

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1362

TITLE PUBLIC SERVICE COMMISSION OF MARYLAND, Petitioner  
v. CHESAPEAKE AND POTOMAC TELEPHONE COMPANY  
OF MARYLAND

PLACE Washington, D. C.

DATE January 13, 1986

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   PUBLIC SERVICE COMMISSION                   :

4       OF MARYLAND                               :

5                               Petitioner                   :

6               v.                                       :   No. 84-1362

7   CHESAPEAKE AND POTOMAC TELE-                   :

8       PHONE COMPANY OF MARYLAND                   :

9   - - - - -x

10                                       Washington, D.C.

11                                       Monday, January 13, 1986

12               The above-entitled matter came on for oral  
13   argument before the Supreme Court of the United States  
14   at 2:03 o'clock p.m.

15  
16   APPEARANCES:

17       KIRK J. EMGE, ESQ., Baltimore, Md.;

18       on behalf of Petitioner.

19       D. MICHAEL STROUD, ESQ., Washington, D.C.;

20       on behalf of Respondent.

21       JACK D. SMITH, ESQ., General Counsel,

22       Federal Communications Commission,

23       Washington, D.C.;

24       on behalf of FCC, as amicus curiae, in support  
25       of Respondent.

C O N T E N T S

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on behalf of Petitioner.	
D. MICHAEL STROUD, ESQ.;	15
on behalf of Respondent.	
JACK D. SMITH, ESQ.,	32
on behalf of FCC, as amicus curiae,	
in support of Respondent.	
KIRK J. EMGE, ESQ.,	40
on behalf of Petitioner - rebuttal	

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1 that was just argued before your case, will your case be  
2 a live case in the event that the Court of Appeals'  
3 judgment were, in the earlier case, was reversed and in  
4 the case that it was affirmed?

5 MR. EMGE: The district court order in our  
6 case indicates that if the Fourth Circuit decision is  
7 reversed that the judgment would be entered in favor of  
8 the defendants in that case, which is the Maryland  
9 commission. However, there are numerous cases involving  
10 other matters than the preemption order under Section  
11 401 enforcement proceedings that have just recently been  
12 instituted, and since there is a conflict between the  
13 First and the Fourth Circuits on whether a private party  
14 can enforce the preemption -- an FCC rulemaking order --  
15 there will be other instances where the decision will  
16 depend upon which circuit you're in.

17 So although the commission's decision -- the  
18 commission as a defendant will have a judgment in its  
19 favor in the event the preceding case is ruled in favor  
20 of the states, there are still conflicts that will  
21 remain that will arise in other areas.

22 If the Court agrees that the preemption order  
23 is not the type of FCC decision that can be enforced by  
24 a private party, it would be unnecessary to address or  
25 reach the broader question as to whether a state

1 commission is a person and to what extent the state  
2 commission is a person for purposes of the  
3 Communications Act.

4 Under the enforcement scheme established by  
5 Congress in Section 401, the FCC has the sole authority  
6 to enforce compliance with provisions of the Act, and  
7 it's important to note at this point that in the  
8 preemption order the FCC based its decision on the fact  
9 that it said that Section of the Communications Act  
10 preempted inconsistent state depreciation practices.  
11 Clearly, enforcement of the preemption order is nothing  
12 more than enforcing compliance with the Act, and under  
13 the enforcement scheme established by Congress is  
14 Section 401 the FCC and not private parties has the sole  
15 authority to determine when and if those violations,  
16 such violations, should be enforced.

17 Under the enforcement scheme in Section 401,  
18 private parties can only enforce obedience to FCC  
19 orders. It is clear that by limiting enforcement under  
20 Section 401(b) to orders, Congress clearly understood  
21 that there were other types of FCC actions that would  
22 not be enforceably by private parties under that  
23 subsection.

24 It's clear that there was a distinction, a  
25 well known distinction, between what constitutes an

1 agency order and what constitutes a rule. Congress  
2 chose to use the word "order" with respect to the type  
3 of actions that could be enforced by a private party.

4 In addition, if Congress had intended private  
5 parties to be able to enforce FCC rules, which are the  
6 functional equivalent of statutes, the provisions of  
7 Section 401(a) would have no meaning. The sole  
8 responsibility, once again, for enforcing the compliance  
9 with the Act resides only in the FCC.

10 The Respondents and their supporting amici  
11 curiae concede that not all FCC actions are enforceable  
12 under Section 401(b). For example, the Respondent  
13 implies in its brief that regulations and rules which  
14 are sufficiently general in their terms and  
15 applicability may not be enforceable by private parties  
16 under Section 401(b).

17 They merely say -- allege in this case that  
18 the Court doesn't have to reach that because of their  
19 position that the preemption order is not one of those  
20 orders. But we submit that if you review the terms and  
21 provisions of the preemption order, it clearly is a rule  
22 of general applicability and is addressed to a broad  
23 group of entities.

24 They seem to indicate, the Respondents that  
25 is, that there is a hybrid action called a rulemaking

1 order, and that rulemaking orders such as the preemption  
2 order can be enforced by private parties under Section  
3 401(b).

4           The first point to be made with respect to  
5 that argument is that the fact that the FCC calls the  
6 action an order is under this Court's decision in CBS  
7 not determinative. It's the substance of what the FCC  
8 has done, rather than what it classifies its actions to  
9 be, that controls.

10           Secondly, if the FCC adopted a rule by an  
11 order, it's clear that if that action were to be  
12 enforced, it would not be the order adopting the rule  
13 that would be enforced, it would be the substance of the  
14 rule that would be enforced by the court. So therefore  
15 you once again get back to the situation where, although  
16 the FCC has the sole responsibility to adopt -- to  
17 enforce provisions of the Communications Act, a private  
18 party under the enforcement scheme suggested by the  
19 Respondents would also share that responsibility.

