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IN THE SUPREME COURT OF THE UNITED STATES

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GLOBAL CROSSING :
TELECOMMUNICATIONS, INC., :
Petitioner :
V. : No. 05-705
METROPHONES :
TELECOMMUNICATIONS, INC. :
- - - - - x

Washington, D.C.
Tuesday, October 10, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

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ROY T. ENGLERT, JR., ESQ., Washington, D.C.; on behalf of the Respondent.
JAMES A. FELDMAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf the United States, as amicus curiae, supporting Respondent.

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Global Crossing Telecommunications versus Metrophones Telecommunications. Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Thank you, Mr. Chief Justice, and may it please the Court:

Complaints alleging violations of the FCC's pay phone compensation regulations allege just that, violations of regulations. The regulatory violations do not give rise to private cause of action under section 206 and 207 of the Communications Act. The proper point of departure in this case begins at section 276. There Congress directed the FCC to create a system guaranteeing pay phone providers compensation for the services that they provide to callers who make dial around calls. There can be little doubt that the FCC has ample authority to enforce the system it created administratively.

But nothing in Section 276 or anywhere else in the Act contemplates that violations of the FCC's implementing regulations should give rise to a private cause of action for damages in Federal court.

1 Accordingly, this Court should reverse the Ninth
2 Circuit's decision allowing pay phone operators to bring
3 through the back door the kinds of cases that Congress
4 declined to allow through the front.

5 There's nothing upsetting about reaching
6 that result here. The Communications Act quite sensibly
7 limits private damages actions in Federal court to those
8 alleging violations of the Act itself. And claims that
9 long distance providers -- I'm sorry -- claims that long
10 distance providers have violated the pay phone
11 compensation regulations require the parsing and the
12 application of the extraordinarily complex and
13 ever-changing FCC rules and regulations and orders.

14 JUSTICE STEVENS: Mr. Fisher, may I ask you this
15 question? In your view, did the regulations create a
16 legally enforceable obligation?

17 MR. FISHER: Yes, Justice Stevens.

18 JUSTICE STEVENS: And where may that obligation be
19 enforced?

20 MR. FISHER: Our position is that can be fully
21 enforced in the FCC. And in fact, the FCC is hearing
22 complaints like this all the time.

23 JUSTICE STEVENS: By means of a private action
24 before the FCC?

25 MR. FISHER: Yes, by means of an administrative

1 action before the FCC.

2 JUSTICE STEVENS: Where the carrier -- where they
3 would file a complaint saying you owe us X dollars, and
4 the agency could order them to pay X dollars.

5 MR. FISHER: That's right. And if you look at the
6 Sprint amicus brief at page 23, the brief cites several
7 cases just like this one that the FCC has fully
8 adjudicated and in some cases awarded damages.

9 JUSTICE STEVENS: And is the obligation
10 enforceable in State court?

11 MR. FISHER: No, we believe -- of course, this
12 Court did not grant certiorari --

13 JUSTICE STEVENS: I understand that. I'm curious
14 to know what your view is.

15 MR. FISHER: If this Court holds there is no
16 private cause of action in Federal court, then it is not
17 enforceable in state court either. Our position is that
18 there is only an administrative remedy that's available.

19 JUSTICE GINSBURG: But the administrative remedy
20 that you just conceded is a counterpart to a private
21 right of action, or isn't it? Would you get the same
22 thing? I complained to the agency, and say, I didn't get
23 -- the pay phone provider wasn't paid, and X under the
24 commission's regulations was supposed to pay it. So I
25 complained against X. Could I get before the FCC exactly

1 what I could get in court, so that we're only talking
2 about which form is proper, or is there a difference in
3 the remedy?

4 MR. FISHER: In terms of damages, we're talking
5 about exactly the same thing, Justice Ginsburg. The only
6 difference between being in Federal court as opposed to
7 the agency is that if you're in Federal court, the
8 Communications Act has a fee shifting provision. And we
9 think that further underscores the Congress's scheme
10 here, which is to reserve Federal court actions for
11 serious violations of the Communications Act, and that's
12 where fee shifting kicks in. Ordinary --

13 JUSTICE GINSBURG: And before the agency, you
14 don't get counsel fees?

15 MR. FISHER: That's right.

16 JUSTICE SOUTER: Mr. Fisher, I realize you don't
17 concede, in fact, quite to the contrary, you deny that
18 the failure to pay the full rate is -- could be
19 considered a practice here. But let's assume for the
20 sake of argument that it is a practice within the meaning
21 of the text.

22 If the -- if the agency had explicitly said, what
23 we are doing here in defining this practice as unlawful
24 or unjust, is to define it as such within the meaning of,
25 what is it, 201(b), so they make explicit reference to

1 the statute and they say, we are fleshing out the
2 statute, would your position be the same?

3 MR. FISHER: I think that's very much what the
4 Commission is contending here Justice Souter.

5 JUSTICE SOUTER: But it wasn't textually as nice
6 as that?

7 MR. FISHER: Right.

8 JUSTICE SCALIA: But they have made it that,
9 haven't they, in a later regulation? Haven't they said
10 just that.

11 MR. FISHER: In a later order, Justice Scalia.

12 JUSTICE SCALIA: In a later order, yes.

13 JUSTICE SOUTER: Let's assume in the reg itself,
14 they were that precise. Would your position be exactly
15 the same?

16 MR. FISHER: Yes. The result would be the same.
17 And I think you're asking me to put aside for the moment
18 whether the FCC was correct in saying it was a covered
19 practice.

20 JUSTICE SOUTER: Sure.

21 MR. FISHER: And in terms of the FCC calling this
22 unjust and unreasonable, the problem with that is that
23 the only reason the FCC has ever given that this is
24 unjust and unreasonable is because it violates its
25 regulations. And if there's one thing we know from the

1 structure of the Communications Act, it's that for
2 something to be remedial in Federal court, in other
3 words -- and if we know something violates 201, it is
4 remediable.

5 JUSTICE SOUTER: Okay.

6 MR. FISHER: It has to be.

7 JUSTICE SOUTER: You invite me to change the
8 hypothetical, then, by jacking it up in this respect.
9 The FCC gives the reason. And it says, the reason it's
10 unjust and unreasonable is that the carriers are getting
11 a free ride on the pay phones, et cetera.

12 So they fill in the gap that you claim.
13 They have a reason. Would your answer or your position
14 still be the same?

15 MR. FISHER: Yes, because the reasoning the FCC
16 would give simply would not be a permissible construction
17 of the terms unjust and unreasonable in 201(b).

18 JUSTICE SOUTER: Are there any times under any
19 circumstances that you can think of in which the FCC can
20 adequately and validly define a practice as unjust and
21 unreasonable within the meaning of the statute so that,
22 in fact, in applying the statute, we would follow -- be
23 bound to follow the regs?

24 MR. FISHER: Of course, in the vast majority. Let
25 me give you some examples, and then I'll distinguish it

1 from this case. The easiest example is rate of return
2 regulations that the FCC can pronounce. So the FCC can
3 say how much long distance companies are able to charge
4 for certain services. Fleshing out the amount that they
5 can charge so that they're not in effect gouging
6 consumers is a regulation that this Court could look to,
7 but --

8 JUSTICE SOUTER: Okay. But why can't they pass a
9 regulation that says don't gouge pay phone operators?

10 MR. FISHER: Well, that goes to the heart of this
11 case, Justice Souter, in the kind of regulations that we
12 have. What we have here is not the FCC telling long
13 distance providers to give pay phone operators money that
14 long distance operators ought to owe pay phone operators.

