

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 81-2332

**TITLE** NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, ETC.  
Petitioner v. CHESAPEAKE AND POTOMAC TELEPHONE  
COMPANY OF VIRGINIA, et al.

**PLACE** Washington, D. C.

**DATE** October 3, 1983

**PAGES** 1 thru 42



(202) 628-9300  
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WASHINGTON, D.C. 20001

1           IN THE SUPREME COURT OF THE UNITED STATES

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3 NORFOLK REDEVELOPMENT AND HOUSING   :

4   AUTHORITY, ETC.,                   :

5                                   Petitioner       :

6                   v.                               :   No. 81-2332

7 CHESAPEAKE AND POTOMAC TELEPHONE   :

8   COMPANY OF VIRGINIA, ET AL.       :

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10                                   Washington, D.C.

11                                   Monday, October 3, 1983

12           The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States  
14 at 2:01 p.m..

15 APPEARANCES:

16 FRANCIS N. CRENSHAW, ESQ., Norfolk, Virginia; on behalf  
17 of the Petitioner.

18 JOSHUA I. SCHWARTZ, ESQ., Office of Solicitor General,  
19 Department of Justice, Washington, D.C.; on behalf of  
20 federal respondent in support of petitioner.

21 JOSEPH L. KELLY, ESQ., Norfolk, Virginia; on behalf of  
22 Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Crenshaw, I think  
you may proceed whenever you are ready.

ORAL ARGUMENT OF FRANCIS N. CRENSHAW, ESQ.,  
ON BEHALF OF PETITIONER

MR. CRENSHAW: Mr. Chief Justice, and may it  
please the Court:

The question in this case is whether the  
Respondent telephone company is eligible under the terms  
of the Uniform Relocation Assistance and Real Properties  
Acquisition Policies Act of 1970 to be reimbursed for  
its costs when it disconnects transmission lines beneath  
certain streets in the City of Norfolk, Virginia and  
rebuilds replacement lines under new streets.

The claim was submitted to the Petitioner,  
Redevelopment Authority, and was denied because it felt  
that the common law requires a utility company to move  
its transmission lines at its expense, and the Uniform  
Act did not change the common law. Furthermore, the  
telephone company did not meet the threshold  
requirements for eligibility under the Uniform Act  
because it did not move personal property, and it did  
not move any property as a result of the acquisition of  
land.



1           Now the telephone company had installed its  
2 facilities in the streets of Norfolk pursuant to a  
3 franchise with the City of Norfolk by virtue of which it  
4 had a mere license. It was a franchisee and it is the  
5 established common law in Virginia and in the  
6 overwhelming majority of other states that a utility  
7 company having such a franchise has the obligation of  
8 moving its lines at its own expense when the public good  
9 requires those lines to be relocated.

10           This is a long-standing and well understood  
11 and respected custom and the opinion of the Circuit  
12 Court of Appeals for the Fourth Circuit would change  
13 that rule. Now in this case these transmission lines  
14 were rerouted because of the execution by the  
15 Petitioner, Redevelopment Authority, of conservation and  
16 redevelopment projects within the City of Norfolk.

17           Under those projects areas of blighted  
18 property were acquired. The old buildings were  
19 demolished and the cleared land was made available for  
20 redevelopment.

21           In certain instances it was necessary and  
22 desirable to rearrange certain streets, and the  
23 Redevelopment Authority petitioned the City of Norfolk  
24 to close streets so that the new street pattern could be  
25 established. The city did close those streets, and in a

1 very cooperative manner the city, the Petitioner and the  
2 City of Norfolk worked together with the telephone  
3 company to work out an arrangement for the new streets  
4 to be built in a manner that the public and the private  
5 utilities could be laid within those streets with a  
6 minimum of inconvenience to all of the parties.

7           There was no coersion, no eminent domain. It  
8 was all done in a friendly and matter-of-fact way, and  
9 there was no request for any reimbursement.

10           Over a year after the redevelopment work had  
11 been done and the new streets had been laid the  
12 telephone company filed its claim which had been  
13 denied. I think it is important that the Court  
14 recognize the nature of the facilities that are here  
15 involved.

16           By and large they are massive. They are  
17 permanent. They are embedded in the ground, and we have  
18 contended that they have become real estate.

19           They consist primarily of conduits which are  
20 about four inches in diameter which carry copper cables  
21 which have as many as 3600 pairs in them. Those  
22 conduits extend between underground vaults which are  
23 known as manholes.

24           These manholes are larger than a man is tall.  
25 They are like a little subterranean womb. The walls are

1 a foot thick. They have a collar that connects the top  
2 of the manholes to the street and when the --

3 QUESTION: Mr. Crenshaw, I suppose the Fourth  
4 Circuit has determined that as a matter of state law  
5 these things were personal property. Is that right?

6 MR. CRENSHAW: Justice O'Connor, I think that  
7 the Fourth Circuit must have been persuaded by the  
8 telephone company's interpretation of Transcontinental  
9 which is --

10 QUESTION: Well, in any event that was the  
11 Fourth Circuit's determination, was it not?

12 MR. CRENSHAW: I think that is a reasonably  
13 fair statement. I think there is a little equivocation  
14 there, yes.

15 QUESTION: All right. Do we not normally  
16 defer to a Circuit Court of Appeals determination on  
17 state law issues and leave that alone?

18 MR. CRENSHAW: I would think so, but the  
19 difficulty here is I think you had a flat out decision  
20 by the Virginia Supreme Court which is contrary to the  
21 Fourth Circuit, and the Fourth Circuit in my judgment  
22 was a not too exhaustively reasoned opinion with respect  
23 to that so that I think that it is not facetious for me  
24 to assert in this Court that these facilities were in  
25 effect real property and not personal property.

