been worked out in accordance with the FCC's rules,  
13 and in accordance with the terms of our tariffs. The  
14 complainants chose not to do that. They chose to sue  
15 which achieved an adjudication. The adjudication  
16 which they achieved was not consistent with the law,  
17 was not consistent with the FCC's own precedent. And  
18 it --

19 THE COURT: That brings us back to where  
20 both Judge Williams and I have been trying to go. We  
21 are not quite certain what it is that is wrong with  
22 the result. You may be attacking process and process  
23 is important, I understand that. But the result comes  
24 out that the same disputed amount of money, it turns  
25 in the same direction anyway, why should we be

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1 meddling with it?

2 MR. MCKENNA: Well, I hate to disagree  
3 with you. I think that process really is critical.

4 THE COURT: Process is important, I don't  
5 doubt that.

6 MR. MCKENNA: But also to remember and  
7 this goes to the third legal point, where the FCC  
8 refused to look, go out and require the complainants  
9 to prove their case. We don't know to this day  
10 whether or not the result would be the same or not  
11 because we don't know what rates AT&T charged.

12 THE COURT: That gets into the substantive  
13 issues. Whether the Commission is entitled to simply,  
14 purchases of the refund from you people collapse, AT&T  
15 and the resellers. It is not clear to me why you have  
16 an entitlement not to have them, not to have the  
17 Commission collapse those charges.

18 MR. MCKENNA: It's much more dangerous  
19 than that Your Honor, because see if AT&T did not pass  
20 the charges through to the resellers then under even  
21 the FCC's logic our rates remain lawful because the  
22 resellers never paid the price that they claimed they  
23 paid. The absolute key to this whole factual case is  
24 what AT&T charged.

25 MR. MCKENNA: Somebody paid your client.

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MR. MCKENNA: Yes sir.

THE COURT: Is that not material what was paid to your client.

MR. MCKENNA: No, that's material. But the persons --

THE COURT: So whether it's a windfall to the reseller and a loss to AT&T, whether AT&T comes up where they bargained and the reseller gets what they bargained, you client will be in the same position either way wouldn't it? But why is it material what AT&T charges the reseller for purposes of this hearing?

MR. MCKENNA: Because if AT&T did not charge the reseller the disputed prices, then even under the FCC's own logic our prices were lawful. Remember our -- the price we --

THE COURT: It doesn't seem to me that follows. As I understand it, the FCC's proposition is that the higher charge for this sort should not be made at both ends. Okay. And I thought that you had accepted that proposition. If so, then your clients are required to, it seems legitimate, for your clients to disgorge the excess. And after that it is sort of a three way squabble or potential three way squabble between the Commission, the interexchange carriers,

1 and the resellers. But now you seem to be saying that  
2 there isn't any excess charge except under certain  
3 circumstances as to how AT&T and the resellers work  
4 out their arrangements.

5 MR. MCKENNA: Your Honor, what we are  
6 required to in our tariffs is exactly what we did do.  
7 That is when we are approached by our customer with  
8 the request for credit, we make the appropriate  
9 credit.

10 In this particular case we were not  
11 approached by our customer or by anybody else for that  
12 matter with a request for credit. Instead we were  
13 approached with a complaint. And we said -- the  
14 obvious question is somebody who is not our customer,  
15 somebody who is not our customer says, "We want money  
16 from you because you violated the law." We say,  
17 "Why?" "Well because you paid something to AT&T and  
18 we want it back" -- AT&T paid us something and they  
19 want it back.

20 I keep asking myself what in the world we  
21 could have done not to violate the law.

22 THE COURT: You could have sent it to  
23 AT&T.

24 MR. MCKENNA: Pardon me.

25 THE COURT: You could have sent it to

1 AT&T. I don't intend that entirely involuntarily. In  
2 certain litigation the mechanism would be paying it  
3 into court, saying, "We don't know whether AT&T gets  
4 it or the reseller." But here it would seem to me  
5 that your mechanism would have been something similar  
6 to the money -- with both names on the check or  
7 otherwise to try to see who got it. But it seems like  
8 your client would seem to owe the money either way.

9 MR. MCKENNA: I think that had there been  
10 a request for credit I think that's probably what  
11 would have happened.

12 THE COURT: Well, part of these were done  
13 in district court, originally. And then of course  
14 they went to the Commission. But it would seem at  
15 that point you could have run down and paid the money  
16 into court.

17 But what seems to be bothering Judge  
18 Williams and what bothers me is it looks like your  
19 client is not denying we would owe the money if the  
20 right person were asking for it. Your just saying  
21 these people shouldn't get it.

22 MR. MCKENNA: What I'm really denying is  
23 that, and I think this is really critical because the  
24 FCC using complaint processes for rulemaking purposes  
25 can be -- end up having things pretty messed up. And

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1 that is being chosen to claim that our tariff prices  
2 were unlawful, there has to be some basis for that  
3 finding. And in point of fact, based on the facts of  
4 this case, there is no basis upon which anybody can  
5 find that we did anything unlawful.