15 The money that's at issue here, the 24 cents per
16 call is the money that callers owe the pay phone
17 operators. If you look back at the D.C. Circuit's
18 decision --

19 JUSTICE SOUTER: Well, do they? I mean, the
20 statute of the United States says that -- I think I'm
21 correct -- the statute of the United States says they
22 can't be required, the caller cannot be required to put
23 in the quarter in order to get the 800 number and so on.

24 So as a matter of law, don't we have to say that
25 the, in practical terms, the caller doesn't owe?

1 Somebody owes. Somebody ought to pay for the use of this
2 facility. But Congress has said it is not the end user.

3 MR. FISHER: You are right, Justice Souter,
4 insofar as we're trying to capture the money here for
5 essentially the equipment rental or the access fee that
6 the caller is availing himself of. But Congress has not
7 said that money cannot rest on the caller's shoulders.
8 All Congress says in Section 226 is that the caller
9 cannot be required to pay in advance.

10 The FCC during its rulemaking proceedings actually
11 considered two alternatives where the caller would have
12 paid in full compliance with Section 226. One would be
13 the caller paying with a later billing device like a
14 credit card, billing it to their home phone number.

15 Another option the FCC considered would have been
16 where the long distance providers would have billed
17 customers on behalf of the pay phone operators. Either
18 way, the customer would have paid. Even the respondent
19 in his brief openly --

20 JUSTICE SOUTER: Well, the customer is going to
21 pay if, in fact, the long distance carrier is the one who
22 has to make the immediate payment, because that payment
23 is going to be figured in the long distance rate. So
24 that ultimately, the end user is going to pay for the
25 service he gets, and Congress is simply saying, the way

1 to make this thing work in a sensible and simple way is
2 to require the long distance carrier to make the
3 reimbursement.

4 The economic end result is exactly the same as it
5 would have been if they had said, well, you can send a
6 bill for 25 cents to the end user.

7 MR. FISHER: The economic result may be the same,
8 but with all due respect, Congress has not decreed that
9 the administrative system work this way.

10 JUSTICE SOUTER: It hasn't decreed
11 otherwise.

12 MR. FISHER: It hasn't decreed otherwise.
13 Congress essentially --

14 JUSTICE SOUTER: Isn't that the classic situation
15 in which agencies are supposed to figure out what to do?

16 MR. FISHER: Congress gave the FCC power in 276 to
17 come up with a plan. But this case, as the Ninth Circuit
18 decided it is not under 276, it is under 201, so the
19 question is whether failing to comply with the
20 administrative plan --

21 JUSTICE SOUTER: Well, as I understand it, it came
22 to the conclusion not that they were not acting under
23 276, but that, in fact, the cause of action has to refer
24 back to 201.

25 MR. FISHER: That's right. I'm sorry. It brings

1 us back to the question that you asked: Whether the
2 Ninth Circuit, or the FCC for that matter, can shoehorn
3 this into 201 as an unjust and unreasonable practice.

4 CHIEF JUSTICE ROBERTS: In your answer for why
5 they can't, Justice Souter's comment is a classic, this
6 is what administrative agencies do all the time in
7 typical rate regulations. They make a determination that
8 utility shareholders have to bear this cost. The rate
9 payers can bear this cost. And at the end of the day, it
10 is a determination that a rate is reasonable or
11 unreasonable.

12 And it seems to me that that is just what is
13 involved here. I don't know why their determination
14 about how to allocate who has to collect the rates, and
15 whether they can pass them on or not makes it an
16 impermissible interpretation of what's unjust or
17 unreasonable under 201.

18 MR. FISHER: Well, Chief Justice Roberts, the FCC
19 was unquestionably acting under 276 when it did this. So
20 the question is whether you can go back to 201. And as I
21 said, you need to start with section 206 and 207 because
22 we're in Federal court. And that says that violations of
23 the Act are remediable but not of regulations, in
24 contrast to numerous other sections.

25 So the question in asking whether it violates 201,

1 it has to be something more than simply the FCC's
2 regulation wasn't followed. And we need to ask ourselves
3 what kind of regulation is it.

4 JUSTICE SCALIA: Are rate making regulations
5 issued under 201, do they purport to be the FCC's
6 definition of what is just and reasonable compensation?

7 MR. FISHER: That's right. That's what I conceded
8 to Justice Souter earlier.

9 JUSTICE SCALIA: They are issued under 201.

10 MR. FISHER: I think largely they are.

11 JUSTICE SCALIA: So they are an interpretation of
12 the statutory language in 201.

13 MR. FISHER: That's right.

14 JUSTICE SCALIA: And you say this one is not.

15 MR. FISHER: That's right. And this Court can
16 look several places, but it can first look to
17 these -- this regulatory regime that was created, which
18 was always thought of as being triggered by section 276.
19 And then asking --

20 CHIEF JUSTICE ROBERTS: When you say it was always
21 thought of as being triggered by 276, did the FCC
22 reference 201 in issuing its determination that a failure
23 to follow these regulations was unjust and unreasonable?

24 MR. FISHER: In its order, it references 276 and
25 201. In the regulations -- I thought I was being asked

1 about the regulations -- it leads with 276.

2 JUSTICE KENNEDY: Suppose it issued the regulation
3 after notice and comment, and said -- violation of the
4 pay phone order is an unjust and unreasonable practice,
5 would the case be different?

6 MR. FISHER: No, it wouldn't be. And I think I
7 want to flesh out and make sure I've gotten across the
8 distinction between the rate making --

9 JUSTICE BREYER: You haven't. Maybe -- if this
10 doesn't clarify it. I think everyone has about the same
11 question. You have a bunch of pay phone operators. And
12 if the AT&T were charging them too much, I think everybody
13 would say that the FCC can say, hey, that's too much. You
14 owe them 2 cents a call refund, and everybody would agree
15 that the people who are hurt could go into court and bring
16 a lawsuit and get the 2 cents. Right under 47 U.S.C.
17 201(b).

18 Now, the only difference here seems to be that it
19 wasn't AT&T that was charging, in my example, too much.
20 They weren't paying what they owed. They should have
21 paid what they owed. And that, says the FCC, is, under
22 201(b), an unreasonable practice. And, therefore, go in
23 and collect it in court. Now, what is the answer to
24 that?

25 So far I have heard nothing that suggests

1 that this couldn't be an unreasonable practice under
2 201(b), which is just what the FCC said it was. Now,
3 what's wrong with what I said? I'm simply trying to
4 focus you upon what I think is the question that's
5 bothering some of us.

6 MR. FISHER: There are two things that are wrong
7 with that, Justice Breyer. The first thing is that in
8 contrast to ordinary rate making regulations, here, in
9 the absence of regulations, long distance providers would
10 owe pay phone operators zero. There's no reason why long
11 distance providers would give money to pay phone
12 operators.

13 The 24 cents here is to capture what callers
14 owe the pay phone operators. And so the FCC has come up
15 with an administrative system. But there's nothing
16 unjust or unreasonable about long distance providers not
17 giving money to pay phone operators before the regulatory
18 regime drops into place, whereas there is plenty that is
19 unjust and unreasonable about overcharging, for example
20 --

21 JUSTICE BREYER: So, my answer -- not answer, but
22 my characterization of what you have just said is that the
23 FCC did say it was an unreasonable practice. But in your
24 view, it was not an unreasonable practice not to pay.