1 Manifestly they are so massive and so  
2 connected that they have to be real property, and the  
3 case Transcontinental which was cited by both parties in  
4 this case holds that underground gas mains are real  
5 property, and the rationale that the Fourth Circuit  
6 relied upon is a rather small point which was not really  
7 applied to the underground mains but was applied to  
8 machinery that was in the Transcontinental case. That  
9 is the reason that I mention that here.

10 QUESTION: Is it essential to your argument  
11 that we disagree with the Court of Appeals for the  
12 Fourth Circuit about what kind of property?

13 MR. CRENSHAW: There are three bases on which  
14 I would contend that the claim would be denied. That is  
15 one of them.

16 I do not have to win on all three, but I think  
17 they are all three sound. The first one is that the Act  
18 did not cover utilities at all.

19 This, I think, is the most compelling  
20 argument. The Uniform Act was passed after a decade of  
21 extensive congressional committee inquiry.

22 It followed a prior decade when the highway  
23 statutes had been considered. During the 1950's the  
24 Federal-Aid Highway statutes came along and in those  
25 hearings there was expressed and careful attention to



1 the requirements of the utility companies. The Highway  
2 Act contains Section 123 which dealt with utility  
3 companies.

4 Contrarywise, during the 1960's when the  
5 hearings were being held on the Uniform Relocation Act  
6 there was no congressional inquiry into the plight of  
7 the utilities. There were --

8 QUESTION: Why do you suppose that is? It  
9 seems so strange that no discussion of that emerged.

10 MR. CRENSHAW: The only reason that I can say  
11 is that the Congress was satisfied with the solution  
12 given by the Highway Act because that solution which was  
13 in Section 123 was retained. It was not changed.

14 QUESTION: But, of course, in the language of  
15 the Relocation Act in defining a person it did not admit  
16 of any exception, and I think it is just strange that  
17 there would not be some reference in the legislative  
18 history to the utility problem.

19 MR. CRENSHAW: I think it is strange that in  
20 all of those hearings with the hundreds really of  
21 representatives that there was no movement by utilities  
22 to have had their particular problem addressed. I think  
23 that the overwhelming reason was that the Uniform  
24 Relocation Act dealt with the acquisition of private  
25 property by and large from individuals and small

1 businesses.

2           The C&P does not have private property. It  
3 does not have a compensible property interest in its  
4 franchise.

5           The Fugate case by the Supreme Court of  
6 Virginia has held that their interest as a licensee does  
7 not amount to a compensible property interest so that I  
8 think that the purpose of the Uniform Act was to help  
9 those people whose property was being taken by eminent  
10 domain and to supplement the benefits. The people who  
11 were getting fair market value under the principles of  
12 eminent domain were not being fairly treated.

13           A hardware store, for example, that was in a  
14 redevelopment project if their property was condemned  
15 they would get the fair market value of the building,  
16 but unless they got relocation costs they would not get  
17 the cost to move to a new location and they had to  
18 compete against another hardware store in the community  
19 who had the fair market value of their property. It had  
20 not been taken, but they did not have to move.

21           That was the kind of disproportionate burden  
22 that I think the committees looked into. The statistics  
23 are overwhelming that that is the sort of thing that  
24 they inquired about.

25           I think the statute had primarily humanitarian

1 interests, the small person, the mom and pop business,  
2 those things who moved personal property in the common  
3 ordinary sense of personal property. I just do not see  
4 anywhere in this statute or its legislative history any  
5 contemplation of the problem of utility lines, and as  
6 the District Court noted this matter was not under the  
7 table or hidden or secret at all.

8           There was a live controversy right across the  
9 Potomac in Virginia where PEPCO and the Virginia Highway  
10 Commission were going through all sorts of litigation  
11 about this very matter, but it was related to Section  
12 123 of the Highway Act so that I think that the Act just  
13 simply did not contemplate it.

14           When you compare the Uniform Act to actions of  
15 the Congress before the Highway statute or actions of  
16 the Congress afterwards, in 1972 it adopted legislation  
17 which permitted relocation costs to utilities in the  
18 District of Columbia. Specifically the committees dealt  
19 with that problem.

20           They recognized that if they did not pass this  
21 the utility companies would not be compensated, and that  
22 was two years after the Uniform Act. Again, this past  
23 May in the Senate they have adopted amendments to this  
24 very statute that we are talking about.

25           I realize this is after this claim and after

1 this decision, but still it is the same committee of  
2 Congress. It is the same thrust that is being  
3 explained. I think that the action by the Congress or  
4 the Senate this last May is very revealing about the  
5 congressional intent.

6 QUESTION: Does the Uniform Act apply to all  
7 federal condemnations?

8 MR. CRENSHAW: Yes, it does.

9 QUESTION: Including highways?

10 MR. CRENSHAW: Yes, it does.

11 With respect to the highways it is interesting  
12 that Chapter 5 of the Highway Act was amended and  
13 repealed, but Section 123 of the Highway Act which  
14 pertained to utilities was left exactly as it was so  
15 that the Uniform Act came up and sat on top of Section  
16 123. It refers to the comment by Justice Powell in the  
17 previous case.

18 There you have a specific statute, Section  
19 123, which deals with utility relocation. You have a  
20 general statute, the Uniform Relocation Act, which was  
21 passed in foreknowledge of the Highway statute which  
22 says nothing about it.

23 I think that simply shouts out that the  
24 Uniform Act does not contemplate utilities. There are  
25 21 federal agencies which administer some 50 programs



1 that are affected by this Act.