20           In order to preserve the enforcement scheme  
21 that was established by Congress in Section 401 and  
22 thereby maintain the role assigned to the FCC by the  
23 Act, enforcement under Section 401(b) must be limited to  
24 FCC orders which determine the specific rights and  
25 responsibilities of specific individual parties and are



1 based upon findings which take into account specific  
2 facts associated with that situation.

3 These orders, in short, must be specific in  
4 their requirements and self-executing. By  
5 self-executing, we mean that in order for a court to  
6 enforce the FCC order there is no further determination  
7 required by the Federal Communications Commission, for,  
8 as the FCC has noted in its brief, under the enforcement  
9 scheme established by Congress in Section 401(b), the  
10 court's role in the enforcement of FCC orders is very  
11 limited.

12 So in order for the federal court's role to be  
13 limited, the order that is sought to be enforced must be  
14 very specific in what it requires, it must be directed  
15 to a specific party, and must be based upon specific  
16 facts that were presented to the agency, not a general  
17 pronouncement of policy, agency policy.

18 The preemption order is clearly not a  
19 self-executing FCC order, but rather is a broad policy  
20 statement containing agency interpretation of its  
21 statutory authority, and it prescribes conduct that's  
22 applicable to a broad class of individuals. It is a  
23 quasi-legislative action, which is the functional  
24 equivalent of the Communications Act.

25 And once again to point out that the FCC's

1 decision in the preemption order was based upon the fact  
2 that it found that the Communications Act, Section 220,  
3 preempted the states from using inconsistent practices,  
4 and that the enforcement of that preemption order is no  
5 different from enforcing compliance with that section of  
6 the Communications Act.

7         There are numerous policy considerations which  
8 underlie the enforcement scheme that was adopted by  
9 Congress and which is set forth in Section 401, and the  
10 consideration of these policies indicates that private  
11 enforcement of the preemption order is precluded. For  
12 example, if the goal of promoting the development of  
13 uniform, nationwide interstate policy permits the FCC to  
14 preempt inconsistent state depreciation practices, then  
15 that policy also dictates that the FCC and not private  
16 parties enforce the preemption order under Section  
17 401(b).

18         You cannot have uniformity absent the FCC  
19 determination that a state ratemaking order is in  
20 violation of the preemption order. The cases that have  
21 arisen in Maine, in the district courts of Maine,  
22 Louisiana, and Kentucky, illustrate that the federal  
23 courts in order to enforce the preemption order are  
24 required to make a detailed analysis, conduct judicial  
25 review of a state ratemaking order to determine if that

1 state's order complies with the FCC preemption order.

2 In determining -- and reviewing a state rate  
3 order involves a substantial amount of judgment to be  
4 exercised by the reviewing court, and will result in  
5 contrary decisions, inconsistent decisions, in privately  
6 instituted enforcement cases.

7 The cases that have arisen illustrate clearly  
8 that, absent FCC enforcement of the preemption order,  
9 there will be inconsistent implementation of that policy  
10 embodied in that preemption order.

11 The FCC has argued that the availability of  
12 that agency to participate in district court proceedings  
13 is sufficient to ensure that uniformity will be  
14 maintained. However, it's obvious that the FCC may not  
15 participate in each and every case that's instituted  
16 under Section 401(b). It may not be invited by the  
17 parties or by the district court to make its views  
18 known.

19 Consequently, the action of the district court  
20 may in fact be contrary to the policies that the FCC has  
21 articulated. But more importantly, it deprives the FCC  
22 of its opportunity to choose the cases that it believes  
23 should be enforced and leaves that decision in the hands  
24 of private parties. A specific case that's instituted  
25 by a private party following private interests, rather

1     than the public interest that the FCC is charged with  
2     promoting --

3             QUESTION: Well, that would make some sense if  
4     -- perhaps more sense if it were an argument advanced by  
5     the FCC. But here the FCC is supporting your opponents,  
6     are they not?

7             MR. EMGE: Well, the FCC is supporting the  
8     opponents in this case, and I agree that perhaps if the  
9     agency thought about maintaining its prerogatives under  
10    the Act, and the prerogative being it has the sole  
11    responsibility for enforcing the provisions of the  
12    Communications Act, perhaps they would take a different  
13    position.

14            But these cases arose and then the FCC came in  
15    subsequently in order to deputize the private party's  
16    enforcement of the preemption order. And even if the  
17    FCC takes that position, I don't think the  
18    Communications Act authorizes the FCC to send out 50  
19    separate private deputies to enforce in order that it  
20    doesn't want to enforce, or may not want to enforce.

21            Now, they argue that they don't have the  
22    resources to enforce all of these actions in 50 states.  
23    Well, I'm not really sure I understand that argument,  
24    because in order to maintain uniformity they say they  
25    can participate in as many cases as are instituted.



1 It's difficult to understand how resources will be  
2 conserved when the FCC has to intervene in proceedings  
3 it may not have even chosen to start in the first  
4 place.

5 Instead of choosing to enforce perhaps one or  
6 two cases, it may find itself faced with ten or 15 cases  
7 and being an unwilling participant in these proceedings  
8 in order to ensure that its policies are carried out.

9 QUESTION: May I ask you, insofar as the  
10 proceeding is against the commission itself -- and I  
11 gather the individual commissioners are sued as well --  
12 do you make any Eleventh Amendment argument?

13 MR. EMGE: We have not made an Eleventh  
14 Amendment argument, and we're not making one. We  
15 haven't made one and we wouldn't make one now, because I  
16 think the cases are clear, Your Honor, that under  
17 Younger, if you name the individuals as defendants, then  
18 you avoid any Eleventh Amendment possibility of  
19 problems.

20 And although Younger is mentioned in the  
21 Respondent's brief, we have not made any Eleventh  
22 Amendment argument in this case.

