

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 84-871; 84-889; 84-1054; 84-1069

**TITLE** LOUISIANA PUBLIC SERVICE COMMISSION, Appellant V.  
FEDERAL COMMUNICATIONS COMMISSION, ET AL.;  
CALIFORNIA AND PUBLIC UTILITIES COMMISSION OF CALIFORNIA, ET AL.,  
Petitioners V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES;  
PUBLIC UTILITIES COMMISSION OF OHIO, ET AL., Petitioners V.  
FEDERAL COMMUNICATIONS COMMISSION, ET AL; and  
FLORIDA PUBLIC SERVICE COMMISSION, Petitioner V.  
FEDERAL COMMUNICATIONS COMMISSION, ET AL.

**PLACE** Washington, D. C.

**DATE** January 13, 1986

**PAGES** 1 thru 54



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IN THE SUPREME COURT OF THE UNITED STATES

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LOUISIANA PUBLIC SERVICE :  
COMMISSION, :  
Appellant, :  
V. : No. 84-871  
FEDERAL COMMUNICATIONS COMMIS- :  
SION, ET AL.; :

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CALIFORNIA AND PUBLIC UTILITIES :  
COMMISSION OF CALIFORNIA, :  
ET AL., :  
Petitioners, :  
V. : No. 84-889  
FEDERAL COMMUNICATIONS COMMIS- :  
SION AND UNITED STATES; :

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PUBLIC UTILITIES COMMISSION OF :  
OHIO, ET AL., :  
Petitioners, :  
V. : No. 84-1054  
FEDERAL COMMUNICATIONS COMMIS- :  
SION, ET AL.; :

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And

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FLORIDA PUBLIC SERVICE :  
COMMISSION, :  
Petitioner, :

V. : No. 84-1069

FEDERAL COMMUNICATIONS COMMIS- :  
SION, ET AL. :

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Washington, D.C.

Monday, January 13, 1985

The above-entitled matters came on for oral argument before the Supreme Court of the United States at 12:59 o'clock p.m.

APPEARANCES:

LAWRENCE G. MALONE, ESQ., Assistant Counsel, New York Public Service Commission, Albany, New York; on behalf of the appellant and petitioners.

CHARLES FRIED, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the federal parties.

MICHAEL BOUDIN, ESQ., Washington, D.C.; on behalf of AT&T and the former Bell System Operating Companies.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Louisiana Public Service Commission against the Federal Communications Commission and related cases.

Mr. Malone, you may proceed whenever you are ready.

ORAL ARGUMENT OF LAWRENCE G. MALONE, ESQ.,  
ON BEHALF OF THE APPELLANT AND PETITIONERS

MR. MALONE: Mr. Chief Justice, and may it please the Court, this is a consolidated case. It is here on three petitions for writs of certiorari to the Fourth Circuit Court of Appeals. They have been brought by California, Ohio, and Florida. And there is a separate appeal which has been instituted by the state of Louisiana.

The issue raised by these cases is whether the 1934 Communications Act empowers the FCC to preempt the state's regulation of depreciation in accounting matters for local telephone ratemaking purposes.

From 1934 to 1983, the FCC did not attempt to preempt. It took the position that the Act as written deserved a system of dual, that's state and federal regulation over these matters. So this dual regulation took hold, and a primitive telephone network eventually became the most technologically advanced, efficient, and

1 reliable system in the world.

2 Then in 1983 the Commission took a new  
3 position. It found at the behest of the utility industry  
4 that the Act as originally written not only allowed but  
5 required preemption, and that even if its new reading of  
6 the Act was inaccurate, it still could preempt because a  
7 failure to do so would frustrate the implementation of  
8 its general responsibility to maintain an efficient  
9 interstate telephone network.

10 So it told the states to base local rates on  
11 its perception of the correct way to depreciate and to  
12 account for the costs in plant which are assigned to the  
13 states under the long accepted separations principle.

14 Now, that decision, if upheld by the courts,  
15 will require local telephone customers to pay very  
16 substantial telephone rate increases with no assurance  
17 that a single dollar of those added payments will go to  
18 fulfilling the purpose for which the FCC preempted. That  
19 is, plant modernization.

20 On appeal, the lower court, the Fourth Circuit,  
21 had affirmed by a two to one vote, and it has done so  
22 based not on agreement with the Commission's new reading  
23 of the Communications Act, but rather on this implied  
24 preemption theory, the syllogism that competition will  
25 breed a need for plant replacement or accelerated

1 depreciation, and that can be facilitated by preemption.

2 The lower court should be reversed for several  
3 reasons. The first is that it ignores the will of  
4 Congress. It ignores the fact that Congress back in 1934  
5 carefully constructed a jurisdictional boundary which  
6 divided the FCC's jurisdiction from that of the states,  
7 and in doing so preserved to the states local  
8 depreciation and accounting regulation.

9 Now, depreciation by definition is the recovery  
10 of a capital asset over its life. So in sitting down to  
11 set up depreciation accruals, a company manager or a  
12 regulator asks him or herself three questions. Is this  
13 cost or is this asset depreciable? That is, they  
14 classify the property.

15 The second question is, what is it worth? What  
16 is its value? That is the valuation of the property.  
17 And the third question is, how long is this going to  
18 live, because I want to allow the company to recover this  
19 capital value over its life, and that is the process that  
20 results in the calculation of a specific depreciation  
21 percentage.

22 QUESTION: That is straight line depreciation.

23 MR. MALONE: That is straight line  
24 depreciation, Your Honor.

25 Now, having developed this percentage, you then

1 simply apply that to the capital asset and derive  
2 specific dollar and cent depreciation charges to recover  
3 each year.

4 The fundamental flaw with the FCC's position  
5 that it is able to preempt and able to set local  
6 depreciation charges is that each of these three  
7 functions, each tool involved in this task has been  
8 denied the FCC by Congress.

9 First, let's look at valuation. Section 213 of  
10 the Communications Act empowers the FCC to value plant,  
11 but Section 213(h) expressly and unequivocally provides  
12 that the states retain the power to value the plant which  
13 is under their jurisdiction.