6 THE COURT: Would you have any legal  
7 objection to the Commission issuing an order saying  
8 for purposes of your tariff, it construes your tariff,  
9 under these circumstances because of the conceded  
10 purposes of the rule, as entitling the resellers to  
11 file for the credit under the circumstances where the  
12 two high charges get made and should not have been  
13 made, should be adjusted?

14 MR. MCKENNA: We would certainly have  
15 objection if that excluded the underlying carriers  
16 who are our customers. And I think the FCC clearly  
17 could not leave AT&T out of any such interpretation.

18 THE COURT: And I'm not sure you have a  
19 right to assert AT&T's interests.

20 THE COURT: Your concern for AT&T is most  
21 touching, but I'm not sure where it comes from  
22 legally.

23 MR. MCKENNA: Well it's not so much my  
24 concern for AT&T, Your Honor. It's that if somebody  
25 comes to us and says, "We want money back." And we

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1 say, "Why?" And they say, "Because ( ) paid AT&T." It  
2 seems that we have a basis legal right to say, "Whoa."  
3 And that's what we did.

4 THE COURT: All right we'll give you a  
5 minute for rebuttal.

6 MR. MCKENNA: Thank you.  
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ORAL ARGUMENT OF WILLIAM J. BYRNES, ESQ.

ON BEHALF OF THE INTERVENOR

Well Your Honors this is a remarkably simple case. The LEC's have virtually admitted liability before the court today.

They've somehow confused the matter by suggesting that in addition to AT&T, MCI's underlying 800 service is involved, it is not involved. The only service from which resellers are seeking credits is service that where they have bought 800 lines from AT&T and AT&T only. There was a very pertinent statement made by counsel a few minutes ago, "AT&T never came to us." So we know that AT&T makes no claim here. So they say A) we are liable, B) AT&T has not asserted any claim.

The resellers have asserted a claim. The FCC has said the resellers are entitled to the compensation. And the FCC has in addition said that AT&T if it had wanted to claim had no basis for receiving compensation. What more do you want.

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1 ORAL ARGUMENT OF ROBERT B. MCKENNA, ESQ.

2 ON BEHALF OF THE PETITIONERS -- REBUTTAL

3 THE COURT: I'll give you a minute. And  
4 would you devote the first part the minute to  
5 answering whether the it is correct that the LECs are  
6 fully in position to detect any inconsistent claim for  
7 a refund by AT&T.

8 MR. MCKENNA: I suppose we could audit if  
9 we wanted to Your Honor. I believe that would be --  
10 but we do not receive the credits in an auditable  
11 form. They are just a list.

12 Your Honors, very briefly, two points.  
13 First a point which I thought of interest was whether  
14 or not the LECs, not just the LECs, the petitioners  
15 here including a number of smaller exchange carriers  
16 as well, whether or not we requested that AT&T be made  
17 a party to proceedings and you will note on paragraph  
18 16 of the *Teleconnect* order where it says among other  
19 things, paragraphs 16 and 17, where they talk about  
20 the request that AT&T be made a party and the FCC's  
21 conclusion that "because we find the higher CCL charge  
22 was assessed, etcetera, the participation of AT&T is  
23 not essential for these proceedings."

24 The second point is on the credits and I  
25 feel they are kind of like a guy with a basket full of

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1 applies an orange convention because it becomes  
2 really clear that we are talking about two different  
3 things. When you look at the credit mechanism which  
4 we -- a typical one we put in on page 6 and 7 of the  
5 reply brief it's typical credit. It is the type of  
6 credit which is dealt with in what Mr. Byrnes said in  
7 his argument. It is a credit for prices which were  
8 paid to us. The rules cited by Mr. Byrnes have  
9 absolutely nothing whatsoever to do with the situation  
10 where we are not getting money.

11 If you look at the tariff provision, it  
12 says that you adjust the minutes and the bills for  
13 what the transaction between the LEC and the customer.  
14 That same thing with the -- section 206 and 205 cited  
15 by Mr. Byrnes. It's a transaction when the reseller  
16 is purchasing access from the LEC. And he gets a  
17 credit. How does he get a credit? His access bill is  
18 reduced.

19 Here we have a non-customer. We have a  
20 basic, fundamental disconnect.

21 THE COURT: Is this a variant of your  
22 privity argument?

23 MR. MCKENNA: Yes. Absolutely, Your  
24 Honor. It is absolutely.

25 THE COURT: For the requirement of privity

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1 you cite an 1898 Supreme Court case not related to  
2 communication law. Do you have an authority that is  
3 either more on point or more recent or, to your  
4 benefit, both?