25 And you want us to go back and second-guess, which

1 we could, if their view of unreasonable practice is
2 unreasonable itself. And I guess you would have to
3 overturn it. I didn't know that was what the case was
4 about, but are you saying now that that's the issue?
5 They said it was an unreasonable practice not to pay this
6 money, you think it is a reasonable practice not to pay
7 the money. There is a dispute. That's what we should
8 do.

9 MR. FISHER: No.

10 JUSTICE BREYER: Okay. Then what should we do?

11 MR. FISHER: Well, what you should do is reverse
12 the Ninth Circuit.

13 JUSTICE SCALIA: You say it would be a reasonable
14 practice not to pay the money, but for the existence of
15 the regulation.

16 MR. FISHER: That's exactly right.

17 JUSTICE BREYER: Just like AT&T when, in fact --
18 or any other utility that, in fact, runs into situations
19 every day of the week, where but for an FCC regulation,
20 they would not be overcharging, because they have a way
21 of doing it that isn't on its face unjust. But the FCC
22 writes some regulations and now it is unjust. So I guess
23 to take that argument would overturn, I guess, about a
24 hundred years of rate making law. Wouldn't it?

25 MR. FISHER: No, it wouldn't. Justice Scalia, I

1 think, has captained that position. And what we're
2 saying is the FCC can pick a fair rate once it is
3 something that long distance providers or any common
4 carrier ought to be compensating somebody for. But what
5 we are saying here is, this is a purely administrative
6 creature. And then it gets to the second reason why --

7 JUSTICE BREYER: So in other words, you are saying
8 -- I think it is common that the FCC might write some
9 accounting rules, for example. And they might say,
10 before these accounting rules, Mr. Bell's system in San
11 Francisco, you could charge people 8 cents a call. But
12 given the way we set up the accounting rules, we think
13 this month you have to do 7 cents in the first six
14 months, 7 cents, in the next six months, 9 cents. And
15 any deviation from that is unreasonable. And the company
16 does deviate. I would have always thought when they do
17 deviate, they are behaving unreasonably, and someone who
18 pays too much could go into court and get money back.

19 Am I wrong about that?

20 MR. FISHER: No, you would have been right,
21 Justice Breyer. We're not asking -- even the Louisiana
22 Public Service Commission is another example of
23 something. And that brings me -- I think I should go
24 back to what --

25 JUSTICE SCALIA: Before you go back, let's hear

1 about the accounting rules. What would they be issued
2 under? Would they be issued under 201?

3 MR. FISHER: They might. The question that we
4 would ask is whether it affects carriers' relationships
5 to their customers. Now, under Justice Breyer's
6 hypothetical, and this is the Louisiana Public Service
7 Commission --

8 JUSTICE SCALIA: It seems to me accounting rules
9 -- in order to decide what is just and reasonable, you
10 have to have accounting rules. So the accounting rules
11 fit very comfortably under 201.

12 MR. FISHER: I don't think we're disagreeing.
13 What I want to do is distinguish those from the case we
14 have here, and go back to Justice Souter's --

15 JUSTICE SOUTER: May I focus your return to me?
16 Because I want to take up with where your answer to
17 Justice Scalia left off. As I understand it, you were
18 saying that the rate in this case is unreasonable because
19 the party or the person who is responsible for the use of
20 the pay phone facilities is the person who's making the
21 call, not the long distance carrier.

22 My question to you is, isn't that simply a choice
23 of characterization? Because another way of looking at
24 it would be that the person who makes the call wants to
25 use long distance facilities to get to the person he

1 wants to talk to. And, therefore, the long distance
2 facility in every pay phone case is using the pay phone
3 in order to get the customer to what the long distance
4 facility provides.

5 Why then isn't it just as fair to characterize the
6 use of the pay phone here as for the benefit of the
7 carrier as for the benefit of the customer? And if that
8 is just as fair, doesn't that end the distinction that
9 you drew with Justice Scalia saying that it is not fair
10 in this case.

11 MR. FISHER: No, for two reasons. The first is --
12 I just want to be clear, we are not challenging the FCC's
13 authority to have created the regulatory regime it did
14 under 276. So the FCC could well have picked, as it did,
15 long distance providers to be on the ultimate hook here.

16 But the reason -- but the problem with saying that
17 -- I'm sorry. I lost the train of thought in your
18 question.

19 JUSTICE SOUTER: My question is simply, you can
20 say -- one way of looking at this transaction is, it is
21 the guy making the call who's using it. Another way is
22 to say the long distance facilities carrier is using it
23 to get the call to the long distance facility. If you
24 look at it in way B, doesn't your argument for
25 unreasonableness disappear?

1 MR. FISHER: Thank you. That would be an entirely
2 different case than the one we have here, Justice Souter.
3 The 24 cents that the respondent is seeking to recoup
4 here, if you go back and look at the regulatory system --
5 and that's what they are asking for, is the 24 cents that
6 the FCC regulations entitle us to -- was calculated -- in
7 fact, the D.C. Circuit made the FCC go through this
8 exercise three times to get it right. So to calculate
9 that 24 cents, it is purely a function of the amount of
10 money that the caller owes the pay phone operator.

11 JUSTICE SOUTER: What difference does that make?
12 What difference does that make? The use of the phone is
13 of a value of 24 cents. But the value of using the phone
14 is a value not only to the caller, but to the long
15 distance provider who couldn't provide anything to the
16 caller without the pay phone? Why isn't the alternative
17 characterization just as easy, regardless of how they get
18 to 24 cents?

19 MR. FISHER: I think another way to perhaps
20 characterize your position is, why is this like a
21 commission that they are seeking. And the reason why is
22 because that number may be very different than 24 cents.
23 If there was such a commission that could exist, it would
24 be far less. And the respondents are not seeking that
25 amount of money.

1 JUSTICE SOUTER: Excuse me, but aren't you arguing
2 with the 24 cents, as opposed to creating an argument
3 about what is the proper characterization of the
4 transaction?

5 MR. FISHER: I don't think so. All I'm saying is
6 if you started with trying to compensate pay phone
7 operators for the service they provide -- that you're
8 characterizing as the service they provide to long
9 distance carriers, you end up with a far different
10 number. Who knows what you would end up with. Probably
11 end up with zero. Because take an example of somebody
12 who rents a cell phone for the weekend. They might make
13 lots of long distance calls on the cell phone, but nobody
14 has ever thought that a long distance carrier ought to be
15 kicking back money, for example, to the store that rented
16 the cell phone to the customer over the weekend.

17 And I want to return, I think in Justice Breyer's
18 question --

19 JUSTICE SOUTER: The reason is that the store that
20 rents the cell phone is getting rental income from the
21 cell phone. And in the case of the pay phone, the pay
22 phone operator is going to get zero, unless there is some
23 such scheme as this.

24 MR. FISHER: Right, but then we're back to the
25 rental income question, and the question of whether it

1 would be unjust or unreasonable for long distance
2 providers, absent the regulations, to be the ones paying
3 that rental income.

4 And the answer, we submit, is no. And the problem
5 that I think we've gotten off on a couple times brings us
6 back, I think, to the assumption you asked me to make at
7 the beginning of the argument, that something is a
8 covered practice under the Act.

9 And so another way to understand the distinction
10 between the accounting rules, the rate making exercises
11 and all the rest in this case is that section 201(b) of
12 the Act doesn't cover everything in connection with a
13 communications service. It only covers certain practices
14 in connection. And the history, as well as the text and
15 structure, shows that it regulates common carriers acting
16 as such.