23 In addition to the conservation of resources  
24 of the Federal Communications Commission being a  
25 consideration, I think it's also an appropriate

1 consideration to take into account the need to conserve  
2 the resources of the federal courts. The FCC implies  
3 that because its resources are somewhat limited that  
4 parties should rely upon the assets that are available  
5 or the resources that are available to the federal  
6 courts, and we don't think Congress intended that, for a  
7 number of reasons.

8 One is that there is, if the FCC is required  
9 to enforce its order, there is the possibility that it  
10 may decide that what was alleged to be a violation  
11 doesn't warrant enforcement. So the case may never get  
12 to federal court.

13 Secondly, it requires, as I've indicated  
14 previously, the federal courts to delve into state  
15 ratemaking orders, which is a very complex and  
16 complicated subject. It will require a great deal of  
17 the court's time to determine if the preemption order is  
18 in fact being violated by a rate order of a specific  
19 state commission.

20 Moreover, if you permit enforcement of rules  
21 that are developed in rulemaking proceedings by private  
22 parties against private parties who may not have been a  
23 party to the agency proceeding, the district court may  
24 be required to again add additional procedures to ensure  
25 that the due process rights of a non-party were

1     protected.

2             If the FCC is required to enforce its own  
3     orders, such procedures would not be necessary and the  
4     court could function, as Congress had intended, in a  
5     very narrow way, looking to see if there was -- the  
6     order was regularly made and duly certified, limiting  
7     its inquiry to the matters of that nature.

8             Finally, by allowing the Federal  
9     Communications Commission to delegate the enforcement to  
10    private parties, you will end up with a significant  
11    amount of issue splitting, cases being -- part of a rate  
12    case being tried in a federal court, part of a rate case  
13    being decided in a state court; consequently the  
14    resources of both the parties and the courts will not be  
15    conserved.

16            For these reasons, we believe that the  
17    decision of the Circuit Court for the First Circuit  
18    properly articulates the policies underlying the  
19    enforcement scheme that Congress chose to adopt with  
20    respect to Section 401 of the Communications Act.  
21    Consequently, we would submit that the preemption order  
22    is not an FCC order which can be enforced by a private  
23    party in federal district court under Section 401(b).

24            Thank you.

25            CHIEF JUSTICE BURGER:   Mr. Stroud.

1 ORAL ARGUMENT OF  
2 D. MICHAEL STROUD, ESQ.,  
3 ON BEHALF OF RESPONDENT

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

6 On January 6th, 1983, the FCC issued its  
7 preemption order in this case. That order was regularly  
8 made and duly served on the state commissions across  
9 this court -- country, rather, including the Maryland  
10 Public Service Commission.

11 If the Maryland Public Service Commission had  
12 implemented that order, it would have had the effect in  
13 Maryland of raising local exchange rates by one penny  
14 per day. However, instead of implementing that order,  
15 the Maryland Public Service Commission defied that  
16 order.

17 As a result of its defiance, it was necessary  
18 for the Chesapeake & Potomac Telephone Company to seek  
19 injunctive relief in the district court. That relief  
20 was obtained and the Fourth Circuit Court of Appeals  
21 affirmed the district court action.

22 The Petitioner in this case asserted two  
23 defenses to that injunction. First of all, it claims  
24 that the injunction was obtained under Section 401(b) of  
25 the 1934 Communications Act and that Act authorizes the



1 issuance of injunctions against persons. The Maryland  
2 Public Service Commission claimed that it is not a  
3 person within the meaning of that statute.

4 Their other argument, Justices, is that in  
5 looking at Section 401(b), it talks about any order of  
6 the commission. It claimed that the order, the  
7 preemption order in this case, was not an order within  
8 the meaning of Section 401(b).

9 Now, even though counsel has elected to argue  
10 only one of these defenses, I would like to address both  
11 of them today. I'd like to start with them in the order  
12 that I've just identified.

13 First of all with respect to the term  
14 "person," it is a fundamental principle of statutory  
15 construction that when trying to determine the meaning  
16 of a word we should look to its plain meaning as the  
17 word is used in the statute. In this particular case,  
18 the word "person" is defined in Section 153(i) of the  
19 Communications Code, and that definition says:

20 "The term 'person' includes an individual, a  
21 partnership, an association, a joint stock company, a  
22 trust or a corporation." It includes an individual.

23 Now, if you look at the complaint which C&P  
24 filed with the district court, it named not only the  
25 Maryland Public Service Commission, but it named the

1 individual commissioners themselves. And indeed, it was  
2 on the basis that they are in fact individuals that the  
3 Fourth Circuit Court of Appeals found that the  
4 requirements of the statute had been satisfied. We  
5 would ask this Court to do --

6 QUESTION: Were they sued in their individual  
7 capacities?

8 MR. STROUD: Yes, they can be, Your Honor.

9 QUESTION: But were they? Weren't they sued  
10 in their official capacities as members of the  
11 commission?

12 MR. STROUD: They were sued as individual  
13 members of the commission, Your Honor. But if you're  
14 asking whether or not this implicates the Eleventh  
15 Amendment, I would say that it does not.

16 QUESTION: No, I'm not asking that. I'm  
17 asking, if they're not sued in their individual  
18 capacity, but merely in their official capacities,  
19 legally that's the same thing as suing the commission,  
20 isn't it?

21 MR. STROUD: It's not the same, Your Honor,  
22 under the doctrine of Ex Parte Young. What we are  
23 saying --

24 QUESTION: Well, for Eleventh Amendment  
25 purposes I agree it's different.

1 MR. STROUD: Yes.

2 QUESTION: For statutory construction  
3 purposes, wouldn't you normally -- you couldn't get  
4 damages against these people individually, could you?

5 MR. STROUD: We're not seeking damages, Your  
6 Honor. We're seeking injunctive relief. And the answer  
7 is no, I could not get damages, and I think if I were  
8 suing them in their individual capacity and looking for  
9 damages that I would have a severe Eleventh Amendment  
10 problem.