14 So, certainly if the FCC cannot dictate to the  
15 states the value of the plant which is subject to  
16 intrastate regulation, then they can't dictate the  
17 specific depreciation accruals which are designed to  
18 reimburse companies for the value of that plant.

19 In other words, the FCC order assumes unto  
20 itself a power expressly denied it by Section 213(h).  
21 Let's look at the other two functions, classification of  
22 the property and the development of these specific  
23 depreciation percentages to apply to the property's  
24 value.

25 Well, the government, the FCC argues that

1 Section 220(b) of the Act, and that is the general  
2 depreciation and accounting section, gives them the  
3 authority not only to set up classifications and these  
4 specific depreciation percentages for the plant under  
5 their jurisdiction, but it also gives them the authority  
6 to set up classifications and percentages for the plant  
7 and the assets under the state's jurisdiction and  
8 authority. That is the new reading. That is the reading  
9 that they never took from 1934 to 1983, and that the  
10 Fourt Circuit was not willing to embrace.

11 But they argue that Section 220(b) expressly  
12 authorizes them to take over these two functions, but  
13 when one reads Section 220 in its full context, with  
14 particular reference to Section 220(j), one sees that  
15 Congress did not give them the authority to classify  
16 plant or to develop depreciation percentages with respect  
17 to the plant in the state's jurisdiction.

18 Now, of course, this is --

19 QUESTION: Mr. Malone, what kind of physical  
20 plant or equipment are we talking about? Is it telephone  
21 instruments?

22 MR. MALONE: It could be telephone poles, Your  
23 Honor, telephone lines, all of the plant which really  
24 goes into -- the vast majority of the plant which goes  
25 into the provision of telephone service. Certainly there

1 is a certain amount of plant which is assigned solely to  
2 the provision of intrastate service, but what we are  
3 dealing with here is the FCC's attempt to take over the  
4 costs mainly which are devoted to jointly used plant.

5 QUESTION: And jointly used plant means plant  
6 whether it is telephones or lines or both that are used  
7 for both intrastate and interstate?

8 MR. MALONE: That's correct, Your Honor.

9 Now, if one considers the fact that in 1934 the  
10 vast majority of this plant was valued on a fair value  
11 basis, and fair value is attune inextricably to the  
12 length of lives, it really makes no sense that Congress  
13 would have ever told the states that you can value the  
14 plant but say to the FCC with the states valuing it, you  
15 can assume how long it is going to live.

16 That is like asking two people to drive a car  
17 at one time with one person having their foot on the  
18 accelerator and the other person steering. It just  
19 couldn't possibly work.

20 But the FCC here is saying that it has the  
21 power to classify this property, and really its position  
22 misreads Section 220(j). Now, that was a provision, Your  
23 Honors, which caused a great deal of dispute in the  
24 enactment of the Communications Act.

25 The Senate wanted a 220(j) which would have

1 assumed preemptive powers with the FCC, and would have  
2 called for a study to look into the reasonableness of  
3 undoing these powers, and the House wanted a 220(j) which  
4 would have expressly prohibited preemption.

5 So, a conference committee was called, and it  
6 ultimately gave both sides part of the loaf. It gave the  
7 House the continuation of the status quo, which in 1934  
8 was dual regulation with the states regulating these  
9 depreciation and accounting functions for local matters,  
10 and it gave the Senate a direction, not a request, but a  
11 direction to the FCC to study this dual regulation, and  
12 to come back and tell us whether it works.

13 If it is causing problems, do a study --  
14 whether it is causing problems or not, do a study, and  
15 come back to us, and if it is causing problems we will  
16 give you new legislation to give you preemptive  
17 authority.

18 But 220(j) clearly evidences Congress's  
19 position that the Act as written left the states with  
20 this power because it envisions a need for new  
21 legislation to harmonize what it describes as state and  
22 federal powers, not practices, but powers over  
23 depreciation in accounting matters.

24 So, the three functions, the classification of  
25 the property, its valuation, and the development of

1 specific depreciation percentages to apply to that value  
2 in order to determine dollar and cents accruals are all  
3 reserved to the states.

4 QUESTION: Well, Mr. Malone, one section you  
5 rely rather heavily on, I guess, is 152(b), and that  
6 talks about prohibiting Commission jurisdiction over  
7 charges, classifications, et cetera, in connection with  
8 interstate communications service.

9 Now, when you have got a telephone pole out  
10 there that has wires on it that are used both for  
11 intrastate and interstate, do you say that that section  
12 means that you allocate a part of that pole to intrastate  
13 service?

14 MR. MALONE: Yes, Your Honor, but I think  
15 Congress has always recognized, Your Honor, that if you  
16 have a telephone pole in Lake Tahoe, it is subject to a  
17 very different climate than a telephone pole in Lake  
18 Placid, and it is --

19 QUESTION: Are either one of them on dry land,  
20 I presume?

21 MR. MALONE: Yes, Your Honor.

22 (General laughter.)

23 MR. MALONE: But one is not going to last as  
24 long as the other. By the same token, if you have a  
25 central office switch serving an area such as Tampa Bay,

1 which is growing, and a central office switch serving an  
2 area such as Green Bay, they are subject to very  
3 different technological obsolescence, growth, very  
4 different factors that go into the development of these  
5 service lives and these depreciation percentages.

6 And Congress back in '34 wisely recognized that  
7 the state regulators on the scene were best able to take  
8 measure of these differences and to set meaningful  
9 depreciation charges in accounting classifications.

10 QUESTION: Did the Commission then allow the  
11 states or did it follow the states' methods when it came  
12 to depreciating for interstate communications service?

13 MR. MALONE: Well, for interstate  
14 communications services, the Commission eventually grew  
15 into a position where it was able to develop its own  
16 depreciation charges with respect to the costs that were  
17 separated to it.