17 CHIEF JUSTICE ROBERTS: It doesn't cover certain
18 practices in connection. It covers all practices in
19 connection.

20 MR. FISHER: I think we agree with respondent, Mr.
21 Chief Justice, that in looking at 201(b), you have the
22 word such communication practices. And to understand
23 what that is referring to, you look back up at 201(a) and
24 see the universe. Now, the beginning of 201(a) is what
25 we colloquially call the carrier customer section of the

1 Act. And that's the core of 201(b), which says that when
2 a common carrier is providing service, it needs to act
3 justly and reasonably. Here -- and with accounting and
4 rate making and all the rest, those are things that
5 affect rates and service to customers.

6 What we have in this case is something very
7 different. This is a carrier-carrier relationship. So
8 you need to look somewhere else. And what respondent
9 says is you look to the end of 201(a), which talks about
10 physical interconnections between carriers. But the
11 problem with that argument, and the reason why this falls
12 outside 201(b), even if it is somehow unjust and
13 unreasonable, is that the carrier-carrier relationships
14 are governed only when the FCC has ordered physical
15 interconnection.

16 CHIEF JUSTICE ROBERTS: So you are saying that,
17 putting aside 276, it would clearly be impermissible for
18 the FCC to say one way that long distance carriers
19 provide service to their customers is when those
20 customers use pay phones; and, therefore, we're setting
21 up this rate regime in connection with that service. You
22 would say that would be outside the scope of 201(a)?

23 MR. FISHER: As we're still talking generically, I
24 don't think it necessarily would be. Because it could
25 regulate the relationship between long distance providers

1 and their customers. I mean, that's the core of what 201
2 is about. It's about how much they can charge, what kind
3 of practices they can have in relationship to their
4 customers. But here we're not talking about a long
5 distance provider that is a common carrier in
6 relationship to its customers or in relation to its rates
7 and practices.

8 JUSTICE BREYER: That's actually -- that's, I
9 think, your strong -- to me that was the strongest
10 argument. When I finished reading it, I thought, well,
11 so what. You know, I mean, can you see why I thought
12 that? I mean, today's rule is different. It is true
13 that you don't have simply a single telephone company
14 providing service ultimately directly to the customer.
15 You have everything mixed up. And there are a lot of
16 inter-carrier things. Language covers it. Purpose
17 covers it. Facts and circumstances change.

18 MR. FISHER: We submit it is a not a "so what,"
19 Justice Breyer. Because section 201(b) is broad, but
20 it's not all-encompassing. And Congress plenty of times
21 in section 276, and in lots of other sections of the
22 Communications Act, has responded to modern necessity by
23 giving the FCC expanded jurisdiction, just as it did, as
24 I said here, in section 276.

25 But our core position here is that when Congress

1 expands the FCC's authority, and it doesn't create a
2 concomitant Federal right of action along with it, it is
3 telling the FCC to handle these things administratively,
4 use its expertise, craft regulations and enforce them
5 accordingly.

6 JUSTICE STEVENS: Mr. Fisher, can I go back to the
7 first question I asked you? Would the FCC have had
8 authority to create an administrative remedy that had a
9 fee shifting provision in it?

10 MR. FISHER: The FCC might have that authority.
11 Section 154(i), as well as other sections in the Act,
12 give the Commission broad authority in crafting its
13 administrative enforcement regimes. I haven't focused on
14 that exact question, but it might well be able to say
15 that in order to have this properly enforced, we need to
16 have fee shifting.

17 JUSTICE STEVENS: It could certainly impose
18 penalties of some kind.

19 MR. FISHER: Yes, it could, and the FCC could
20 double fine -- the FCC could do lots of things. That's
21 our very purpose, is that the FCC ought to be the single
22 forum deciding what kind of an enforcement mechanism is
23 best, not leaving it to Federal courts across the
24 country. And as Ninth Circuit invites, state court
25 rulings across the country with varying rules.

1 If there are no more questions I'll reserve the
2 remainder of my time.

3 CHIEF JUSTICE ROBERTS: Thank you, Mr. Fisher.
4 Mr. Englert?

5 ORAL ARGUMENT OF ROY T. ENGLERT, JR.,
6 ON BEHALF OF THE RESPONDENT

7 MR. ENGLERT: Thank you, Mr. Chief Justice, and
8 may it please the Court:

9 It is not particularly unusual for the grants of
10 authority in the FCC -- to the FCC throughout the
11 Communications Act to be enforceable through the
12 provisions of section 201(b) barring unjust or
13 unreasonable charges, classifications, rates, or
14 practices.

15 Justice Scalia asked a question during Mr.
16 Fisher's argument about, what about the accounting rules?
17 Would they be prescribed under section 201? They would
18 be prescribed under section 220, which is the provision
19 of the Act that governs accounting. And they would also
20 be prescribed under the last sentence of section 201,
21 which is the general authority given to the FCC to
22 promulgate all of its rules.

23 But nothing in those facts would keep a violation
24 of those rules from being enforced as an unjust or
25 unreasonable practice under Section 201(b).

1 JUSTICE SCALIA: What can't -- what can't be
2 sucked in under section 201? I mean, once the FCC issues
3 a regulation, it's easy to say that any violation of that
4 regulation is unjust. And that's what's happened here.
5 And this just makes a farce of the provision that says
6 the only private causes of action are for violations of
7 the statute and not for violations of the regulation.

8 It seems to me if this thing, 276, can get sucked
9 into 201 simply by reason of the fact that failing to
10 obey an FCC regulation is unjust, that provision is a
11 nullity.

12 MR. ENGLERT: Well, Your Honor, first of all, the
13 FCC has never argued, and we have never argued that all
14 FCC regulations are enforceable through a private right
15 of action. I mean, to give an example, as --

16 JUSTICE SCALIA: No, I'm saying you'd have to
17 argue that if the theory you're propounding for this case
18 is correct. Violation of an FCC regulation is unjust.
19 Failing to comply with an FCC regulation is unjust.

20 MR. ENGLERT: No, no, Your Honor. The phrase
21 unjust or unreasonable is a classic phrase delegating to
22 the administrative agency the authority to make the
23 determinations in the first instance of what's just and
24 reasonable. If, for example, there were a violation of
25 the regulation forbidding giving credits to political

1 candidates, the FCC could decide in the first instance
2 whether the violation of that regulation rises to the
3 order of unjust or unreasonable.

4 JUSTICE SCALIA: So can -- every FCC regulation
5 can be enforceable by private action? All the FCC has to
6 say is that violation of this regulation is unjust.

7 MR. ENGLERT: No, Your Honor.

8 JUSTICE SCALIA: No?

9 MR. ENGLERT: There are also examples of things
10 that fall outside of charges, classification, rates or
11 practices. There are examples in the case law. There
12 are old ICC cases in which providing a particular type of
13 boxcar was deemed not to be a charge, classification,
14 rate -- held not to be a charge, classification, rate or
15 practice.

16 There is a recent D.C. Circuit case involving an
17 attempt to dictate, in the FERC context, to an energy
18 company who can be on its board of directors.

19 JUSTICE SCALIA: But at least -- at least any FCC
20 regulations relating to charges, practices -- and you
21 want to interpret practices very broadly --
22 classifications, and regulations for and in connection
23 with communication service, all of those regulations can
24 be sued upon in Federal court with all the diverse and
25 contradictory rulings that that will produce, so long as

1 the FCC says that the failure to obey this regulation is,
2 in our view, unjust.