11 In this particular case, under this Court's  
12 holding in Ex Parte Young, et cetera, I am looking only  
13 for injunctive relief, and I am suing them in their  
14 individual capacities.

15 QUESTION: Well, my questions really are not  
16 intended to raise the Eleventh Amendment problem, but  
17 the statutory definition that you referred to of  
18 "person" does not include official commissions as an  
19 example of a commission, and there is a separate -- I  
20 mean of a person.

21 And there is a separate statutory definition  
22 of the term "state commission," isn't there?

23 MR. STROUD: You are right, Your Honor, it  
24 does not include them. However, it does not exclude  
25 them as well. And indeed, there is a separate section

1    which defines state commissions. But of course, that is  
2    not an unusual problem, and if you look at cases which  
3    have been decided by this Court and which I refer to in  
4    my papers, including Georgia v. Evans, Simmons v. U.S.,  
5    Ohio v. Helvering, you will see that in a number, a  
6    variety of different statutory contexts, you see the  
7    term "person" and you have "state" defined separately  
8    somewhere else in that statute.

9           In each of the cases that I have quoted to  
10   you, the term "person" has been construed to include  
11   state, even though there's a separate definition in the  
12   statute for the word "state." And that of course is  
13   case law that is not cited by the Petitioner in this  
14   case.

15           Now, Petitioner argues that -- well, I'd like  
16   to, before I go back to get to the policy questions, I'd  
17   like to make another point with respect to the  
18   definitional section. If you look at the Section 153(i)  
19   and the words that Congress used, it said in connection  
20   with the definition of the term "person" that "the  
21   definition includes." It didn't say that the definition  
22   means. It says that "the definition includes."

23           And it suggests there, we contend, that the  
24   entities enumerated in the definition are only  
25   illustrative of the types of entities which could be



1 included there. And indeed, I believe the Petitioner in  
2 this case concedes that point.

3 The only argument that the Petitioner makes is  
4 that there has to be some common denominator, some  
5 common thread between the entities that are included and  
6 those which are sought to be included within the  
7 definition.

8 That argument, we would suggest, Your Honors,  
9 is not an argument based on law. In fact, the law is  
10 different. It says that there are no hard and fast  
11 rules for determining exclusion or inclusion, and what  
12 you really have to do is to look to the legislative  
13 context.

14 If you look at the cases that I've just  
15 referred to -- Georgia v. Evans, Simmons v. U.S., et  
16 cetera -- you would see that the controlling factor is  
17 the legislative context. Those statutes have exactly  
18 the same kinds of provisions which are set forth in the  
19 Communications Act, and this Court has consistently  
20 construed "persons" to include states.

21 The policy arguments that Petitioner offers in  
22 support of his definition of the term "person" are not  
23 persuasive. First of all, he argues that states should  
24 be excluded from the definition of the term "persons"  
25 because or in deference to what he claims to be a

1 federal policy of deference to the states. We would  
2 argue, Justices, that that policy position is incorrect,  
3 and indeed we would cite the Court to the language of  
4 the Fourth Circuit wherein it said that even if the  
5 individual commissioners themselves were not persons,  
6 that the court would nevertheless find that states were  
7 included within the definition of the term "persons"  
8 because to do otherwise would be to completely undermine  
9 the 1934 Communications Act.

10 How would that happen? Well, if you look back  
11 to the legislative history of the 1934 Act, if you look  
12 even to the letter from President Roosevelt to Sam  
13 Rayburn, you see that at that time the communications  
14 policy in this country was in chaos. The policy was  
15 distributed between the Interstate Commerce Commission,  
16 between the Postmaster General's Office, and between the  
17 Radio Commission.

18 And in that letter to Congress, the President  
19 asked that Congress pull this all together and put it  
20 under one agency, so that we could have a unified  
21 communications policy and a system of regulation in this  
22 country. And indeed, courts have held that the power of  
23 the FCC, the recipient of this authority and the agency  
24 which has the responsibility for implementing national  
25 and international communications policy, that power

1 extends to all regulatory actions necessary to ensure  
2 achievement of the commission's statutory  
3 responsibilities.

4 And we would argue that that policy  
5 responsibility would not be achieved in indeed the  
6 states were excluded from the definition of the term  
7 "person." If such a result occurred, one could readily  
8 imagine an event in which the states were evading lawful  
9 orders of the FCC and the FCC would be powerless under  
10 the Act to seek enforcement of those orders, even the  
11 adjudicatory kinds of orders to which Petitioner  
12 refers.

13 And we would argue that if the Congress  
14 intended that after the FCC issued an order against a  
15 commission like the Maryland commission, if Congress  
16 intended that it had to go to Anne Arundel County or  
17 some other circuit court in order to get that order  
18 enforced, that it would have said so, and indeed it did  
19 not say so.

20 Now, what other language do we have in the  
21 statute to suggest what Congress intended with respect  
22 to the word "person," whether they intended that states  
23 be included within that definition. It has been argued,  
24 and correctly so, that Section 401(b) is in fact based  
25 upon Section 1612 of the Interstate Commerce Act, and

1 there is no real dispute about that.

2 But if you look back at that statute, if you  
3 look back at Section 1612, you see that the Section  
4 401(b) was not copied directly after that statutory  
5 section. Everywhere you see the word "person" in  
6 Section 401(b), under the old 1612 that word was  
7 "carrier."

8 So that when 401(b) was enacted, the word was  
9 changed from "carrier" to "person." In looking at the  
10 legislative history, there is no explanation for this  
11 change. However, we would argue that, in view of the  
12 fact that Congress changed that word, and certainly in  
13 view of the fact that the term "person" is broader than  
14 the term "carrier," and in view of the obvious fact that  
15 the three principle players in this scheme of regulation  
16 are the state commissions, the FCC, and the carriers,  
17 that the reason Congress changed that word from  
18 "carriers" to "persons" was to make it broad enough to  
19 include states like the Petitioner in this case.