2           None of them have regulations which pertain to  
3 utility relocation. HUD which is the agency which was  
4 involved here has a specific regulation that the  
5 relocation costs for a utility transmission line is not  
6 an eligible cost unless the state law requires it.

7           That regulation was in effect before the  
8 Uniform Act. It is in effect after the Uniform Act and  
9 there was no change by HUD.

10           So surely the agencies which interpret this  
11 Act as well as the utility companies in the localities  
12 have dealt with this Act as not including utilities.  
13 Now there are two threshold requirements.

14           I have alluded briefly to one, that is, you  
15 must move personal property. I contend that it is not  
16 personal property.

17           I think these facilities manifestly are real  
18 property, but secondly they were not moved. When the  
19 street was discontinued the collar to this vault that I  
20 described was destroyed.

21           The vaults themselves were filled with sand  
22 and abandoned. The conduits were abandoned and the  
23 cable which was in the conduits was withdrawn and sold  
24 for salvage where it was profitable to do so.

25           QUESTION: What relocation expenses so-called

1 are they claiming? The cost of filling up the holes,  
2 for example?

3 MR. CRENSHAW: Justice White, it is a little  
4 hard for me honestly to answer that because we have not  
5 got into damages. The claims are very stark. They have  
6 not been flexed out at all.

7 But my impression of those claims is the cost  
8 of constructing in the new streets --

9 QUESTION: A new manhole.

10 MR. CRENSHAW: -- the new facility, right. So  
11 there is not any movement from point A to point B, but  
12 it is a discontinuance in the old street and a new  
13 building job in the new street. It is a construction  
14 job, not a move.

15 I think the last threshold requirement is that  
16 the real property must --

17 QUESTION: You do not think that if the City  
18 just closed the street, for example, and there was not  
19 any so-called move at all there would not be any claim  
20 here?

21 MR. CRENSHAW: Well, I will say this. If the  
22 City simply closed the street and there was no  
23 redevelopment project, no acquisition --

24 QUESTION: Well, assume that Washington, D.C.  
25 builds a convention center that covers two or three

1 blocks and you cannot go up and down Tenth Street any  
2 more. They closed that street. They built a building  
3 on it. I suppose the utilities took their -- Suppose  
4 they filled up their manholes in that street.

5 Under their claim in this case they would not  
6 have claimed anything.

7 MR. CRENSHAW: I think they would have claimed  
8 and the reason I say that --

9 QUESTION: For just filling up the holes?

10 MR. CRENSHAW: No, the claim is far more than  
11 filling up the holes. We would give them the money to  
12 fill up the holes.

13 But the point -- When they terminate a block  
14 here they have to build a new block there because the  
15 service has got to be continued. Ordinarily these lines  
16 are through.

17 They are not just serving little blocks, but  
18 these are transmission lines which go the extent of the  
19 city. If you cut one here you have got to loop it  
20 around so it connects to another place.

21 You have got to keep the service going.

22 QUESTION: Unless you have already got a  
23 utility line in some other street that would serve the  
24 purpose.

25 MR. CRENSHAW: Right. Now I do think if they

1 discontinued a line and did not connect somewhere else I  
2 do not know of any claim. But we do not have that in  
3 this case.

4 QUESTION: All right.

5 MR. CRENSHAW: I would like to reserve the  
6 rest of my time for rebuttal.

7 CHIEF JUSTICE BURGER: Mr. Schwartz.

8 CRAL ARGUMENT OF JOSHUA I. SCHWARTZ, ESQ.,  
9 ON BEHALF OF FEDERAL RESPONDENT IN SUPPORT OF PETITIONER

10 MR. SCHWARTZ: Mr. Chief Justice, and may it  
11 please the Court:

12 In the view of the United States the Court of  
13 Appeals has misinterpreted the pertinent provisions of  
14 the Federal Uniform Relocation Assistance Act. It is our  
15 submission that that Act was never intended to address  
16 the question of who should bear the cost of  
17 reconstructing utility lines when those lines are  
18 recreated in a new location because of local public  
19 improvements in the very streets in which they have been  
20 located pursuant to local franchises.

21 QUESTION: Mr. Schwartz, the Solicitor General  
22 has changed his mind in this case from the time of  
23 petition for certiorari. Am I correct?

24 MR. SCHWARTZ: There has been some change, Mr.  
25 Justice Blackmun. Our recommendation to the Court most



1 forthrightly was that the petition should be denied.

2 I take it that is a moot question.

3 QUESTION: I am not insisting that you do not  
4 have a right to change your mind. I just want to be  
5 sure.

6 MR. SCHWARTZ: We have to that degree  
7 certainly -- Well, the question is no longer presented  
8 whether the Court should have granted the petition. The  
9 petition has been granted.

10 QUESTION: I know but that is not the extent  
11 of your prior position.

12 MR. SCHWARTZ: That is right.

13 QUESTION: Your prior position was that this  
14 was a reasonable construction of the statute.

15 MR. SCHWARTZ: If I may continue, Justice  
16 White, that is quite right.

17 QUESTION: You have changed your mind on  
18 that?

19 MR. SCHWARTZ: We have concluded that it is an  
20 erroneous construction of the statute. The position we  
21 urge is the same one we urged in the Court of Appeals,  
22 and if I might just say this, our reason for concluding  
23 that it is erroneous is based frankly on a closer study  
24 of the statute. We believe that we have identified  
25 concrete statutory language that this claim simply does

1 not fit.

2           So that contrary to what we said in the  
3 unfortunate brief we filed at the petition stage, this  
4 case simply does not in our view involve interpolating  
5 an exception into plain statutory language that covers  
6 the situation. That is what the Court of Appeals  
7 thought it involved, and if that were true the Court of  
8 Appeals might be right.