3 MR. ENGLERT: Well, Your Honor, let's start with
4 statutory text. Section 206 says that there is a damages
5 action for anything in this Act declared to be unlawful.
6 Section 201(b) says unjust or unreasonable
7 classifications, practices, et cetera, are declared to be
8 unlawful. So we have a very precise match in statutory
9 text between 201(b) and 206.

10 Now, what Mr. Fisher's argument amounts to is to
11 say that if it is covered in a regulation, it is exempted
12 from being called an unjust or unreasonable charge,
13 classification, practice, et cetera, because that would
14 allow the FCC to enforce too much. But if we start with
15 the text Congress enacted, there is a precise match
16 between 201(b) and 206.

17 And to say that that which the FCC hasn't
18 regulated is more subject to judicial review --

19 JUSTICE SCALIA: I don't think he's saying that.
20 I don't think he's saying that if it is covered under
21 regulation, it can't be unjust. Some regulations do
22 relate to justness and reasonableness, but not 276.
23 I think what he's saying is 276 established a scheme.
24 It didn't have to be this scheme. It could have been
25 some other scheme. Nothing in the nature of things says

1 that the long distance carrier has to be the one liable
2 for this.

3 It rather was simply imposed by the FCC. That's
4 fine. But to say that it would be unjust for them not to
5 do that is just unreal, unless you're going to allow any
6 violation of any FCC regulation to be unjust.

7 MR. ENGLERT: Your Honor, our position doesn't
8 require us to argue that it would have been unjust for
9 the FCC to adopt some other scheme. Our position is that
10 once the scheme is in place, it is unjust to depart from
11 that scheme in the way Global Crossing did, just as once
12 a scheme of rate regulation is in place, even though
13 there could be many different schemes of rate regulation,
14 it may be unjust or unreasonable to charge a higher rate
15 than that.

16 JUSTICE SCALIA: But the rate regulation is -- is
17 established in order to determine what reasonableness and
18 justness requires. And 276 is something quite different.

19 MR. ENGLERT: I respectfully disagree, Your Honor.
20 276 is, asks -- was a delegation by Congress to the
21 agency to fill in the details of a plan to make sure that
22 pay phone service providers were fairly compensated, a
23 phrase not very different from just and reasonable, for
24 each and every completed interstate and intrastate pay
25 phone call. They really fit quite nicely together as

1 opposed to being in tension with one another.

2 JUSTICE BREYER: Is it possible -- I was worried
3 somewhat about, I think, the problem Justice Scalia
4 raised, that old regulations become unjust and
5 unreasonable. And then I thought, no, but tell me if
6 this is right. That they're going to fall within 201(b)
7 only if a violation is unjust and unreasonable.

8 Now, we could say, and moreover, the FCC has to
9 find that a violation of these rates is unjust and
10 unreasonable, that is, it has to focus on it, make that
11 determination. And then, of course, that determination
12 has to be a reasonable interpretation. In other words,
13 it can't just call anything unjust and unreasonable --

14 MR. ENGLERT: That's right. The usual --

15 JUSTICE BREYER: And it has to focus on the fact
16 that their doing so will create this private remedy in
17 the courts.

18 MR. ENGLERT: Well, Your Honor --

19 JUSTICE BREYER: That that -- if you have that
20 tough -- which I haven't seen anywhere, but I mean, if
21 you had that tough a requirement, so they actually have
22 to focus on it, it would tend to minimize the problem of
23 a thousand different actions in ten thousand different
24 courts and a big mess.

25 But I mean, how much is written into those words

1 unjust and unreasonable? I'm certain you can't squeeze
2 any rate -- it is not the case that any and every
3 regulation can be -- fall within.

4 MR. ENGLERT: No, that's right. The usual Chevron
5 limitations apply. And in your question, Justice Breyer,
6 you added to the usual Chevron limitations that the FCC
7 has to focus on --

8 JUSTICE BREYER: Yeah --

9 MR. ENGLERT: Well, that's fine. Here the FCC did
10 focus on it and is criticized for having focused on the
11 consequences for judicial action.

12 CHIEF JUSTICE ROBERTS: Well, but reasonably
13 criticized for it. I would have thought your answer
14 would be unjust or unreasonable has, for generations,
15 been given a very expansive reading. And you don't need
16 to say that the FCC has to do what typically I would have
17 thought was a job for a court, which is to determine
18 whether there's a private right of action to bring its
19 action within a boilerplate term like unjust or
20 unreasonable.

21 I would have thought the contact point was what I
22 was talking about with Mr. Fisher earlier, which is
23 whether or not this is such communication service under
24 201(a), which is -- which is, again, I suppose, something
25 that the agency gets deference on. But it would seem to

1 me, that's where the limitation would come.

2 MR. ENGLERT: Mr. Chief Justice, let me address
3 the interplay between 201(b) and 201(a), because Mr.
4 Fisher has simply misunderstood our position.

5 We cited the second half of section 201(a) not to
6 say it applies of its own force here, but to say that it
7 disproves the contention that the communications services
8 referred to in the phrase such communications service in
9 201(b) have to be limited to carrier-customer relations,
10 because 201(a) isn't limited to carrier-customer
11 relations.

12 Yes, all 201(a) does of its own force is allow the
13 prescribing of through routes and interconnections. But
14 there is no possible way to read 201(b) as limited to
15 carrier-carrier communications in light of the full
16 breadth of practices covered by 201(b). So that's the
17 reason to cite 201(a) is simply to disprove Mr. Fisher's
18 contention about the limits on 201(b).

19 The phrase such communications service is actually
20 used in 201(a) and in 201(b), and the antecedent in the
21 first few words of 201(a), the such communications
22 service, is interstate or foreign communication by wire
23 or radio. So 201(b) isn't necessarily restricted to
24 either carrier-carrier or carrier-customer relations, but
25 such communication service relates back to all

1 communication by wire or radio, which is what we have
2 here.

3 JUSTICE SCALIA: Well, but wait. Wait.
4 Wait. It says to furnish such communications service, is
5 what (a) says. And they don't furnish such
6 communications service to your client.

7 MR. ENGLERT: No, but -- well, that's debatable,
8 but what 201(b) refers to, in any event, is in connection
9 with --

10 JUSTICE SCALIA: Such communications service.

11 MR. ENGLERT: Right.

12 JUSTICE SCALIA: And I would think that would mean
13 such communications service that was furnished.

14 MR. ENGLERT: Well, they have furnished a
15 communications service to a customer, not to us, but to a
16 customer. So again, this is connected with that
17 communications service. And as the colloquy with Justice
18 Souter earlier touched on, the caller pays sooner or
19 later.

20 Under the FCC's regulatory scheme, and in part
21 because of the prohibition on advanced caller payment in
22 226(e)(2), what happens is the long distance carrier gets
23 the money, and they're saying there's no private right of
24 action to make them give it back. In other words, the
25 world would look quite different without a regulatory

1 scheme, but it would not be a regulatory scheme in which
2 they get all the money they are currently purporting to
3 keep.

4 Now, Mr. Chief Justice, you also asked a question
5 about the flash point on whether the FCC was improperly
6 or suspiciously commenting on the scope of the private
7 right of action as opposed to interpreting a substantive
8 provision. The private right of action provisions are
9 206 through 208, the provisions that let the complainant
10 go to either court or the Commission.

11 The FCC said nothing controversial about the scope
12 of 206 through 208. The controversy is over the scope of
13 201(b), which is a substantive provision. But once you
14 have something brought within the scope of 201(b), after
15 the application of traditional tools of statutory
16 construction with Chevron deference, the private right of
17 action follows automatically under 206 and 207.