20 I would now like to turn to the second  
21 argument that has been made by the Petitioner in this  
22 case, and that is that the preemption order is in fact  
23 not an order within the meaning of Section 401(b). And  
24 the reason that argument is advanced is because  
25 Petitioners argue that an order generated from an



1 adjudicatory proceeding is different than an order  
2 generated in a rulemaking proceeding. They argue that  
3 adjudicatory orders are enforceable, rulemaking orders  
4 are not enforceable under Section 401(b).

5 Moreover, they argue that the preemption order  
6 in this case was a product of a rulemaking proceeding  
7 and therefore is not enforceable.

8 We would argue, Justices, that Petitioner's  
9 claim on this point is totally without merit. Moreover,  
10 if that position were adopted, prompt enforcement of FCC  
11 orders would be impossible. And I might also point out  
12 at this juncture that this is not the position that the  
13 Petitioners took before the district court.

14 There seemed to be little doubt in that  
15 proceeding that this was an enforceable order. This  
16 argument about adjudicatory orders, enforceable orders,  
17 is one that was raised for the first time before the  
18 Fourth Circuit Court of Appeals.

19 However, if you look at the statutory  
20 provision which is at issue here, you see that that  
21 statutory section does not distinguish between  
22 rulemaking orders and executory orders. In fact, the  
23 statute does contain an exception. It says "orders  
24 except for the payment of money." And from that we  
25 conclude that Congress did indeed identify a statutory

1 exception which it wanted included. It did include, it  
2 did not intend to include, the exception which is being  
3 argued for here today.

4 Nothing in the legislative history of that  
5 statute supports the Petitioner's position on this  
6 point. In fact, if you look at the Petitioner's  
7 argument you see that the primary basis for his argument  
8 is in fact the Administrative Procedure Act. With  
9 respect to that Act, we would point out only a couple of  
10 things.

11 First of all, it is true that the  
12 Administrative Procedure Act does contain a definitional  
13 section and it does contain a definition of the word  
14 "order," and "orders" under that section would exclude  
15 rulemaking orders.

16 I would point out, however, that the  
17 Administrative Procedure Act has no relevance of  
18 application whatsoever to the 1934 Communications Act.  
19 The Administrative Procedure Act was passed more than  
20 ten years after the 1934 Act.

21 Moreover, if you look at the definitions set  
22 forth in the Administrative Procedure Act, you see that  
23 those definitions are expressly limited to the Act  
24 itself. So Petitioner in this case has failed to give  
25 this Court, or anyone else for that reason, any reason

1 for believing that you should engraft onto the 1934 Act  
2 definitions which were not considered by Congress until  
3 ten years later.

4 In addition to ignoring the plain language of  
5 the statute and the legislative history, the Petitioner  
6 in this case has already -- also ignored a number of  
7 cases by this Court which indicates that orders which  
8 are the product of rulemaking are indeed enforceable.  
9 And in that regard -- this regard, I would cite to the  
10 Court the case of Ambassador v. U.S. and also CBS versus  
11 United States.

12 Now, with respect to the CBS case I should  
13 point out that that decision was a decision which was  
14 made pursuant to Section 402(a). But Section 402(a), of  
15 course, does use the word "order" and is the section  
16 next adjacent to Section 401(b). Therefore, we would  
17 argue that where the same word is used in different  
18 parts of the same statute, those words should have the  
19 same meaning in both places.

20 And that would suggest to you that if an order  
21 is an order for purposes of 402(a), it also should be an  
22 order for purposes of 401(b).

23 Ultimately, though, after looking at the  
24 statutory information that is available and also the  
25 precedents that exist in this area, ultimately the

1 question is whether or not the preemption order is  
2 itsely enforceable. And in looking for guidance on that  
3 question, we would refer the Court to the CBS case.

4 In that case, the Court held that labels are  
5 not dispositive, you cannot judge a book by its cover.  
6 And indeed, I believe that's the fallacy that's implicit  
7 in counsel's argument, and I believe that was the  
8 problem with the First Circuit decision. Indeed, you  
9 must look at the substance.

10 And if you look at the substance, there are  
11 certain things that you should look for. You should  
12 look to determine whether or not the order is fully  
13 executory, look to see if there's anything else that is  
14 left to be done, look to see if that order determines  
15 rights, look to see if it was intended to be binding on  
16 the parties to whom it was addressed, look to see if it  
17 was served on the persons who would be affected by it.

18 QUESTION: How about your opponents'  
19 contention that if the argument requires a great deal of  
20 tailoring, or the order requires a great deal of  
21 tailoring or work by the federal court, perhaps it ought  
22 not be enforced by private parties?

23 MR. STROUD: Your Honor, I am not making the  
24 argument that every order or every piece of paper that  
25 is denominated by the FCC as an order need be enforced



1 under Section 401(b). What I am trying to do is no  
2 suggest, as the Court did in the CBS case, a standard of  
3 review, a set of criteria which could be used to  
4 evaluate in an individual case whether or not an order  
5 is or is not enforceable.

6 There may be some orders which are so -- which  
7 are denominated as orders, but which are so imprecise  
8 that they could not be enforced. The order in Kroeger  
9 v. Stahl, for example, is exactly that kind of order,  
10 where the FCC called something an order, but it was  
11 merely an authorization to conduct certain kinds of  
12 tests. It didn't require anybody to do anything.

13 That type of order perhaps -- in fact was not  
14 and perhaps should not be enforced under Section  
15 401(b).

16 QUESTION: May I ask, in this case we have  
17 kind of a frontal assault on the FCC's order to the  
18 Maryland commission. Supposing that the utility just  
19 complained about the application of the order to one set  
20 of accounts, say they didn't like the way they  
21 depreciated -- the commission required depreciation of  
22 the telephone poles in Anne Arundel County, but  
23 everything else was all right.