5 MR. MCKENNA: Your Honor the major case I  
6 think that really sums this up is the *Illinois Brick*  
7 case because we certainly agree --

8 THE COURT: *Illinois Brick* was the one  
9 that developed treble damages.

10 MR. MCKENNA: Well, *Illinois Brick* was  
11 based upon an indirect purchaser suing because the  
12 alleged price was too high. And all of the public  
13 interest arguments cited by the FCC and by the  
14 intervenors were considered.

15 THE COURT: That was an antitrust case  
16 right?

17 MR. MCKENNA: Yes sir. It was treble  
18 damages for price fixing I believe.

19 THE COURT: The court gave two reasons on  
20 *Illinois Brick* as I recall for disallowing the passing  
21 on issue. One was the complexity, difficulty of the  
22 litigation it would create. And the other was the  
23 need for deterrents. Neither of those is really  
24 relevant here is it?

25 MR. MCKENNA: I think the complexity issue

1 is. But there was a third reason, I think, and this  
2 is also important and that was what they decided to  
3 do, and this is over the objection of the government,  
4 was they said, "We have to have consistency in the  
5 passing on area." And what they said was, "We are  
6 either going to apply passing on offensively and  
7 defensively or we are not going to apply it at all."

8 The FCC in a recent case which I know Your  
9 Honor, you sat on, involving overearnings by a variety  
10 of exchange carriers has specifically ruled that  
11 passing on could not be use as a defense in a suit for  
12 excessively high rates. The FCC then turned around  
13 and wrote exactly the opposite in this case. They  
14 said, "Passing on can be used offensively." Because  
15 after all the alleged damages which are alleged by the  
16 complainants are nothing more than the high prices  
17 which AT&T charged to them. It had nothing to do with  
18 anything we charged to them. They were not our  
19 customers for these particular services.

20 So I think that's a key part and I think  
21 the complexity angle cannot be undersold.

22 THE COURT: In allowing the indirect  
23 purchaser here to seek the recovery, they are  
24 disallowing the direct purchaser at the same time.

25 MR. MCKENNA: I think that's right. I

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1 certain hope so.

2 THE COURT: So the difficulties created in  
3 Illinois Brick are out of the picture.

4 MR. MCKENNA: That's only if in fact there  
5 was this direct pass through by the direct purchaser  
6 which we don't know had happened yet. See we do not  
7 know because of what the FCC did that there was a  
8 passing on at all because AT&T was not brought into  
9 explain what it did.

10 THE COURT: Do you really seriously think  
11 that AT&T could not come in and get this same credit  
12 after the FCC has ordered it to the reseller?

13 MR. MCKENNA: I think that, as Your Honor  
14 and Judge Williams said, that on a prospective basis  
15 this is perfectly reasonable. The question here is  
16 whether damages are --

17 THE COURT: Well, I'm talking about these  
18 particular ones, this case. After the FCC has ordered  
19 the reseller to get the benefit of this, do you really  
20 think they were recovered by entertaining the claim  
21 AT&T that they are entitled to it, too.

22 MR. MCKENNA: No. But I don't think that  
23 Your Honor --

24 THE COURT: So isn't what Judge Ginsburg  
25 said exactly right?

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1 MR. MCKENNA: Only if T&T charged the  
2 resellers and we don't know that.

3 THE COURT: What difference does that  
4 really make to you? Your companies have got high pay  
5 on both ends which they are not entitled to.

6 MR. MCKENNA: I think we were entitled to  
7 Your Honor. At least until the FCC told us not to be.

8 THE COURT: That's not what this case is  
9 about anyway. You really have not made any argument  
10 to us that you are entitled to get high pay on both  
11 ends. You have not made --

12 MR. MCKENNA: I think prospectively we  
13 would agree that that's reasonable.

14 THE COURT: As far as prospectively, but  
15 never mind prospectively, in this case you weren't  
16 entitled to get high pay on both ends. We went  
17 through several exercises on that and I don't see why  
18 it really should make a great deal of difference to  
19 you whether AT&T is getting it or the -- everybody is  
20 getting a windfall.

21 MR. MCKENNA: I think Your Honor --

22 THE COURT: As long as your are not  
23 entitled to it, you are not entitled to it.

24 MR. MCKENNA: We charged our tariff rates  
25 Your Honor. We had a credit mechanism available. I

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think that in just normal commercial relationships if somebody doesn't so it right then we are entitled to rely on our tariffs, which is what we did.

THE COURT: Okay.

MR. MCKENNA: Thank you very much, Your Honor.

(Whereupon, the proceedings in the above-entitled matter was concluded.)

CERTIFICATE OF TRANSCRIBER

MATTER: SOUTHWESTERN BELL TELEPHONE COMPANY  
V.  
FEDERAL COMMUNICATIONS COMMISSION

NO. 95-1193

DATE: MAY 4, 1997

I hereby certify that the attached transcription of pages 1 to 26 inclusive are to the best of my belief and ability a true, accurate, and complete record of the proceedings as recorded on tape provided to us by the agency.

Jonathan Zilinsky

06-30-97