18 It is not a matter of the FCC reaching out to say,
19 we are going to create a private right of action. It is
20 a matter of the FCC construing a substantive term with
21 consequences for a private right of action.

22 CHIEF JUSTICE ROBERTS: Well, I think that's
23 right, but that's also why I guess I don't regard it as
24 particularly helpful that the FCC opines on what the
25 consequences of its determination that something is

1 unjust or unreasonable under the statute are, with
2 respect to a private right of action.

3 MR. ENGLERT: Well, it may not be particularly
4 helpful, but it is surely not particularly harmful. And
5 they did have a reason --

6 JUSTICE SCALIA: Well, except that it is none of
7 their business.

8 MR. ENGLERT: If they were trying to construe --

9 JUSTICE SCALIA: We --

10 MR. ENGLERT: -- 206 through 208, Your Honor, I
11 might agree. But they construed 201(b) and commented on
12 the consequence. And this is quite important, that it is
13 their business, because 208 is the provision under which
14 each and every one of those Commission proceedings cited
15 in the Sprint brief, which Mr. Fisher alluded to, has
16 proceeded before the agency. 208, just like 206,
17 requires a violation of the Act, so it is very much their
18 business to decide whether these pay phone controversies
19 state violations of the Act. If they don't, the
20 Commission has absolutely no power to proceed under 208,
21 which is the only provision under which any
22 administrative proceeding has ever gone forward.

23 There are some arguments made here that they
24 clearly have the authority to proceed administratively
25 even if you can't go to court, but Mr. Fisher hasn't

1 identified the source of that authority. And the sources
2 identified in the brief are section 4(i), which has been
3 problematic, and others -- and other sections on which
4 the FCC has never relied on in this setting, and some
5 kind of divination of an action within Section 276
6 itself.

7 The question was put at one point to Mr. Fisher,
8 could the FCC mandate fee-shifting as part of this
9 administrative remedy it's going to create. Well, if you
10 read 276 broadly, it's giving the Commission great powers
11 to create administrative remedies, notwithstanding 208,
12 which was supposed to be the administrative provision,
13 then maybe anything goes. But we're getting awfully far
14 from the statute that Congress wrote and giving the FCC
15 awfully expansive powers to construe 276, while also
16 denying the FCC rather mundane powers to construe rather
17 ordinary phrases of administrative law, "unjust or
18 unreasonable," in 201(b).

19 Now, with respect to the question of whether this
20 is a practice in connection with a communications
21 service, Mr. Fisher argues strenuously that it is not.

22 JUSTICE STEVENS: Let me just be sure I understand
23 your argument on 208. You're saying that 208, like the
24 earlier provision of the statute, requires a violation of
25 the statute, not just regulations, in order for there to

1 be an administrative remedy.

2 MR. ENGLERT: Yes, Justice Stevens, and section
3 207 expressly gives the complainant a choice of forums.

4 JUSTICE STEVENS: So the same statutory
5 requirement for the remedy that your opponent challenges
6 is the one he acknowledges is available.

7 MR. ENGLERT: That's correct, and in fact, Global
8 Crossing -- Global Crossing went so far as to argue
9 before the Ninth Circuit that there is no administrative
10 remedy, that there's simply nothing to do except get
11 fines under sections 502 and 503, and has reversed its
12 position before this Court.

13 JUSTICE SCALIA: Well, you should be arguing,
14 then, that we should give Chevron deference to the
15 Commission's interpretation of Section 208. And once we
16 do that, if 208 governs this thing, then so does 206.

17 MR. ENGLERT: I'm happy to make that argument.

18 JUSTICE SCALIA: I thought you should be.

19 MR. ENGLERT: With respect to the question whether
20 practices are limited to carrier-customer relations, I've
21 already touched on that by talking about the interplay
22 between 201(a) and 201(b). But there's another angle of
23 approach for that issue, which is that in the Louisiana
24 Service -- Louisiana Public Service Commission case, this
25 Court was asked to draw the inference, just as it has

1 been in this Court, from other provisions in the
2 Communications Act, that those phrases always refer to
3 carrier-customer relations.

4 And the Court said, no, that phrase can also refer
5 to depreciation rules, so it's not limited to
6 carrier-customer relations, the inference from other
7 provisions of the Act doesn't flow. And the reason is
8 there are words of limitation when those words, "charges,
9 classifications, rates or practices" are used in those
10 other sections that make it clear that they apply only to
11 tariffed services. You find no such words of limitation
12 in 201(a) and 201(b) -- or in 201(b), excuse me.

13 Now, there remains the argument that there's a
14 mismatch between section 201 and the relevant regulations
15 because the regulations apply to intrastate as well as
16 interstate calls, and section 201 applies to interstate
17 or foreign communications.

18 That argument appears for the very first time in
19 merits briefing in this Court. It wasn't made below. It
20 wasn't made in the cert petition. It wasn't made to the
21 agency. And that's a problem, because the limits of the
22 FCC's ability to regulate jurisdictionally mixed
23 communications depend on factual determinations, factual
24 determinations neither the agency nor even the lower
25 courts have ever been given a chance to make.

1 But had this issue been raised in a timely
2 fashion, I suggest that it would have been appropriate
3 for the FCC to reach intrastate as well as interstate
4 communications because long distance -- dial-around calls
5 are overwhelmingly long distance, overwhelmingly
6 interstate, and it is difficult to sort out which calls
7 are which. In fact, the seven years of rulemaking the
8 FCC underwent in this case largely were because of the
9 difficulties of keeping track of particular pay phone
10 calls.

11 CHIEF JUSTICE ROBERTS: I saw that argument. I
12 have to say I don't understand it. Why is it so
13 difficult? I get a bill every month that easily sorts
14 out which are interstate and which are intrastate.

15 MR. ENGLERT: Sorting one call from one carrier
16 that has a relationship with you is not difficult, or
17 sorting 100 calls from a carrier that has a relationship
18 with you is not difficult.

19 But when you go from a PSP to an inter-exchange
20 carrier to a switch-based reseller, matching up the
21 information of all three is -- has proven, in practice,
22 to be quite difficult. And it's especially difficult in
23 an era in which you can't just tell by area codes, for
24 example, whether something is interstate. If I dial 202
25 to 202, I may be dialing someone's cell phone out of

1 state.

2 Now, the judgment below could be explained
3 on the alternative ground that a violation of the
4 regulations constitutes a violation of section 276.
5 Before I even get to the substantive discussion, let me
6 respond to the absolutely groundless claim that that
7 argument has been abandoned. Global Crossing cites a
8 bunch of cases involving section 1291 appeals in which
9 people didn't appeal a particular order after final
10 judgment, and says that's an abandonment of the claim.

11 That's both correct and irrelevant. This is
12 a 1292(b) appeal and there is no final judgment on any
13 claim in this case, certainly not on the 276 claim, so my
14 client certainly hasn't abandoned it.

15 My client was also a party to Greene and lost
16 Greene and has argued the merits of the section 276
17 position all along. On the merits, section 276 contains
18 rights-creating language that creates a concrete monetary
19 entitlement, focuses on the party benefitted, and does
20 not have an aggregate focus. Global Closing doesn't even
21 try to defend the Ninth and D.C. Circuits' reasoning that
22 the statute does not contain rights-creating language.

23 That leaves the tricky question whether a
24 violation of the regs can be deemed a violation of the
25 Act itself when Congress specified only the right, but

1 didn't specify what fair compensation was, and didn't
2 specify who had to pay the compensation.