9           But we believe that the statutory requirement  
10 which says that payment shall be made for moving of  
11 personal property or for moving one's self or one's  
12 business simply cannot comfortably be made to cover the  
13 situation of reconstructing utility lines. I think the  
14 words are important, and the reality is important.

15           This really is a construction job. The  
16 Respondent -- I refer to C&P as the Respondent -- says  
17 in their answering brief that we are in no position to  
18 deny that their claims represent certain matters.

19           One of the things they say they represent are  
20 the costs of reconstructing those lines. I take that to  
21 be a concession that what we are talking about for the  
22 largest part is the cost of digging new trenches,  
23 pouring new concrete, installing new pipes, laying and  
24 installing new cables, and it seems to me that it would  
25 be a very odd choice of words indeed to use the words

1 "moving personal property" if one wanted to describe  
2 those operations and paying for those costs.

3           If I might turn to something Justice O'Connor  
4 asked, the Court is not confronted necessarily with the  
5 question of whether the Fourth Circuit misunderstood  
6 Virginia law. There is a question here whether this  
7 equipment, these lines are real or personal property.

8           The government is skeptical of the Fourth  
9 Circuit's conclusion that it is all personal property.  
10 If the Court please, the Petitioner has lodged with the  
11 clerk an illustration of a sample utility manhole which  
12 is as far as we can see an underground building, and if  
13 you look closely at the Court of Appeals' opinion I  
14 would suggest that the Court of Appeals may have simply  
15 misunderstood what the physical equipment involved was  
16 and what the operation of replacing it was.

17           The Court of Appeals appears to have believed  
18 that this equipment was removed from its location and  
19 transferred to a new location. Because of that  
20 misunderstanding I think the ordinary deference to the  
21 Court of Appeals reading of state law is not required  
22 here.

23           But even if it were, the question necessarily  
24 presented is a federal one, the question of what  
25 Congress meant by "moving." That is the term in the

1 federal statute as to which there is no reason to  
2 believe that state law was intended to be controlling.

3 QUESTION: I have a little problem. The  
4 difference between personal property and real property  
5 is determined by state law.

6 MR. SCHWARTZ: Ordinarily we would say that  
7 would be true but --

8 QUESTION: It is ordinarily any way. Do you  
9 know any other way to determine it?

10 MR. SCHWARTZ: If the federal statute  
11 indicated an intent otherwise, but in this case we do  
12 not --

13 QUESTION: Could the federal statute say that  
14 property in a manhole in Virginia is personal property?

15 MR. SCHWARTZ: The federal statute does not --

16 QUESTION: Can a statute say that, a federal  
17 statute?

18 MR. SCHWARTZ: A federal statute could say  
19 that for the purposes of this statute the term "personal  
20 property" shall include the following, and the Congress  
21 could choose that manner of legislating. We are not  
22 suggesting that that is what it has done here.

23 QUESTION: Then next they can say a man is a  
24 woman in Virginia.

25 MR. SCHWARTZ: Congress probably could do



1 that, Your Honor, but again that is not the mode of  
2 analysis by which we perceive Congress has used the term  
3 "moving personal property" or moving it itself. We  
4 think that that choice of language does not comfortably  
5 apply to this process of abandoning capital facilities  
6 and recreating new ones in new locations.

7           We would submit that at a minimum this  
8 language "moving personal property" is sufficiently  
9 ambiguous that it is not sufficient to stop with the  
10 statutory language, and it is sensible to go beyond it  
11 and look at the usual indicia of legislative intent.

12           In this case the first thing we are confronted  
13 by is the rather stark silence in the ten year long  
14 legislative record, and I might add that representatives  
15 of the American Right of Way Association which  
16 represents the interests of the utilities insofar as  
17 rights of way are concerned did speak at the hearings on  
18 this. But they never suggested that this statute would  
19 or that it should alter the established common law  
20 rule.

21           Accordingly, while this would be an easier  
22 case if someone has said the obvious, it appears to us  
23 that everyone understood that this issue, the question  
24 of relocation assistance, was one that was governed by a  
25 well-established rule of state law and that absent any

1 indication of an intent to change it Congress must have  
2 intended to leave it where it was especially because in  
3 1956 in the Highway Act Congress had demonstrated that  
4 it was aware of the state law rule and that it chose for  
5 Highway Act purposes to defer to that state rule.

6           Now the Uniform Relocation Act does not say  
7 except insofar as provided by other law the following  
8 payments shall be made. It says all federal acquisition  
9 shall be controlled and federally assisted acquisitions  
10 shall be controlled by this statutory scheme.

11           Given that, it is difficult for us to  
12 understand why Congress apparently quite deliberately  
13 left in effect provisions of the Highway Act which said  
14 thou may pay relocation assistance but only if state law  
15 provides for it. If there were any question left in the  
16 wake of that Act in 1972 when Congress turned to the  
17 question again in the District of Columbia Public  
18 Utilities Reimbursement Act when Congress provided  
19 specifically for the purposes of interstate highways  
20 that these monies should be paid, that portion of the  
21 statute would have had precisely no effect and would  
22 have been entirely superfluous if the Uniform Relocation  
23 Act in 1970 had set aside the rule of Section 123 of the  
24 Highway Act.

25           As it happened, Congress did set aside other

1 provisions of the Highway Act, Title 23, Sections 501  
2 and the following sections which dealt with other  
3 provisions of relocation assistance. So one cannot even  
4 say that Congress might have overlooked the Highway Act.