18 Let's assume we have a telephone pole that  
19 costs \$100, and we assume that 75 percent of that pole's  
20 usage is devoted to intrastate services and 25 percent is  
21 devoted to interstate. What we do is, we assign the  
22 states responsibility for dealing with the \$75 on that  
23 pole, and the FCC is responsible for dealing with the  
24 other \$25.

25 QUESTION: So the allocation is between a

1 percentage of value of a single physical entity.

2 MR. MALONE: That's right, Your Honor. That's  
3 correct. And with respect to Section 152, Your Honor,  
4 that is a jurisdictional overlay to the act. It tell us  
5 how to read the other provisions.

6 Subdivision (a) assigns the FCC jurisdiction of  
7 interstate matters, and subdivision (b) tells the FCC and  
8 the states what the FCC can't do. Subdivision (b), which  
9 you referred to, Your Honor, prohibits the FCC from  
10 asserting jurisdiction over charges, classifications, and  
11 practices devoted to the provision of intrastate  
12 services.

13 So, clearly the threshold question with respect  
14 to that provision is, do these terms, charges,  
15 classifications, and practices refer to local or  
16 intrastate matters? Because if they do, the FCC is  
17 violating 52(b) as well as 213(h) and 220(j).

18 Now, charges, classifications, and practices  
19 traditionally have been used to refer to depreciation  
20 charges or classification and accounting classifications  
21 or practices. Congress in fact in Section 220, which is  
22 the lynchpin for the FCC's preemption theory in this case  
23 that general depreciation and accounting statutes uses  
24 the term "charges" seven times to refer to depreciation,  
25 and it uses the term "classifications" to refer to

1 accounting.

2 Academics, state regulators, the utility  
3 industry, the FCC, and before it the ICC have all  
4 consistently used these terms found in Section 152(b) to  
5 refer to depreciation and accounting. So, I don't think  
6 there is any question that if we read 152(b) consistently  
7 with its general usage, that it prohibits preemption by  
8 preserving to the states and to their jurisdiction  
9 regulatory control over local depreciation charges and  
10 accounting classifications.

11 But how does the FCC -- how does it answer  
12 these claims? How did the Fourth Circuit answer them?  
13 Well, the Fourth Circuit did not give a great deal of  
14 attention to the law because it went on to Section 151  
15 and the implied preemption theory.

16 But on appeal, the respondents have argued that  
17 Section 152(b), although by its express design it refers  
18 to all of Title 2 other than the pole attachment statute,  
19 and therefore would refer to Section 220, and although  
20 Section 152 uses the very same terms as appear in Section  
21 220, they argue that it has no relevance to depreciation  
22 accounting.

23 They claim that the terms charges,  
24 classifications, and practices refer to rate structures  
25 or rates for services, but their position ignores the

1 fact that that statute uses very different language than  
2 Congress had intended to just refer to rates for  
3 services.

4 It says that the FCC cannot assert jurisdiction  
5 over charges, classifications, and practices for or in  
6 connection with local rates, and it is the in connection  
7 with language which clearly encompasses depreciation and  
8 accounting.

9 Their position also in claiming that it has no  
10 reference to 220 and simply refers to rate structure  
11 attributes extreme redundancy to Congress by assuming  
12 that Congress used six terms to mean one.

13 With respect to Section 220(j), and that is the  
14 provision again which calls for a study by the FCC to  
15 look into the reasonableness of harmonizing state and  
16 federal powers over depreciation, they argued that that  
17 provision was nothing more than a paraphrase of the  
18 Senate pro-preemption 220(j).

19 But again, that statute belies their position,  
20 because it calls for the harmonization of state and  
21 federal powers, and clearly by calling for the  
22 harmonization of powers, it assumed that the states did  
23 have powers under the law as written, a position directly  
24 contrary to that which formed the basis for the  
25 preemption order.

1           With regard to Section 213(h), they haven't  
2 answered us, and frankly, we can't criticize them for not  
3 doing so, because our position on that evolves from our  
4 analysis of allegations made by the respondents in their  
5 briefs concerning Section 213(h), GTE in particular, so  
6 they haven't had an opportunity to respond on that.

7           But we have here two very different readings of  
8 the Communications Act. We have a reading by the states  
9 which, of course, is consistent with the reading that the  
10 FCC took for its first 50 years which has all of the  
11 pieces of the legislative puzzle fitting. They are  
12 structurally coherent. They supplement one another.

13           Each word in each statute has a meaning, and we  
14 had the respondents' reading, the new reading, which has  
15 pieces in the legislative puzzle clashing. They  
16 conflict. You have Section 152(b) referring clearly to  
17 other provisions of the Act, including Section 220, but  
18 under their position having no relevance to Section 220.

19           You have six terms of art in Section 152(b),  
20 according to their position, meaning only one term. You  
21 have Sections 220(h), referring to waivers, and Section  
22 220(i), a notice statute, as proposed by the states,  
23 directly at odds with Section 220(j) as originally  
24 proposed by the states.

25           In other words, their new reading of the Act

1 violates a number of rules of statutory construction, but  
2 the Fourth Circuit was still willing to preempt, and it  
3 did so by reasoning that even though this increase or  
4 this order by the FCC is really designed to increase  
5 local rates, that is still justified because it is going  
6 to further general responsibilities found in Section 151  
7 of the Act.

8 But that sort of reasoning, as the lower court  
9 dissent indicated, really allows an agency to overreach  
10 with its general purpose language. It invites an agency  
11 to hold general purpose language such as 151, which  
12 really has no legislative history to it, and simply tells  
13 the FCC, go and regulate interstate matters, to hold that  
14 language up to the light and to manipulate it until it is  
15 able to derive a stream of unstated purposes which are  
16 really predesigned to conflict with the state law to be  
17 overridden.

18 And that process is particularly bothersome  
19 when it overrides historic, deeply rooted police powers  
20 which preexisted with the states at the time that the  
21 Communications Act was passed. We don't think that this  
22 Court has ever endorsed this sort of stepping stone or  
23 bootstrap preemption.