24 Could you bring a federal lawsuit to review  
25 the validity of that kind of a rule?

1 MR. STROUD: The review of any order of the  
2 FCC, if in fact --

3 QUESTION: Well, I mean it actually would be a  
4 Maryland commission would enter an order on some kind of  
5 a depreciation schedule, and then the utility would say,  
6 well, that really doesn't comply with in all respects  
7 with the preemption order, the depreciation order of the  
8 commission, the FCC.

9 Could you get federal review of every one of  
10 those claimed violations, claimed departures from the  
11 federal rule?

12 MR. STROUD: I could get review of that  
13 situation certainly before the FCC.

14 QUESTION: No, I mean in a federal court,  
15 under 401. Or do you have to have a wholesale assault  
16 on the order, as you have in this case?

17 MR. STROUD: As opposed to one piece of it?

18 QUESTION: As opposed to just one  
19 application. To what extent are we opening up the  
20 federal courts to review of particular applications of  
21 depreciation rulings by state commissions, is what I'm  
22 asking.

23 MR. STROUD: Justice, I would have to say  
24 this, that the FCC's orders are intended to be binding  
25 until they are reviewed and reversed, and if indeed an

1 order is executory and meets all of the criteria that I  
2 mentioned before and is served on the commission and it  
3 elects to disobey that order --

4 QUESTION: Oh, no, I'm assuming a case in  
5 which the commission says, we're trying to obey it, but  
6 we think it means something else than you. You can have  
7 fights over --

8 MR. STROUD: Oh, fine, okay. If that's the  
9 situation, then I think what we would try to do would be  
10 to get the FCC involved in the process and see if we  
11 couldn't work that out before the commission. If, after  
12 that process had been concluded, we still were in a  
13 position where we felt that the commission was not in  
14 good faith compliance with the FCC --

15 QUESTION: It's in good faith, it's just  
16 wrong, under your view.

17 MR. STROUD: Well, if it's just wrong I would  
18 think that we wouldn't want to go to district court on  
19 that. I would think we'd want to --

20 QUESTION: Do you think you could go to  
21 district court? That's my question.

22 MR. STROUD: Well, if you have -- let me  
23 assume the underlying points again. If you have an FCC  
24 order --

25 QUESTION: You do.

1 MR. STROUD: -- the commission is acting in  
2 good faith, but we think it's wrong --

3 QUESTION: Right.

4 MR. STROUD: -- and the question is should we  
5 get that reviewed in the district court or --

6 QUESTION: Does the district court have the  
7 jurisdiction to entertain a claim that it's just plain  
8 wrong?

9 MR. STROUD: I would think that it does.

10 QUESTION: You think it does?

11 MR. STROUD: Yes.

12 Now, in addition to the case law and the  
13 considerations that were set forth in CBS, the  
14 Petitioner in this case has also raised certain policy  
15 considerations, and I'd like to address just some of  
16 those because I have counsel following me who will  
17 address others.

18 But with respect to the issue of whether or  
19 not construing the term "order" as C&P request would  
20 have the effect of creating a private cause of action  
21 not intended by Congress, we would argue that that  
22 clearly would not be the result.

23 Thank you very much.

24 CHIEF JUSTICE BURGER: Very well.

25 Mr. Smith.



1 ORAL ARGUMENT OF JACK D. SMITH, ESQ.,  
2 ON BEHALF OF THE FCC AS AMICUS CURIAE,  
3 IN SUPPORT OF RESPONDENTS

4 MR. SMITH: Thank you, Mr. Chief Justice, and  
5 may it please the Court:

6 Congress intended Section 401(d) of the Act as  
7 a broad enforcement mechanism, available both to parties  
8 injured by violations of the Act and to the FCC itself.  
9 The section fairly bristles with the word "any." It  
10 says that if any person violates any provision of the  
11 Communications Act, the FCC or any party injured thereby  
12 may appeal to the appropriate district court for  
13 enforcement of such order.

14 Yet Petitioner reads this broad language very  
15 narrowly, in a manner that would have this Court exclude  
16 a significant class of potential violators and a large  
17 category of FCC orders. Neither the statutory language,  
18 legal precedent, or common sense supports that result.

19 As to whether the state of Maryland is a  
20 person under the Communications Act, I don't think I  
21 need to repeat my arguments made in the brief as to the  
22 broadness and inclusiveness of Section 3(i) of the Act.  
23 Suffice it to say that in 50 years of practice the FCC  
24 has never, at least to my knowledge, ruled that a person  
25 does not include a state or a state commission.

1           To the contrary, we have always afforded state  
2 commissions and state officials all the rights and  
3 duties and obligations under the Communications Act  
4 afforded to any other person. For example, Section 301  
5 of the Communications Act prohibits use of radio  
6 channels by anyone unless they're a person duly  
7 authorized by the FCC. But states and state agencies  
8 are among the largest licenseholders in the whole  
9 country.

10           The state of Maryland alone holds well over  
11 100 FCC licenses, licenses for police and fire  
12 communications, licenses for police radar, for highway  
13 maintenance, even licenses for the University of  
14 Maryland to run a broadcast station just down the road.

15           Every one of these licenses is signed by a  
16 Maryland state official, and he binds the state to abide  
17 by all regulations of the FCC heretofore and hereafter  
18 made. And this is how it has to be. Otherwise, our  
19 nationwide system of clear channel communications would  
20 soon degenerate into a cacaphony of interference  
21 noises.

22           The same thing holds true for our preemption  
23 orders. The state must be bound by the FCC's preemption  
24 orders. These orders are critical to avoid frustration  
25 of valid and important federal goals by states and state

1 commissions. If enforcement can't be obtained against  
2 the states in federal courts, then the FCC's enforcement  
3 orders would lead -- the FCC's enforcement orders would  
4 not be able to be enforced and it would lead to a  
5 situation where our unified system would be fragmented  
6 by conflicting federal and state orders.