5           If you go through this statute and if you go  
6 through the House and Senate committee reports you will  
7 find an extraordinarily detailed listing set out in haec  
8 verba of each of the statutory texts that was repealed  
9 in many sections of the Highway Act that are to be found  
10 there.

11           It is just very difficult for me to believe  
12 that Congress just missed this. It appears that  
13 Congress chose to leave Section 123 and its rule which  
14 defers to state law in effect.

15           There is another thing that one can garner  
16 from looking at the several occasions on which Congress  
17 has addressed the question of relocation assistance.  
18 Congress has used different language to speak to this.

19           In the District of Columbia Act of 1972  
20 Congress spoke of abandoning, relocating,  
21 reconstructing, reestablishing, and used a large number  
22 of terms which speak to the capital building process.

23           QUESTION: Mr. Schwartz, did that bill go  
24 through the same committee that this bill, the Uniform  
25 Relocation Act, would have gone through?

1 MR. SCHWARTZ: Justice Rehnquist, I do not  
2 know the answer to that question, and I am skeptical  
3 that --

4 QUESTION: I wonder how relevant it is if you  
5 do not really have any knowledge that the same  
6 individuals on a committee compared the two and chose to  
7 leave them the way they were.

8 MR. SCHWARTZ: I think we have something  
9 special because there are three stages to this. There  
10 is Section 123. There is the Uniform Act, and there is  
11 the D.C. Act while perhaps the action of one committee  
12 in 1972 does not say that much about what the 1970  
13 Congress thought the entire statute that was enacted  
14 would have been of no effect at all.

15 I would question whether we ought to attribute  
16 that intent of Congress in 1972. We would suggest that  
17 when Congress wishes to address this subject it knows  
18 how to do so and that it did not do so in the Uniform  
19 Relocation Act and that the judgment of the Court of  
20 Appeals accordingly should be reversed.

21 CHIEF JUSTICE BURGER: Mr. Kelly.

22 ORAL ARGUMENT OF JOSEPH L. KELLY, ESQ.,

23 ON BEHALF OF RESPONDENT

24 MR. KELLY: Mr. Chief Justice, and may it  
25 please the Court:



1           I believe we should first make quite clear  
2 that there is no uncertainty on the record in this case  
3 about the nature of the telephone company's claim, the  
4 nature of the expenses for which it claims. There is no  
5 need to speculate from what is said in the briefs  
6 whether they correctly described them.

7           Those claims were filed in the beginning and  
8 have been in the possession of both Petitioner and the  
9 federal defendant since that time and still are. Those  
10 claims are for the nonbetterment cost of reconstructing,  
11 the nonbetterment cost of moving utility lines, a  
12 completely familiar concept that is observed and applied  
13 every day.

14           It involves determining the true cost of  
15 moving by starting with the cost of rebuilding which is  
16 inevitably required whenever you move a utility line for  
17 the most part unless there happened to be overhead poles  
18 that can be moved or wires that can be moved and used  
19 again which would be exceptional. But in all events in  
20 the multitude of cases in which a utility company moves  
21 its lines at the expense of someone else whether by  
22 contract or under voluntary arrangement at the time the  
23 parties well understood here from the beginning from the  
24 time these claims were filed as they understood when  
25 they stipulated that a similar expense if it happened to

1 be a municipal system, stipulated in those words in this  
2 case, that the nonbetterment cost if it happened to be a  
3 municipal line is part of the cost of the project or is  
4 carried as the city's share, I guess the city's share of  
5 the total project cost.

6           So there should not be any uncertainty about  
7 the fact that this case from the beginning has involved  
8 claims for the relocation, for moving the lines in the  
9 only sense in which the vicinities of most displaced  
10 persons which happen to use heavy or large equipment and  
11 structures which are not part of the land taken because  
12 they are severed from it by agreement or by law. As the  
13 Fourth Circuit has determined it, these were severed by  
14 law.

15           They were personal property. Since they are  
16 not taken, then the expense of moving them, relocating  
17 them would be one of those inequitable expenses and  
18 burdens borne by a particular class of people instead of  
19 being borne --

20           QUESTION: Mr. Kelly, you used the word  
21 "moving" a moment ago in your argument. These  
22 facilities were never moved were they?

23           MR. KELLY: They were moved in the sense in  
24 which that term is most frequently moved in the same  
25 sense in which it is used -- If the hardware store

1 referred to in Mr. Crenshaw's brief had been the  
2 property of the hardware store owner severed from the  
3 land by agreement and he had a right to move it or if  
4 some structure that was part of it he had a right to  
5 move from the land, it did not belong to the owner of  
6 the land. It was taken.

7 QUESTION: Are there two manholes out there  
8 where there used to be one?

9 MR. KELLY: Two manholes, Your Honor?

10 QUESTION: Yes.

11 MR. KELLY: There used to be one?

12 QUESTION: Yes.

13 MR. KELLY: No, Your Honor. The facilities  
14 that were moved were simply duplicated by construction  
15 in a new place.

16 QUESTION: Did they take up the manhole and  
17 move the manhole to another place?

18 MR. KELLY: The manholes were not dug out of  
19 the ground and lifted and transferred to another place.

20 QUESTION: So they were not moved, were they?

21 MR. KELLY: There was no physical movement of  
22 them from one spot to another. I submit that the  
23 language of the Act when it refers to moving personal  
24 property has to apply if the Act is to be intelligible  
25 at all, for instance, to this same hardware store

1 operator's store cases, show cases, other trade fixtures  
2 which he has a right to move but which it is not  
3 sensible, not economically feasible for him to move  
4 bodily to the new place. But no one would doubt that he  
5 has within the meaning of that Act moved those  
6 structures and facilities when he takes them down and  
7 scraps or abandons them when it is not practical to move  
8 them bodily and rebuilds and reconstructs them in a new  
9 place.