24 Indeed, in the Pacific Gas and Electric case,  
25 this Court indicated where Congress has clearly evidenced

1 a willingness to tolerate dual regulation, there is no  
2 basis for implying preemptive authority in an agency to  
3 preempt in order to avoid the effects of the dual  
4 regulation which Congress has indicated a willingness to  
5 live with.

6 What we have in this case is a classic example  
7 of --

8 QUESTION: I think the thrust of your argument  
9 is that there just isn't any room under the Act for any  
10 kind of an implied preemption. It is just contrary to  
11 the express terms of the Act.

12 MR. MALONE: Exactly, Your Honor. Exactly.  
13 What we have here is, we have an Act of Congress which  
14 clearly sets up dual regulation, which constructs this  
15 jurisdictional wall between the states and the federal  
16 government, and then we have an administrative order  
17 which simply circumvents that wall, and it is based not  
18 on new law, or it is based not on the study which was  
19 called for by Congress, but simply on the FCC's adoption  
20 of an agency argument that competition had triggered a  
21 need for accelerated depreciation, which triggered a need  
22 for preemption, and that argument ignores --

23 QUESTION: I take it you would be making the  
24 same argument even if you accepted, which I gather you  
25 don't, that dual regulation permitting the states to set

1 depreciation rates for interstate, intrastate equipment  
2 would frustrate the FCC's powers.

3 MR. MALONE: We would make the same argument,  
4 Your Honor --

5 QUESTION: Yes.

6 MR. MALONE: -- and you are right, we do not  
7 accept that assumption which is the basis for the FCC's  
8 action. We don't accept that assumption for several  
9 reasons, one of which is that depreciation is but one of  
10 many factors, and it is far down the list on the list of  
11 factors which affect a management's decision to modernize  
12 plant or to replace it.

13 Certainly rate of return, the trading value of  
14 stock, interest rates, and all of these other factors are  
15 much more important in the equation, and if the FCC is  
16 allowed to preempt on a deeply routed police power based  
17 upon this guise of plant modernization which it was able  
18 to derive from its general responsibility by the power of  
19 its imagination, then where do we draw the line? What  
20 can't it preempt?

21 What the FCC is really doing by asking the  
22 Court to adopt this general responsibility language as a  
23 gateway to preemption is inviting a trolley ride. It is  
24 one way. It has no brakes on it. And it is destined  
25 inevitably to result in the dissolution of dual

1 regulation.

2 But Section 220(j) of the Act tells the FCC  
3 that if it has problems with dual regulation, it isn't to  
4 do away with it by administrative order. It is to do a  
5 study and make its case to Congress.

6 But the FCC hasn't made its case to Congress,  
7 and it hasn't asked for new legislation. It has simply  
8 taken unto itself an attempt to expand its jurisdictional  
9 guidelines. We think that the Fourth Circuit has clearly  
10 erred in endorsing that order, and that it should  
11 therefore be reversed.

12 QUESTION: I've got a little bit of confusion  
13 over one of your figures of speech, your analogies. You  
14 use the analogy of someone handling the steering wheel  
15 and someone else on the accelerator and the brakes. It  
16 cuts against you a little bit here, doesn't it?

17 MR. MALONE: No, Your Honor, because what that  
18 analogy refers to is the fact that -- let me explain what  
19 the analogy meant, and then why I don't think it cuts  
20 against us at all.

21 By the analogy I was referring to the fact that  
22 the FCC is attempting to tell the states, in fact the  
23 very purpose of its order is to tell the states what  
24 dollar and cent depreciation accruals have to be included  
25 in local rates. Now, Section 213(h) preserves to the

1 states the power to classify property or the power to  
2 value property, and the valuation of property -- picture  
3 yourself attempting to determine what a telephone pole is  
4 worth under a fair value jurisdiction, which was the  
5 brunt of the jurisdiction back in 1934.

6 One question you would ask yourself is, how  
7 long is it going to last? Their position is that the  
8 states can go out -- well, they haven't conceded this,  
9 but Section 213(h) clearly provides that the states would  
10 go out and ask that question, how long is it going to  
11 last, to determine the value, but that the FCC would come  
12 in and tell them how long it is going to last for the  
13 purpose of developing depreciation charges.

14 And that is inconsistent, and that is what I  
15 meant when I referred to one person on the accelerator and  
16 the other person on the wheel. You wouldn't be able to  
17 develop depreciation charges that way. It wouldn't  
18 work.

19 I think the implication of your question, Your  
20 Honor, is, if we have two different bodies setting  
21 depreciation charges for one telephone pole, don't we  
22 have one person on the pedal and another person on the  
23 wheel, and the answer is no because Congress, I think,  
24 correctly recognized that you can easily separate the  
25 costs, and then each jurisdiction can deal with the costs

1 under its power for the purpose of developing local rates  
2 and allowing capital recovery.

3 And 47 years of history demonstrate that the  
4 process has worked extremely well.

5 QUESTION: Mr. Malone, if you should not  
6 prevail here, how much of a disaster really is it to the  
7 state?

8 MR. MALONE: Well, Your Honor, I think there  
9 would be disasters in two forms. One would be the  
10 immediate rate effect, which we estimate at about a  
11 billion dollars a year that local customers would have to  
12 bear in rates, and the problem --

13 QUESTION: Because of accelerated  
14 depreciation?

15 MR. MALONE: Because of the ELG and the  
16 remaining life concepts, which would be forced onto  
17 states by the FCC. It would be about a billion dollars a  
18 year. And as the --

19 QUESTION: Countrywide?

20 MR. MALONE: Yes. In New York we estimate the  
21 effect for this year would be about \$120 million, Your  
22 Honor, and the problem with that is the brief, the amicus  
23 brief of TRACER, the Telephone Ratepayers for a Cost  
24 Based and Equitable Rates, which was a business  
25 association of business users of telephone service,

1 points out that that rate increase, which the Department  
2 of Defense indicated below would not be justified and  
3 wouldn't really serve any purpose, would have the effect  
4 of causing business customers to try to get off the  
5 network, and that would lead to investment which was out  
6 there -- it wouldn't be serving anybody -- called  
7 stranded investment, which would force other rates  
8 upward. You would have a spiraling effect,  
9 self-perpetuating, which would then force other people  
10 off the system, all based upon the FCC's application of a  
11 broad brush to a set of circumstances really requiring a  
12 fine stroke.