3 In that respect, I think *Alexander v. Sandoval*,
4 though it's been cited against us repeatedly, is actually
5 helpful to our position. That case says it's meaningless
6 talk about a violation of the regs separate from a
7 violation of the Act, and that a Congress that intends an
8 Act to be enforced intends the regulations filling out
9 the Act to be enforced.

10 I think the theory of *Chevron* itself is also
11 helpful to our position in this regard, because the point
12 of *Chevron* is that the use of broad language constitutes
13 an administrative -- a delegation of authority to the
14 administrative agency, not just to fill in details, but
15 to give definitive content to a statute whose direct
16 content is less than definitive.

17 So it is perfectly appropriate to talk about this
18 statute, section 276, and its rights-creating language as
19 ordering the FCC not just to create a plan, but ordering
20 the FCC to create a plan that has a particular goal such
21 that violation of that goal can be deemed a violation of
22 section 276 itself.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, Mr. Englert.

25 Mr. Feldman?

1 ORAL ARGUMENT OF JAMES A. FELDMAN
2 ON BEHALF OF THE UNITED STATES,
3 AS AMICUS CURIAE, SUPPORTING RESPONDENT

4 MR. FELDMAN: Mr. Chief Justice, and may it please
5 the Court:

6 There is no dispute in this case that under
7 sections 206 through 208 of the Communications Act, a
8 party damaged by any violation of the Communications Act
9 may bring an action either in Federal court or before the
10 Commission to obtain damages. The scope of the remedies
11 before the Commission under the kind of standard primary
12 provision of the Act that deals with damages, 208, and
13 207 mentions it as well, the scope of the action before
14 the Commission and before the court is exactly the same.

15 Now, because petitioner's -- therefore, if --
16 well, because petitioner's failure to pay fair
17 compensation to respondent was an unjust or unreasonable
18 practice --

19 JUSTICE STEVENS: Let me just ask this. Is it the
20 same with respect to fee-shifting?

21 MR. FELDMAN: No. The Act in 207 -- I believe
22 it's 207 -- specifically says that you may, the court may
23 award attorneys' fees in an action in court. It doesn't
24 provide that -- there's no similar provision for actions
25 before the Commission. But the scope of the kind of

1 thing that Congress decided that a complainant could
2 bring either to the Commission or to court is exactly the
3 same. There's no way to drive a wedge between them.

4 There are other provisions of the Act, as Mr.
5 Fisher said, where Congress specifically authorized the
6 Commission -- an action before the Commission for
7 damages. But those are -- those provisions which
8 Mr. Fisher cited are in section 226, which do not have to
9 do with common carriers. They have to do with automatic
10 dialing, with do-not-call lists, with things like that,
11 where the person who's violating it is definitely not the
12 -- never going to be a common carrier.

13 In those provisions, Congress found it necessary
14 to say, okay, we have to now give you the authority to
15 create a damage action.

16 But in other provisions, where you are dealing
17 with common carrier, 206 through 208 provides Congress's
18 determination of what the scope of a damage action should
19 be either before the Commission or before a court.

20 CHIEF JUSTICE ROBERTS: Do you have a position on
21 whether or not Chevron deference is owed to the
22 Commission's determination of whether or not their action
23 creates or gives rise to a right of action?

24 MR. FELDMAN: I think that --

25 CHIEF JUSTICE ROBERTS: There are two different,

1 it seems to me, two different Chevron questions. The one
2 is the deference on its interpretation of what's unjust
3 and unreasonable. The other is the question of whether
4 or not they have anything to say about whether that means
5 there is a private right of action in court.

6 MR. FELDMAN: I think that -- I guess we don't
7 have a position on whether 276, independent of 201, would
8 be sufficient to have a prior right of action under 206
9 through 208. But as for 201(b), once -- the FCC does
10 certainly gets deference, has gotten deference for a
11 hundred years for its determination of what is an unjust
12 and unreasonable practice.

13 CHIEF JUSTICE ROBERTS: But it's never gotten
14 deference, at least I guess from this Court, on whether
15 or not there is or is not a right -- whether there is a
16 right of action to enforce its regulations.

17 MR. FELDMAN: No, and I don't think the FCC here
18 is claiming that there's a right of action to enforce its
19 regulations.

20 JUSTICE SCALIA: Well, but they're certainly
21 entitled to deference as to whether an administrative
22 action can be brought under 208.

23 MR. FELDMAN: That's correct, and that's why under
24 --

25 JUSTICE SCALIA: Once you say that it can, then a

1 court action can be brought under 206.

2 MR. FELDMAN: That's correct. That's correct.

3 JUSTICE SCALIA: So you think we don't owe them
4 deference for 206, but we do for 208. And if you give
5 deference for 208, 206 automatically decides itself.

6 MR. FELDMAN: Right. But 208, like 206 -- maybe
7 I'm not understanding the question. Both provisions
8 address only violations of the statute.

9 JUSTICE SCALIA: Yes.

10 MR. FELDMAN: So in order for the FCC to decide
11 that there's an action either before the agency or the
12 court, it has to identify a violation of the statute.
13 Here it's identified 201(b) as being the provision that's
14 violated. It's absolutely standard for a hundred years
15 that -- I mean, Mr. Fisher says, well, you can't look at
16 201(b) and decide who is supposed to pay and how much
17 they're supposed to pay. That is absolutely standard
18 from the very beginning of the Interstate Commerce Act,
19 that you can't look at the words "just and reasonable"
20 and decide whether a rate was just and reasonable or the
21 practices that a carrier is using are just and
22 reasonable. In fact, the whole --

23 JUSTICE STEVENS: Is your position -- I want to be
24 sure I understand you. Your position on the two
25 different questions that the Chief asked you is, they get

1 deference on question one. And with respect to question
2 two, it follows from the plain text of the statute.

3 MR. FELDMAN: That's correct, that's correct. I
4 would add also, with respect to the Commission's
5 determination about what is just and reasonable, it was
6 not just a question of saying that a violation of the
7 regulations is just and reasonable. The Commission was
8 charged here with the responsibility for adopting a
9 compensation scheme that would provide for fair
10 compensation for each pay phone operator for each and
11 every call. And it spent a number of years and a number
12 of different attempts working out what is a fair
13 compensation.

14 I would submit that all of that reasoning about
15 what is a fair compensation scheme is also reasoning why
16 it's unjust and unreasonable for a carrier not to pay the
17 compensation. It's not just simply a question of an ipse
18 dixit, it's a question of years of rulemaking and working
19 out what the scheme should be, so it's fair.

20 Once it did that, it didn't require a lot of
21 explanation for why a failure to pay fair compensation
22 that had been worked out over this period of time, a
23 failure to pay that was unjust and unreasonable.

24 JUSTICE GINSBURG: Are you making the point that
25 Chief Judge Ginsburg made in the D.C. Circuit that it is

1 necessarily unjust and unreasonable to refuse to pay a
2 charge that is fair and reasonable?

3 MR. FELDMAN: Yes. I'm really expanding on that
4 point, that it didn't -- the FCC has always gotten
5 deference for what -- determining what is unjust and
6 unreasonable under the Act. And it didn't require a
7 great deal of explanation. The FCC's explanation here
8 was more than adequate in light of its years of
9 explanation about why this -- this scheme with these
10 rates and these carriers and the primary economic
11 beneficiary being the one who pays. All of that were
12 reasons why this was fair compensation.

13 Once it decided all of that, it didn't take much
14 to say that a failure to pay fair compensation is unjust
15 and unreasonable. That was adequately explained and
16 didn't require a huge additional amount of explanation.