10 QUESTION: Is there anything in the  
11 legislative history that will help you?

12 MR. KELLY: I beg your pardon, Your Honor?

13 QUESTION: Is there anything in the  
14 legislative history that will help you?

15 MR. KELLY: I am so sorry, Your Honor. I  
16 could not hear.

17 QUESTION: Is there anything in the  
18 interpretive history that will help you in saying that  
19 this is what you mean by moving?

20 MR. KELLY: By moving personal property?

21 QUESTION: Yes, sir. You cited a hardware  
22 case. What else do you have?

23 MR. KELLY: The fact that in common  
24 acceptance when one of the tower lines constructed on  
25 one man's land in sight of us all is taken down and



1 rebuilt on another man's land, the whole world would say  
2 the company has moved its power line.

3 QUESTION: But if you had a power line on one  
4 land and built a brand new power line on another man's  
5 land that would not be moving it, would it?

6 MR. KELLY: Yes, I think, Your Honor, it would  
7 be.

8 QUESTION: It would be moving?

9 MR. KELLY: You would still -- We would all  
10 still say the company has moved its power line. Now we  
11 should not from that proceed to the assumption that a  
12 statute authorizing payment for the cost of moving that  
13 line would entitle anyone to be paid for building  
14 himself a new line the whole cost of that which might be  
15 a much bigger, better and newer line than the old one,  
16 and that is not the cost that was claimed here.

17 It is not the cost that all utility companies  
18 have always claimed when they were entitled, admittedly  
19 entitled to claim the nonbetterment cost of moving. You  
20 start with the cost of the new construction.

21 You must deduct from it the unused value, any  
22 difference in value between the new line and the value  
23 of the old one that they gave up. You do not get the  
24 benefit of new construction.

25 Our claims do not claim it. Under our

1 interpretation of the Act the displaced person does not  
2 get the benefit of new construction.

3 He gets the cost of replacing what cannot be  
4 moved. It is not part of his cost of just moving if he  
5 builds a better one. That is the cost of an improvement  
6 which he cannot claim and should be received.

7 But he has moved any shared structure of any  
8 kind which he had a right to take. It was not taken  
9 with the land because it belonged to someone else.

10 That is why it was personal property. He did  
11 not take it with him to the new land, but if --

12 QUESTION: Mr. Kelly, will you look at Section  
13 202(a) that is quoted in the Appendix to the  
14 government's brief. I am sure you are familiar with the  
15 statute.

16 It talks about whenever the acquisition of  
17 real property, et cetera, and then it tells what you can  
18 recover for. The first is actual, reasonable expenses.  
19 The second is actual direct losses, and the third is  
20 actual reasonable expenses in searching for  
21 replacement.

22 Does your claim come under (a)(1)?

23 MR. KELLY: It comes under (a)(1), Your Honor.

24 QUESTION: You are not claiming actual direct  
25 losses of --

1 MR. KELLY: That is what, Your Honor?

2 QUESTION: You are not claiming under (2) then  
3 that it is actual direct losses of tangible personal  
4 property as a result of moving.

5 MR. KELLY: No, the figure representing that  
6 loss appears in these claims in only one indirect way.  
7 When you determine what was the cost of relocating this  
8 utility line from the old land it used to be on to the  
9 land it is on now, you start with the cost of building  
10 the new line.

11 You deduct from that the difference between  
12 the value of that new line and the old one that you gave  
13 up. You must deduct also the salvage value of --

14 QUESTION: I do not know where you get that  
15 measure of damages under (1) which simply talks about  
16 actual reasonable expenses in moving himself, his  
17 family, business, farm operation or other personal  
18 property. It does not seem to allow the kind of  
19 computation you made.

20 MR. KELLY: Because, Your Honor, we would --  
21 The same statement -- These same claims although we do  
22 argue and it is still our position that they are the  
23 cost of moving these utility lines the same thing is  
24 also --

25 QUESTION: But the statute does not say cost.

1 It says expenses.

2 MR. KELLY: I beg your pardon, the expense of  
3 moving the lines. It is not only the expense of moving  
4 the lines. It is equally as true that those same  
5 expenses or the expense of moving a business --

6 QUESTION: But if you do not move your line at  
7 all, if you do not move the physical personal property  
8 out of the ground how can you have any actual reasonable  
9 expenses incurred in moving it?

10 MR. KELLY: If that view of the expense of  
11 moving personal property were accepted which we still  
12 contest, if that were accepted the same figures still  
13 represent the expense of moving a business which is  
14 defined in the statute very carefully so as to mean any  
15 legitimate activity of business cannot be physically  
16 moved. It is an activity. It is not a thing  
17 physically.

18 QUESTION: What section of the statute is it  
19 that defines carefully the expenses incurred in moving a  
20 business?

21 MR. KELLY: 4601, subparagraph 7.

22 QUESTION: Is that in your brief?

23 MR. KELLY: Oh, yes, Your Honor. It is in the  
24 Appendix to the government's brief. It is in the  
25 opening pages of our brief on the merits. It is 4601



1 (7), and it is in this instance every expense claimed  
2 was also we think it was an expense of moving a utility  
3 line.

4           Whether it was or not is was a sure expense of  
5 moving the lawful activity of using these lines from the  
6 land where they used to be used to serve the public.  
7 That is what Senator Caplan defines as the meaning of  
8 the word "business" wherever used in the Act.