13 We may have competition out there. We do. And  
14 the states recognize that. And we are willing to deal  
15 with that in the development of depreciation charges, but  
16 certainly you don't have the same competition in Peoria  
17 that you do in Houston, and it is the regulators in those  
18 states who are best able to evaluate this competition and  
19 determine its effect on depreciation lives.

20 So, the first effect would certainly be  
21 increased rates, and that would be deleterious to the  
22 states.

23 The second effect, Your Honor, that we are  
24 concerned with is, if the FCC is upheld, where does that  
25 lead us? If it is able to preempt depreciation and

1 accounting based upon this broad-gauged approach of plant  
2 modernizing, which isn't even set forth in the Act, why  
3 can't it then attempt to preempt all of the factors on  
4 the list of relevance to plant modernization which are  
5 above depreciation, such as rate of return and other  
6 factors which are again an integral part of state  
7 regulation?

8 Thank you, Your Honor.

9 QUESTION: Of course, a good bit of it, that  
10 is, the federal system will -- on your approach will  
11 increase rates, too, does increase rates.

12 MR. MALONE: If the FCC takes action simply for  
13 the --

14 QUESTION: For the interstate.

15 MR. MALONE: Yes.

16 QUESTION: And has it in fact driven away  
17 customers into other areas?

18 MR. MALONE: With respect to interstate usage?

19 QUESTION: Yes.

20 MR. MALONE: Oh, yes, there is no question  
21 there has been bypass which has resulted from rate  
22 increases.

23 QUESTION: And the Republic hasn't come to an  
24 end.

25 MR. MALONE: The Republic hasn't come to an

1 end, Your Honor, no.

2 Thank you.

3 CHIEF JUSTICE BURGER: Mr. Solicitor General.

4 ORAL ARGUMENT OF CHARLES FRIED, ESQ.,

5 ON BEHALF OF THE FEDERAL PARTIES

6 MR. FRIED: Thank you, Mr. Chief Justice, and  
7 may it please the Court, I should first begin by making a  
8 remark about the effect on rates.

9 In the Maryland case, which is the case which  
10 you will be considering immediately after this, the  
11 Fourth Circuit Court of Appeals at Page 8 of the cert  
12 petition -- Page 8A of the appendix to the cert petition  
13 estimated that the effect on rates was on the average a  
14 penny a day per customer, and there is no reason to  
15 suppose that Maryland is unusual in this respect.

16 Our affirmative argument is straightforward, so  
17 I would like to just set the predicate for it, and then  
18 move on to some of the concerns that have been raised by  
19 petitioners and others.

20 The basis for federal intervention here is, I  
21 think, rather palpable. We are talking about  
22 maintaining --

23 QUESTION: Mr. Fried, excuse me for  
24 interrupting, but I just was turning around in my mind  
25 here your opening remarks as a response to his figure, I

1 guess it will be a billion dollars or something. You are  
2 saying, well, in Maryland it is only a penny a day. Are  
3 you disagreeing with his overall figure, or are you just  
4 saying it isn't very much in Maryland?

5 MR. FRIED: I don't know quite how to deal with  
6 that overall figure. It is an estimate. I don't know of  
7 any finding to that effect, and when we are talking about  
8 telephone rates nationwide, I am not able on the spur of  
9 the moment to decide whether a billion dollars is a lot  
10 or a little, but I don't want to concede --

11 QUESTION: That is why I didn't know how you  
12 got a penny a day, either.

13 MR. FRIED: I don't want to concede that  
14 billion dollars. I thought the penny -- a penny a day  
15 was a --

16 QUESTION: What does a penny a day translate  
17 into in dollars per year for the whole state? Do you  
18 know?

19 QUESTION: Sixteen million.

20 MR. FRIED: I can't tell you that.

21 QUESTION: There are four million people in  
22 Maryland. You figure \$4 a year, you are talking about  
23 \$16 million in Maryland on your figures.

24 MR. FRIED: And perhaps that way we can begin  
25 to approach Mr. Malone's figure, and we are both right.

1 QUESTION: Well, there --

2 (General laughter.)

3 QUESTION: There seems to be some difference  
4 between the effect in New York and the effect in Maryland  
5 if you are both right. Maybe it is the Mason-Dixon line.

6 (General laughter.)

7 MR. FRIED: Well, perhaps my brother, Mr.  
8 Boudin, can assist on some of these matters, but I do  
9 want to call the Court's attention to the findings of the  
10 Court of Appeals in the Maryland case, because there  
11 there is a specific finding which brings the matter down  
12 to the effect on consumers.

13 Now, we are talking about the physical  
14 integrity and the modernity and the financial soundness  
15 of the very channels of interstate communication, and  
16 what depreciation is about is paying for physical  
17 equipment as it wears out, technologically or  
18 physically.

19 And all that the preemption order sought to do  
20 is to make sure that the preemption calculations were  
21 made in as accurate a fashion as possible, and that is  
22 very important.

23 QUESTION: The what, the preemption  
24 calculation?

25 MR. FRIED: I am sorry, the depreciation

1 calculations, Justice White, that the depreciation  
2 calculations were made in as accurate a way as possible,  
3 that they reflected as accurately as possible what in  
4 fact was happening to those assets out there in the  
5 world.

6 Now, all of these assets are used both in inter  
7 and intrastate communications because, as Justice Burger  
8 said when he was on the D.C. Court of Appeals, in terms  
9 of facilities, we have one integrated system, and when  
10 the switch fails in a local exchange or a telephone pole  
11 which is rotted blows down, the effect is as much on  
12 interstate as it is on intrastate communication.

13 Now, the basis for what the FCC did here is, as  
14 Mr. Malone pointed out, first of all in Section 1 of the  
15 Act, Section 151, in which the FCC has an overriding  
16 mandate to make available to all the people of the United  
17 States rapid, efficient nationwide facilities at  
18 reasonable charges, and Section 220(b), which says that  
19 the Commission shall prescribe depreciation charges.  
20 Those are the two statutory bases.