17 JUSTICE STEVENS: What -- sorry, go ahead.

18 CHIEF JUSTICE ROBERTS: So you would have a
19 different position here if 276 said something like, we
20 think there ought to be more pay phones; in order to
21 promote investment in pay phones, we're going to have
22 this scheme. In other words, it has nothing to do with
23 whether it's fair or not, it's a subsidy. Then you'd say
24 that could be something that's not covered by the "just
25 and reasonable" provision?

1 MR. FELDMAN: I think in that case also, I would
2 probably be here arguing that maybe if the FCC had
3 determined that it's necessary, for whatever regulations
4 they came up with under that scheme, in order for the Act
5 to function correctly, that they have to be complied
6 with. I think I would also argue that that was unjust
7 and unreasonable.

8 But this case, if the question is, did the
9 FCC adequately explain what it did here, I think that all
10 of the years of explanation of why something is fair are
11 also reasons why it was unjust and unreasonable not to
12 pay the compensation.

13 JUSTICE GINSBURG: Are there regulations, FCC
14 regulations, the violation of which would not be unfair
15 and unreasonable?

16 MR. FELDMAN: I think there probably are. Mr.
17 Englert mentioned a couple. I mean, there's probably
18 numerous ones that wouldn't be. And in fact, the
19 question about most FCC action, or at least a lot of FCC
20 action, regulations, adjudications, and so on, most of
21 them have to do with carriers' obligations, and most of
22 them are things that have to do with what's unjust and
23 unreasonable under the Act. And they've been enforced
24 for years, in the -- you know, from the very early cases
25 under the Interstate Commerce Act.

1 Mr. Fisher also suggested that there's a
2 difficulty with numerous district courts deciding these
3 issues as opposed to the FCC. Well, I would suggest that
4 Congress decided that these kinds of actions can go
5 either to district court or to the FCC. And in fact, by
6 making damages actions, the scope of damages actions, as
7 opposed to other remedies, co-extensive, did anticipate
8 that there would be that result. The primary
9 jurisdiction --

10 JUSTICE SCALIA: Depending upon how broadly you
11 think Congress intends regulations to be sucked into the
12 terms of this statute. I mean, your interpretation means
13 Sandoval really didn't say a heck of a lot.

14 MR. FELDMAN: I don't think that that's correct.
15 It means that in the context of a statute that gives the
16 agency authority -- that prohibits unjust and
17 unreasonable action, which was not the case in
18 Sandoval --

19 JUSTICE SCALIA: Yeah, but you could say any
20 violation of a regulation is unjust.

21 MR. FELDMAN: No. I think it is possible that the
22 FCC could determine that any violation of a regulation is
23 unjust, and the FCC is entitled to deference for its
24 determinations about what is unjust and unreasonable,
25 that's been --

1 JUSTICE SCALIA: So Sandoval doesn't mean a heck
2 of a lot. All the FCC has to say is, we think violation
3 of this regulation is unjust.

4 MR. FELDMAN: No. I think the FCC's determination
5 has to be reasonable under the ordinary types of Chevron
6 standards. But, in fact, when you look at questions of
7 what's just and unreasonable over the years, it is -- it
8 has always been the case that the agency entrusted with
9 determining that and getting the communications system
10 working or getting common carrier systems -- common
11 carriers to fulfill their obligations, does have a lot of
12 leeway in determining what is unjust and unreasonable in
13 that context.

14 Thank you.

15 THE COURT: Thank you, Mr. Feldman.

16 Mr. Fisher, you have three minutes remaining.

17 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

18 ON BEHALF OF THE PETITIONER

19 MR. FISHER: Thank you. Let me begin, Mr. Chief
20 Justice, with your question about whether the FCC can
21 opine on remedies. All you need to do is look to what
22 the FCC was telling everybody it was deciding in these
23 order proceedings. It was deciding, and asked for notice
24 and comment, on whether PSPs have a remedy for violations
25 of the pay phone regulations. That is cited everywhere

1 in the briefs. It never asked for notice and comments,
2 or considered whether failure to pay under the
3 regulations is a violation of 201(b).

4 So the question this Court needs to ask itself is
5 when the FCC, by its own acknowledgment, until now, is
6 simply opining on the presence of a Federal court remedy,
7 whether it gets deference simply because it hangs the
8 hook on a substantive provision of the statute.

9 Now, there are three problems with what the FCC
10 has done in construing section 201. The first is that
11 this is not a covered practice, because I want to make
12 clear our position, it's that the FCC has plenty of
13 authority with respect to carrier-customer relationships,
14 but not with respect to carrier-supplier relationships.
15 And that's what we have here.

16 On unjust and unreasonable, I think we need to
17 unpack two separate questions. One is whether the rate
18 the FCC chose is reasonable, whether the amount of money
19 that it said needs to be put into pay phone operators'
20 pockets is a fair and reasonable choice. We have no
21 dispute about that. And we think that in and of itself
22 could generate deference.

23 But the FCC's determination to put the payment
24 obligation on long distance carriers simply can't be
25 shoehorned into the unjust and unreasonable phrase in

1 201(b), because if that's -- the only reason why
2 anything, us failing to pay the money, would be because
3 of the regulations.

4 And you hear it again and again in their argument,
5 the FCC having concluded that long distance companies are
6 the ones that pay, the failure to pay is unjust and
7 unreasonable. There's no way to get there without the
8 regulations, and that's what distinguishes --

9 CHIEF JUSTICE ROBERTS: That's not true. You can
10 say that this is a way you make a lot of money from your
11 customers that you wouldn't otherwise make, because if
12 there wasn't a pay phone there, they wouldn't be able to
13 use your service.

14 MR. FISHER: The FCC might have said that, but as
15 I said to Justice Souter, that would be a very different
16 proceeding and a very different scheme than we have here,
17 and a very different dollar figure or cent figure that
18 the FCC might have come up with when it was trying to
19 encapsulate that figure, which we think is zero, but
20 under your reasoning may be something very small. But
21 that would be a very different case.

22 Two more things. One is, on the jurisdictional
23 mismatch question, Mr. Chief Justice, you are exactly
24 right. It is not hard -- there are plenty of hard things
25 in this case, but figuring out whether a call is

1 interstate or intrastate is not one of them.

2 All you need to know is where the call originated from,
3 and the number that was dialed, and pay phone operators
4 have that information.

5 CHIEF JUSTICE ROBERTS: What about the cell phone
6 example?

7 MR. FISHER: This is a pay phone case. So all you
8 need to know is the cell phone number and
9 that --

10 CHIEF JUSTICE ROBERTS: But you don't know, the
11 cell phone holder may be right next to the pay phone or
12 he may be across the country.

13 MR. FISHER: I think it still constitutes a long
14 distance call, depending on where the cell phone owner
15 lives. And that's still an easy thing to figure out,
16 where the area code is.

17 Finally, Justice Stevens, you asked a question
18 about the co-extensive nature of the remedies under 206
19 and 208. We don't dispute that the statute itself is
20 co-extensive. What we're saying is that 276 gives the
21 FCC more than ample authority to do what it's doing.
22 Nobody has denied that, and so we think that that's the
23 place to look for the FCC to craft the arrangement under
24 Southwestern Cable. Combined with section 154(i), the
25 FCC would have ample authority to do that.

1 CHIEF JUSTICE ROBERTS: Thank you, Mr. Fisher.

2 The case is submitted.

3 (Whereupon, at 12:01 p.m., the case in the

4 above-entitled matter was submitted.)

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