9           It was most assuredly the cost of moving that  
10 business activity --

11           QUESTION: All I see -- I am looking on the  
12 Statute Involved Section of your brief, the red brief,  
13 at page vii and viii, and all I see set off for (7) is  
14 the term "business" means any lawful activity, excepting  
15 a farm operation conducted primarily for the sale of  
16 services to the public.

17           MR. KELLY: That is correct, Your Honor. That  
18 is not all of that section, but that is the act of  
19 business that we moved.

20           Then 4622(a) provides that payment shall be  
21 made for the cost not only of moving personal property  
22 -- in this case it happened to be the same thing -- it  
23 is the cost of moving a business which is that lawful  
24 activity that we were conducting on that property and  
25 also for the cost of just moving. In the case of any

1 business organization the business corporation,  
2 partnership or association cannot physically move. It  
3 has no physical existence.

4 QUESTION: Now you have got a proviso in (2),  
5 4622(a)(2) where you say you can also include "actual  
6 direct losses of tangible personal property as a result  
7 of moving or discontinuing a business", but then it goes  
8 on to say "but not to exceed an amount equal to the  
9 reasonable expenses that would have been required to  
10 relocate such property as determined by the head of the  
11 agency."

12 So that sets a ceiling on the kind of damage  
13 you are claiming of the amount of expenses you have  
14 incurred to relocate.

15 MR. SCHWARTZ: No, Your Honor. I think it  
16 does not. I think the clear sense of that section is  
17 altogether different from that.

18 It sets a ceiling on an expense we do not  
19 claim here. No item of our claim is for the loss of  
20 property we left.

21 The sense of that section (2) is to cover the  
22 very common situation very likely to arise in which the  
23 owner of property that is not taken because it is not  
24 part of the land still like these manholes not feasible  
25 to move bodily. The owner may just abandon and give

1 up.

2           He may never find another place for part of  
3 his business, and yet he is a displaced person because  
4 he moved his business. He just did not move that part,  
5 and he abandoned and lost it in place and never  
6 reconstructed it anywhere or in any other sense moved  
7 it.

8           In such case he just loses that property and  
9 that would be an expense borne by him, not borne by  
10 anyone else. Yet one of the burdens, the expenses that  
11 that project required some persons to pay and the sense  
12 of the Act is that he should be reimbursed for that  
13 loss. That would occur --

14           QUESTION: Mr. Kelly, I guess the lower courts  
15 have not resolved these questions yet have they? They  
16 just were dealing with whether the utilities were  
17 covered at all and then were going to send it back to  
18 resolve some of these things.

19           MR. KELLY: They have not considered these  
20 questions except to the extent that they are necessarily  
21 included in the legal conclusion that a company in  
22 moving its facilities has moved or at least has moved  
23 its business or has moved its personal property from one  
24 place to another. We think it moved all three.

25           It has not considered them directly because

1 the contention that we have not moved our facilities was  
2 never made in the lower court or in any of the  
3 administrative proceedings and were stipulated by the  
4 parties alleged in the complaint that we did move all of  
5 our facilities, admitted in the answer that we did move  
6 all of our facilities, stipulated that we did move all  
7 of our facilities, stipulation agreed to by all the  
8 parties. The significance of that fact -- I do not  
9 contend that the parties, the Petitioner and the  
10 government, bound themselves by the legal conclusions  
11 involved in the use of those terms.

12           It is highly significant, though, to my  
13 contention that that is the usual and ordinary  
14 acceptance of the word "moved its facilities" when we  
15 are dealing with any displaced person whose facilities,  
16 whose personal property includes property of such  
17 physical nature that it needs to be rebuilt in a new  
18 place.

19           QUESTION: Mr. Kelly, may I ask you a  
20 question?

21           MR. KELLY: Yes, Your Honor.

22           QUESTION: Am I correct in believing that the  
23 Court of Appeals did not rely on the provision that  
24 pertains to the moving of a business? They relied on  
25 the moving of personal property as I remember the



1 opinion. Is that right?

2 MR. KELLY: They did not mention --

3 QUESTION: They did not mention 4637.

4 MR. KELLY: -- the removal of personal  
5 property although they plainly regarded that the  
6 reconstruction of these lines amounted to moving the  
7 lines.

8 QUESTION: But moving the lines is a question  
9 --

10 MR. KELLY: They hear fully understood --

11 QUESTION: But the question of moving a  
12 business they did not really face up to?

13 MR. KELLY: It was never discussed.

14 QUESTION: Yes, because one might argue -- I  
15 do not know if it is right or not -- that that thinks in  
16 terms of moving an entire business or moving a facility  
17 or something like that.

18 MR. KELLY: That point is indeed argued in the  
19 reply briefs. The courts below did not consider any of  
20 these contentions now being made as to the meaning of  
21 the expression "moved" in the case of a corporation,  
22 moved from land, moved personal property from land when  
23 in fact it had to be rebuilt elsewhere. It did not  
24 consider any of those because made for the first time in  
25 the government's brief on the merits never once advanced

1 before and the Court will review the pleadings, the  
2 stipulations. It is perfectly apparent that we were all  
3 agreed then that the utility company here, the telephone  
4 company, had moved its lines to the new places, moved  
5 all of its facilities to the new places stipulated in so  
6 many words that --

7           QUESTION: Did they agree that the move of the  
8 personal property was a move made as a result of the  
9 acquisition of real estate?

10           MR. KELLY: That is the one thing they did  
11 not. The answers denied although the government did not  
12 agree with this, that is, the Department of Housing and  
13 Urban Development in the administrative review  
14 disagreed. They contended that we did not move as a  
15 result of the acquisition.

16           But they admitted that the removal of all of  
17 these facilities occurred. That is expressly admitted  
18 in the answers, alleged in the complaint, admitted in  
19 the answers and stipulated in the stipulation of facts.