21 Now, let me address some of the concerns that  
22 have been raised apart from the concerns about rate  
23 increases. First, there is a very real concern about  
24 federalism. It is an important concern. It is one that  
25 we share.

1           But here, unlike some other cases the court has  
2 had to consider, there is no setting of the state's  
3 regulatory agenda, no mandating of state procedures, as  
4 one Justice has put it, no kidnapping of the state  
5 procedures at all, just the familiar instance of federal  
6 law supplying one of the determinants in an element in a  
7 calculation which otherwise goes forward wholly according  
8 to state procedures and concerns.

9           QUESTION: But, Mr. Fried, your opponent  
10 argues, and I would be interested in your response to  
11 this, but if you could take care of this one element,  
12 what about all the other elements, such as rate of  
13 return, and rate base, and other factors that go into  
14 rate? Could you take over those as well?

15           MR. FRIED: Well, in this case, though the  
16 Court of Appeals spoke in terms of Section 1, the  
17 Commission was very assiduous to rely on Section 220(b),  
18 which specifically spoke about depreciation.

19           So, if there is a slippery slope here, the FCC  
20 has not sought to put its foot on it. It has rested  
21 firmly on Section 220(b). Now, Section 152(b) is --  
22 2(b)(1) is the one which causes most difficulties for the  
23 petitioners.

24           And here I must say we read the legislative  
25 history rather differently from petitioners because what

1 we see happening, happened back there in 1934 was that  
2 the state commissioners were alarmed about federal  
3 intervention in depreciation, and sought from the House a  
4 provision, 220(j), sought a 220(j) which would block any  
5 federal effect on intrastate depreciation rates, and they  
6 failed to get that provision.

7 What they got seems to me to look like a  
8 typical face-saving compromise which gave them some sort  
9 of compromise language, but not at all the substance of  
10 what they were seeking.

11 Now, the language also of 152(b) does not do  
12 what petitioners claim. The petitioners read 152(b) as  
13 if it said, if you have a facility which exists in both  
14 interstate and intrastate communication, then the fact  
15 that it exists in intrastate communication precludes  
16 federal jurisdiction over it.

17 That reading is a reading which has been  
18 consistently urged upon the commission and consistently  
19 rejected. It was first urged and first rejected back in  
20 1947, when the Commission began its long trek towards the  
21 situation which now obtains where you can buy your  
22 telephone rather than having to rent it from the phone  
23 company.

24 And what the Commission did to bring about that  
25 result, and of course it doesn't obtain just in respect

1 to the telephone you have in your home, but it relates to  
2 private exchange systems, to all kinds of complicated  
3 computer equipment and the like.

4 What the Commission did was to mandate that the  
5 state commissions remove from their tariffs any  
6 requirement that customers pay for and lease their phones  
7 from the phone company. Now, that telephone, which you  
8 now can buy because of the FCC orders, that telephone is  
9 used 97 percent, it is estimated, in intrastate  
10 communication, yet the remaining 3 percent is crucial to  
11 interstate and was found to be sufficient for a federal  
12 regime about customer terminal equipment.

13 QUESTION: Ninety-seven percent of intrastate  
14 and three --

15 MR. FRIED: Most -- yes --

16 QUESTION: -- percent in interstate?

17 MR. FRIED: Yes, Justice Rehnquist. Most --  
18 the telephone you use in your home probably is used 97  
19 percent intrastate, and the regime which now obtains is a  
20 regime that was imposed by the FCC against exactly the  
21 same 2(b)(1) argument that you are hearing today. The  
22 regime which has been imposed on the transmission of --

23 QUESTION: Mr. Solicitor General, that regime  
24 wasn't imposed pursuant to 220(b), was it?

25 MR. FRIED: No, it was --

1 QUESTION: That is what really raises my  
2 question that you answered before by saying, well, the  
3 Commission has merely acted pursuant to 220(b) here. But  
4 if they are right on 220(b) and the one involving the use  
5 of the phone, why couldn't they also use the same  
6 argument or 220(a) to prescribe rates of return and  
7 capital investment and all the rest?

8 MR. FRIED: As we read, as we read --

9 QUESTION: First, let me ask you, do you think  
10 they could?

11 MR. FRIED: I think that would be a long  
12 stretch, and a very serious move which I would not --

13 QUESTION: That is a matter of --

14 (General laughter.)

15 MR. FRIED: -- which I would -- I myself would  
16 be very hesitant to embrace, because if you see what  
17 remains, Justice Stevens, and I think the question really  
18 points out what this case is about, because if you see  
19 what remains of the states' capacity here, what they are  
20 left with is that part which is peculiarly appropriate to  
21 state concern, the rate design questions.

22 For instance, will businesses subsidize  
23 residences? Will large users subsidize small users? Are  
24 we going to have lifeline rates? Are we going to have  
25 special rates for low income users? All of these things

1 are exactly the kinds of things which are --

2 QUESTION: They have said that depreciation was  
3 one of those things for the last 50 years, too, but that  
4 the FCC has now taken a different view, and might it also  
5 not take a different view of rate of return, capital  
6 investment, and all the rest?

7 MR. FRIED: I think that depreciation with  
8 respect is not one of those things. Depreciation --

9 QUESTION: Well, it is true that the states  
10 have done it for themselves for 50 years, is it not?

11 MR. FRIED: I think that that is a rather --

12 QUESTION: At least as to intrastate  
13 components.

14 MR. FRIED: I don't think that can be affirmed  
15 wholeheartedly, Justice Stevens, because in fact what has  
16 been happening for the last 50 years on depreciation  
17 rates is that they are set in three-way meetings between  
18 the FCC, state commissioners, and the telephone  
19 companies, and at the end of those three-way meetings a  
20 depreciation rate is set by the FCC, and by and large it  
21 is followed.