7 Justice Stevens asked, what about the fact  
8 that Section 3(i) contains a separate definition for  
9 state commissions. Well, as a matter of fact Section  
10 3(i) -- Section 3 contains 39 definitions, all told.  
11 The very next one after Section 3(i) is corporations,  
12 and corporations is included and definitely named in  
13 Section 3(i).

14 And in fact, there is at least a quarter -- a  
15 quarter of the 39 definitions are other examples of  
16 persons: carriers, connecting carriers, ship operators,  
17 radio officers. That is no indication that states or  
18 state commissions are not persons, because they're  
19 separately identified in 3.

20 The commission's preemption order said that  
21 the states were required to abide by the FCC's rules  
22 allowing telephone companies to make their depreciation  
23 calculations according to the FCC's prescriptions. The  
24 order was duly served on all the states, including the  
25 state of Maryland.

1           The commission intended for it to be  
2 immediately binding. Whether that order is  
3 characterized procedurally as a rulemaking or an  
4 adjudication doesn't seem to make any difference to us.  
5 It's a final action. We declared the obligations of all  
6 the state commissions, including the state of Maryland,  
7 and we didn't contemplate entering any other orders.

8           As such, that order is enforceable under  
9 Section 401(b), just as much as that order is reviewable  
10 by this Court under Section 402.

11           Petitioner contends nevertheless that, since  
12 it was produced according to, using rulemaking  
13 proceedings, that it is not capable of enforcement under  
14 Section 401(b). But as has already been said and bears  
15 repeating, it is the substance of what the agency  
16 purports to do, not the procedures that are used, that  
17 dictate reviewability and enforceability.

18           In recent years, the commission's workload has  
19 expanded greatly. We have all read about it in the  
20 papers. At the same time, the pressures upon the  
21 Government have been to reduce expenditures.

22           QUESTION: May I ask, then, Mr. Smith, if the  
23 order had had the label "rule" on it instead of being  
24 called an order, and then the preemption order had been  
25 called an interpretation or something, the same argument



1 would apply?

2 MR. SMITH: The order --

3 QUESTION: The fact that it's called an order  
4 doesn't really make any difference?

5 MR. SMITH: No, it doesn't as far as we're  
6 concerned. But our practice is that all those orders  
7 would be called memorandum opinion and order, and we  
8 don't label anything a rule per se that's on a written  
9 document like that.

10 We do have a body of rules under 47 CFR, and  
11 of course this is not a rule; it's not in 47 CFR. It  
12 was a separate order. It was never incorporated as a  
13 rule itself, as part of the commission rules.

14 To meet the challenge brought on by increased  
15 workload and federal deficits, the FCC and other  
16 Government agencies have increasingly turned toward  
17 rulemakings and we have decreased our emphasis on  
18 procedures that are more time-consuming, like  
19 adjudications. There have been numerous decisions by  
20 this Court and other courts that have approved these  
21 efforts, and Petitioner's arguments pleading for more  
22 burdensome requirements definitely tend to run contrary  
23 to that more progressive trend.

24 Nor is Petitioner correct that our nationwide  
25 communications policy will be undermined if private

1 parties are allowed to seek enforcement of FCC orders.  
2 The FCC is the one responsible for maintaining that  
3 uniformity and we vigorously disagree with that  
4 position.

5 Under Section 401(b), the district court  
6 doesn't review the propriety of the FCC's orders. Its  
7 effort is confined to enforcement. If there's any  
8 question that arises about the FCC's policies or  
9 communications policy in general, they are free and have  
10 ample authority to seek the views of the FCC or to refer  
11 it to us under the doctrine of primary jurisdiction.  
12 They can always solicit our views as an amicus or an  
13 intervenor.

14 And it's not true to say that this puts  
15 burdens on the FCC that are just the same as if we went  
16 in ourselves. It's much more burdensome to go in and  
17 sustain a suit by yourself than it is to just file as an  
18 intervenor. In fact, many times we can file the same  
19 brief that we filed in a previous case.

20 Our experience has been especially good in  
21 many contexts like this: antitrust, Section 401, and  
22 other statutes authorizing district court litigation.  
23 We have had very good success with this process. The  
24 fact is that with a shrinking budget, we are  
25 considerably aided by private enforcement of our

1 actions, particularly in the instant case, where it  
2 should be remembered that there was no question what the  
3 FCC's order was. We said that you should allow them to  
4 use these methods.

5 There was no question that the state disobeyed  
6 it. They were proud of it. They said, we are not going  
7 to follow it. So there's no factfinding for the  
8 district court to make there. It's a simple case of  
9 enforcement.

10 Lastly, the Court doesn't have to get involved  
11 in ratemaking, either. It's just not true that the  
12 district court has to review the rates set by the  
13 state. In this case, all we did again was say that you  
14 have to abide by these methods.

15 In enforcing that order, the district court  
16 doesn't have to review the rates, it doesn't have to  
17 review the rate of return set by the state, and it  
18 doesn't have to review the many other aspects of state  
19 ratemaking. Those are issues for state courts. Of  
20 course --

21 QUESTION: What would you say, Mr. Smith, to  
22 the question I asked Mr. Stroud? Supposing there was a  
23 fight about the meaning of the order in a particular  
24 application. Would there be district court  
25 jurisdiction?

1 MR. SMITH: I would hope that we -- in the  
2 Common Carrier Bureau we have an accounting and audits  
3 division, and they're always free to talk with people  
4 about the meaning of the orders, and they would work  
5 that out.

6 QUESTION: I'm not interested in what you'd  
7 hope. What do you think, would there be jurisdiction or  
8 not?

9 MR. SMITH: If we found that they were acting  
10 inconsistent with our decision and they had violated the  
11 decision, yes, it would be in the district court.