20           QUESTION: Can I go back to when I raised the  
21 point? Does the record still show that there were two  
22 manholes?

23           MR. KELLY: I think the testimony makes clear  
24 that the manholes were abandoned and left in the ground.

25           QUESTION: Well, how in the world can you say

1 you moved them? You moved one that did not move.

2 MR. KELLY: In the same sense in which we say  
3 they rented the building. The shed which one company  
4 has rented and used for years to store machinery on the  
5 land of another after which rebuilds on a new place we  
6 all say the company has moved its shed to the new  
7 place.

8 QUESTION: I guess if we can put a grain  
9 elevator into Commerce we can do that.

10 MR. KELLY: It is indeed possible and under  
11 this view of what is meant by "moved" the utility  
12 companies and all other displaced companies including  
13 the chainsaw company involved in the Beaird-Foulan case  
14 discussed where they moved plant. They did not pick  
15 that plant up and move it, Your Honor.

16 They did not pick much up and move it. They  
17 moved a whole plant, and the Court concluded that the  
18 Beaird-Foulan moved. It is also the answer to the  
19 suggestion that maybe you have to move your entire  
20 business.

21 The chain saw plant was most assuredly not the  
22 only business of the Emerson Company. That is why the  
23 statute was so careful to define what activity is, what  
24 a business means. It means any activity conducted for a  
25 business purpose.

1           That activity was moved. Whether we all could  
2 agree that the company moved that is what everyone would  
3 say in common parlance and that the power line was  
4 moved, the underground lines were moved, that is what  
5 everyone would say in common parlance. We say that is  
6 what the Act meant.

7           Whether we could all agree on that or not,  
8 most assuredly the activity was moved to the new  
9 location. I trust the Court understands that from the  
10 time when the claims were first filed right through -- I  
11 cannot recall how many years of administrative  
12 consideration of those claims -- two years in the trial  
13 court, a total of three years in litigation, the parties  
14 seem to be fully agreed that we had moved the lines and  
15 that we had moved. There was never any contention to  
16 the contrary ever asserted.

17           That continued to be true down through the  
18 time when the government's first brief was filed.  
19 Having declined to join in a petition for writ of error,  
20 the government's position was not quite fully stated  
21 just now by the Solicitor General.

22           The statement there twice was that the plain  
23 terms of the Act that the Court of Appeals had merely  
24 followed the plain terms of the Act. Nothing has  
25 happened.



1           At that point the Department of Justice had  
2 been defending this litigation on behalf of the United  
3 States for more than three years. It has in the trial  
4 court supported the administrative interpretation until  
5 the Fourth Circuit held that it was contrary to the  
6 plain terms of the Act after which the Solicitor General  
7 concluded and informed the Court in its brief in  
8 opposition that the Court of Appeals cannot be said to  
9 have erred in following the plain language of the Act  
10 and that the arguments to the contrary of the Petitioner  
11 and amicus supporting the Petitioner were made despite  
12 the Act's plain terms.

13           Nothing has been said to explain how in the  
14 next five months the Act's plain terms became any less  
15 plain. I think attention should be called to the  
16 anomolous constances that would arise out of any  
17 interpretation of the word "move personal property" in  
18 this or move property that would limit it to the case  
19 when it can be bodily transplanted.

20           The law was never intended to treat  
21 differently the power company, the gas company that  
22 takes up his lines and moves them and uses them again  
23 and the one where it is not feasible and not sensible to  
24 do that and puts new ones in the new place and recovers  
25 compensation only for the difference between the old and

1 the new or the loss, the actual cost of putting itself  
2 back where it was by reconstructing and relocating its  
3 facilities in a new place.

4 CHIEF JUSTICE BURGER: Do you have anything  
5 further, counsel, by way of rebuttal?

6 ORAL ARGUMENT OF FRANCIS N. CRENSHAW, ESQ.,  
7 ON BEHALF OF THE PETITIONER -- REBUTTAL

8 MR. CRENSHAW: I have just a couple of words  
9 if I might, sir. I would like to call to the Court's  
10 attention that the complaint at paragraph 7 alleges that  
11 these lines were moved.

12 The Redevelopment Authority's answer at  
13 paragraph 7 denies those allegations. The stipulation  
14 -- That is at page 21 of the Joint Appendix -- which  
15 refers to the term "relocated facilities" is the cables,  
16 lines, poles, or other equipment which C&F has removed.

17 Then we stipulate that then any that have been  
18 removed were removed subject January the 2nd. I do not  
19 think we have articulated well our argument on removal,  
20 but it certainly has been in the case.

21 The second thing I would like to say is that  
22 this statute was passed to supplement benefits of people  
23 whose private property was taken. In this case we are  
24 dealing with the acquisition or the removal or  
25 reconstruction of lines in public property.

1           The public street was where the lines were.  
2 When the streets were closed the Redevelopment Authority  
3 owned them. It is a political subdivision of the  
4 state. It is still public property.

5           Nowhere in this are we talking about taking a  
6 compensible property interest, and the telephone company  
7 has not cited and I do not believe they can cite any  
8 case in which benefits under the relocation statute are  
9 conferred unless there is the acquisition of a  
10 compensible interest in real property. We think the  
11 claim should be denied.

12           Thank you.

13           CHIEF JUSTICE BURGER: Thank you, gentlemen.

14           The case is submitted.

15           (Whereupon, at 2:54, the case in the  
16 above-entitled matter was submitted.)

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# CERTIFICATION

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

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, ETC., Petitioner v.

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, ET AL.

# 81-2332

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

BY

Diane Hammond

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