22 Now, what has not happened is that --

23 QUESTION: Did that necessarily govern the  
24 depreciation rate for purely intrastate facilities?

25 MR. FRIED: It has so far. Yes, Your Honor.

1 Yes, it has. Now, it has never come to a conflict. Those  
2 three-way meetings have by and large -- I can't say  
3 universally, but by and large been the basis for  
4 depreciation rates throughout the country, and those are  
5 meetings with those three components leading to the  
6 setting of a rate by the FCC.

7 There has been one reported case in which there  
8 was resistance to that, and the state court decision  
9 which held, as Mr. Malone has argued, but beyond that,  
10 the universal practice has been one of accommodation, no  
11 particular conflict, under the aegis and leadership of  
12 the FCC.

13 QUESTION: Well, it was working so well, what  
14 was the reason for a change?

15 MR. FRIED: The reason for the change is the  
16 reason which the Commission gave, which is that in the  
17 new technological and competitive environment, the  
18 inaccurate depreciation formulas, the whole life formulas  
19 and the vintage group formulas, and that is what we are  
20 talking about, that is all we are talking about here, and  
21 essentially those are formulas which have to do -- at  
22 least the whole life formulas have to do with how you  
23 adjust to misestimates.

24 QUESTION: So it didn't think the three-way  
25 meeting would accomplish what it wanted to accomplish?

1 MR. FRIED: I think that what happened --

2 QUESTION: And why not?

3 MR. FRIED: What happened was, in the first --  
4 the first depreciation order, the one which -- where the  
5 Commission has departed from that, they assume that the  
6 states would go along, and there had been this kind of  
7 collaboration.

8 What happened, and this is set out in Footnote  
9 14 of Paragraph 37 of the FCC's order, to their surprise,  
10 for the first time 14 states refused to follow them on  
11 one element of the depreciation order, and nine on  
12 another. So, for the first time, the FCC was faced with  
13 a real confrontation, a confrontation which had not  
14 existed until this time.

15 Now, if I may go back, Justice Stevens, to your  
16 question, because I think it is an important one, there  
17 is a big difference between depreciation on one hand and  
18 these rate design questions on the other.

19 QUESTION: Yes, I would suppose that one could  
20 argue that rate of return is something of national  
21 interest, and on a nationwide basis the federal agents  
22 would be best able to value what the money market was for  
23 the whole country, and therefore be thoroughly justified  
24 in saying the rate of return ought to be 12 percent  
25 rather than 6 percent.

1 MR. FRIED: Well, rate of return seems to us to  
2 be different from depreciation.

3 QUESTION: It is more a local matter, do you  
4 think?

5 MR. FRIED: Well, it may be more local. Of  
6 course, it is subject to federal constitutional  
7 limitations, which -- these other elements are not, at  
8 least not directly, but the other aspect of depreciation  
9 is depreciation is a fact in the world. It is not really  
10 a -- it is not really a normative judgment at all.

11 When you decide whether you are going to have  
12 businesses subsidizing residences, that is a political  
13 judgment and one which we can understand the state  
14 commissioners would like to reserve for themselves, but  
15 how quickly something depreciates, and what you do about  
16 misestimates of depreciation, which is what remaining  
17 life versus whole life is all about, that is about facts  
18 in the world.

19 QUESTION: But even with respect to the  
20 accountants --

21 QUESTION: You don't think the accountants  
22 disagree about these things?

23 QUESTION: We are saying the same thing.

24 MR. FRIED: I am sorry, Justice --

25 QUESTION: I think Justice Stevens and I both

1 wanted to ask you, don't respected accountants disagree  
2 about how depreciation should be handled?

3 MR. FRIED: Well, indeed they do, Justice  
4 Rehnquist. But the question is that in the face of such  
5 a disagreement, is the FCC out of bounds or is it not in  
6 fact exercising the authority given to it in Section 220  
7 to resolve that question and to resolve that question on  
8 a record which shows that the previous rule had resulted  
9 in something like \$20 billion of unrecovered phantom  
10 assets as the result of too slow depreciation and an  
11 unwillingness or an inability under the old whole life  
12 formulas to recapture when you have made an initial  
13 mistake?

14 So it was a response, to be sure. Accountants  
15 will differ. They are probably like lawyers. They will  
16 differ about almost anything. But the question is  
17 whether the determination here was a reasonable one --

18 QUESTION: Well, the question isn't so much  
19 whether the determination here was a reasonable one, but  
20 whether the concept or element of depreciation is so  
21 dramatically different from the other elements of rate as  
22 you have made them out to be, that those are kind of  
23 political judgmental questions, and this is just purely a  
24 question of historical fact.

25 I don't think it is quite that simple.

1 MR. FRIED: I perhaps am oversimplifying  
2 somewhat, but I think depreciation is in the end --  
3 accountants would agree to this, that depreciation in the  
4 end is an attempt to reflect year by year a fact about  
5 the world. And they may differ about the best way to do  
6 that. When you are designing rates, nobody disagrees  
7 that that is a political judgment about who ought to be  
8 paying what and who ought to be subsidizing who.

9 So, it is in that respect that I think the two  
10 are rather different.

11 QUESTION: But certainly rate base is equally  
12 factual, isn't it, the capital investment and plant at  
13 any given time?

14 MR. FRIED: Well, in respect to rate base --

15 QUESTION: It is the other side of the coin  
16 from depreciation.

17 MR. FRIED: Rate base is a matter of valuation,  
18 and there -- at least it starts out with the initial  
19 valuation of the asset, and there I believe 213 does  
20 speak directly to that, and as I understand it, the  
21 Commission here has not sought in any way to intervene on  
22 the subject of the initial valuation of these assets. It  
23 has made no attempt to say anything on that subject.

24 I think one of the positions which needs to be  
25 -- which is a matter of concern is the question of the

1 FCC's having changed its position, and one is used to  
2 regulatory commissions sometimes turning on a dime. That  
3 is not an unfamiliar process.