12 QUESTION: If you found what -- well,  
13 supposing that the private party goes directly to the  
14 federal court without asking you.

15 MR. SMITH: Your first question --

16 QUESTION: The jurisdiction doesn't depend on  
17 what you find, does it?

18 MR. SMITH: Your first question is one if  
19 there is ambiguity, if there is ambiguity about whether  
20 they have violated it or not.

21 QUESTION: Or there's a dispute between one  
22 side and the commission.

23 MR. SMITH: The answer would be it would  
24 probably in the district court, and the district court  
25 would say: Gee, this looks very complicated to me; FCC,



1 I'm going to defer this to you under primary  
2 jurisdiction.

3 QUESTION: But your answer is there would be  
4 federal jurisdiction?

5 MR. SMITH: Yes, sir, exactly.

6 QUESTION: And does the FCC have declaratory  
7 -- does it issue declaratory orders? Could there be a  
8 filing with the FCC and you could issue a declaratory  
9 order as to what your prior order meant?

10 MR. SMITH: Exactly. If there's any confusion  
11 or there's a need for clarification, we can always do  
12 that, and we'd be happy to do something like that.

13 Thank you very much.

14 CHIEF JUSTICE BURGER: Do you have anything  
15 further, Mr. Emge?

16 REBUTTAL ARGUMENT OF

17 KIRK J. EMGE, ESQ.,

18 ON BEHALF OF PETITIONER

19 MR. EMGE: Just briefly, Mr. Chief Justice.

20 The Respondent in its brief and in the  
21 argument today places a great deal of reliance on the  
22 Court's decision in the CBS case. But I think, reading  
23 that case, it's clearly distinguishable from the case  
24 now before the Court. In that case, the Court was  
25 concerned with whether an FCC action is reviewable and

1     there is a presumption that actions are in fact  
2     reviewable unless Congress expressly states otherwise,  
3     particularly in the exceptional circumstances that were  
4     before the Court in that case, where if they did not --  
5     if the Court did not permit review of the FCC action,  
6     CBS, whose rights were clearly being injured, would have  
7     absolutely no remedy.

8             Here we're not talking about reviewability.  
9     We're talking about enforceability and who can enforce  
10    the Act. I think the policy considerations that we  
11    outlined in our brief and I outlined earlier in my  
12    argument clearly distinguish that enforcement question  
13    of whether an order can be enforced from the question of  
14    whether an order is subject to judicial review.

15            Contrary -- secondly, contrary to the FCC's  
16    assertion, I think it's clear that enforcement of the  
17    preemption order by private parties requires the courts  
18    to review state ratemaking decisions. If you look at  
19    the decision of the district court in Maine when it  
20    tried to determine whether or not the Maine commission  
21    had complied with the FCC's preemption order, it made  
22    findings with respect to rate of return, rate design, as  
23    well as depreciation rates.

24            There are a large number of interdependent  
25    factors involved in ratemaking. Depreciation is only one

1 of them. In order to determine whether or not a state  
2 commission has complied with the FCC's order, courts  
3 have engaged in what amounts to judicial review of state  
4 ratemaking decisions.

5 With respect to the question that Justice  
6 Stevens asked Mr. Stroud concerning whether you have the  
7 situation where a state does not completely disagree  
8 with the FCC's decision, but instead maybe there is a  
9 question as to whether it has complied with one aspect  
10 of it, I think the case that arose in Kentucky is the  
11 example of that sort of instance, where the state  
12 commission said: We agree that the FCC can preempt us,  
13 our ratemaking order reflects the preemption order.

14 The telephone company said: No, you haven't  
15 properly reflected. They filed an action in federal  
16 district court, and the federal district court is  
17 required to review that order, which the Kentucky  
18 district court is still doing, to determine if the rate  
19 order, although the state commission says we will follow  
20 the FCC, whether that rate order is in fact consistent  
21 and complies with the preemption order.

22 Although in the case involving the Maryland  
23 commission the commission's decision said, we don't  
24 believe the FCC has the authority to preempt us and on  
25 the basis of that conclusion and the fact that they

1 didn't think the rates prescribed by the FCC were  
2 reasonable for intrastate ratemaking purposes --  
3 although that was the basis of the commission's  
4 decision, once the district court issued its preliminary  
5 injunction the problems associated with private  
6 enforcement of the FCC preemption order were still  
7 present in this case when the commission, the Maryland  
8 commission, had to decide how to comply with the FCC's  
9 preemption order, since the order was general in its  
10 terms and did not -- and there's no determination by the  
11 FCC of what constitutes a rate order that complies, the  
12 Maryland commission had to conduct proceedings in which  
13 it had to take comments as to how it should redefine its  
14 order in order to be in compliance with the FCC's  
15 preemption order and the district court's injunction.

16 And although the commission ultimately opted  
17 to adopt the telephone company's proposals as to what  
18 constituted compliance, it was done with one dissenting  
19 commissioner and there was a significant amount of  
20 discussion as to what constitutes compliance.

21 The problems are still there, even in the  
22 Maryland case. But there are specific examples in other  
23 jurisdictions where the state commission said, we will  
24 abide by the FCC's preemption order and this is what we  
25 think the effect is in our ratemaking order, and the



1 telephone company is not satisfied with that and they  
2 file suit in federal district court, and then it's up to  
3 the federal district court to review the rate order to  
4 determine if it's in compliance.

5 Thank you.

6 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
7 The case is submitted.

8 (Whereupon, at 2:56 p.m., oral argument in the  
9 above-entitled case was submitted.)  
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CERTIFICATION

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

#84-1362 - PUBLIC SERVICE COMMISSION OF MARYLAND, Petitioner v. CHESAPEAKE AND

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POTOMAC TELEPHONE COMPANY OF MARYLAND

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

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