4 But here I think that turnaround should not be  
5 exaggerated, because in fact the way was prepared because  
6 of the assumption, because of the assumption that the  
7 states would go along with what the FCC had determined,  
8 and the subsequent experience which is raised for you by  
9 the Ohio case which you are holding, I suppose, for the  
10 result in this case, as shown in the Ohio case and in  
11 many other cases where for the first time there was  
12 confrontation.

13 Now, I think that Judge Tuttle in the Fourth  
14 Circuit explained very well why there is this  
15 confrontation. There is in depreciation -- I thank the  
16 Court.

17 CHIEF JUSTICE BURGER: Mr. Boudin.

18 ORAL ARGUMENT OF MICHAEL BOUDIN, ESQ.,

19 ON BEHALF OF AT&T AND THE

20 BELL SYSTEM OPERATING COMPANIES

21 MR. BOUDIN: Mr. Chief Justice, and may it  
22 please the Court, the position of the telephone industry  
23 in this case is that the FCC's preemption order is  
24 correct and should be sustained.

25 I want to make clear at the outset what the

1 facilities are, what the FCC has and is doing, and what  
2 the states are asking to do in this case.

3 The facilities in question are telephone poles,  
4 lines, and switching systems along with the buildings  
5 that house them that are used jointly in interstate and  
6 intrastate communication. The FCC, as it has for many  
7 years, is determining the percentages, the useful lives,  
8 the depreciation formulas so that in the end you say of a  
9 telephone pole, this pole will last five years, it must  
10 be depreciated at 20 percent a year.

11 And what the states are saying is that they are  
12 entitled with respect to this same telephone pole to say,  
13 no, it is going to last ten years, depreciated at 10  
14 percent a year. It is exactly the case of two hands on  
15 the steering wheel. The Chief Justice was absolutely  
16 right.

17 And this is not a remarkable reversal of past  
18 practice. The FCC has had rules relating to depreciation  
19 since its foundation. It has been prescribing  
20 depreciation for about 95 percent of the telephone plant  
21 in the United States since the late forties and early  
22 fifties, and the states have in fact with very rare and  
23 unimportant exceptions followed those depreciation rates  
24 in intrastate proceedings because you are talking about  
25 depreciation of exactly the same facility.

1                   You cannot in fact have accurate depreciation  
2 for the telephone pole, mathematically cannot do it  
3 except by one in a billion chance. You have two  
4 different regimes of depreciation, two different formulas  
5 for the same physical facilities.

6                   GTE actually put in a mathematical illustration  
7 demonstrating it which is in the joint appendix, but the  
8 practical consequences are what are of importance to us.

9                   QUESTION: May I ask, Mr. Boudin, must they  
10 also have the same evaluation on the capital investment?

11                   MR. BOUDIN: The valuation is a red herring.  
12 There has been no dispute about valuation. Its original  
13 cost is what is used since Hope Natural Gas. That  
14 213(h), which was not addressed --

15                   QUESTION: Isn't it original cost less  
16 depreciation?

17                   MR. BOUDIN: Original cost less depreciation is  
18 the rate base, but the valuation is the original cost  
19 less the accumulated depreciation.

20                   QUESTION: Does it mean, then, that the  
21 Commission rule has the effect of determining what the  
22 rate base will be for all the --

23                   MR. BOUDIN: No, because you have to make a  
24 large number of different determinations with respect to  
25 rate base, some of which are historical, some of which

1 are legal or public policy. It does not. This is solely  
2 the determination as to the length of time and the  
3 spreading out of that cost, whatever it may be.

4 QUESTION: Well, confining it to the telephone  
5 pole for a moment, must the remaining cost, the remaining  
6 value of the telephone pole be the same for both federal  
7 and state purposes in determining rate base?

8 MR. BOUDIN: It will virtually always -- in  
9 fact there is very little disagreement.

10 QUESTION: Well, but must it be the same under  
11 the commission --

12 MR. BOUDIN: You mean if the states try to set  
13 a different value?

14 QUESTION: Say they wanted to use their  
15 old-fashioned method of depreciation for purposes of  
16 measuring original cost. Could they do so?

17 MR. BOUDIN: They cannot use an old-fashioned  
18 method of depreciation. They may or may not be able to  
19 use a different method of valuation.

20 QUESTION: Under the regulations as they exist  
21 today?

22 MR. BOUDIN: Yes.

23 QUESTION: Could the commission forbid them  
24 from using a different original cost measure --

25 MR. BOUDIN: It would be a significantly more

1 difficult case, because it would take you back to the  
2 distinction between valuation and depreciation. The FCC  
3 has clear statutory authority with respect to  
4 depreciation. On valuation, you can make a great deal of  
5 argument. I want to --

6 QUESTION: On valuation of a telephone pole, I  
7 am wondering if you can have one person driving and  
8 another one working the --

9 MR. BOUDIN: Well, that would be -- that is  
10 another case, and it is a harder case for the telephone  
11 company and the commission.

12 Let me make that clear by turning back to the  
13 argument on the legal issue in the case, and on the  
14 statutory language that Congress enacted, because we  
15 think Section 220 is the key to this case. It solves  
16 this case without deciding more difficult cases later on,  
17 and the result in this case is very clear.

18 Congress in Section 220 of the Act told the  
19 commission that on this issue, depreciation and  
20 accounting, the FCC shall determine the depreciation for  
21 subject carriers. The subject carriers shall not use any  
22 other method of depreciation, and the FCC shall consider  
23 the views and recommendations of the state, views and  
24 recommendations, but not the binding veto.

25 That statutory language was taken from Section

1 20(5) of the Interstate Commerce Act, because the  
2 Interstate Commerce Commission had the same power.

3 QUESTION: Mr. Boudin, why did the Court of  
4 Appeals shy away from reliance on this section?

5 MR. BOUDIN: Because the other ground, agency  
6 preemption, was so clearly established in the Fourth  
7 Circuit by the two North Carolina cases that there was  
8 nothing new to decide as long as they didn't bother with  
9 the new statute.

10 It is nevertheless the clearest ground for  
11 affirmance and it is the narrowest ground, and that is  
12 why I am arguing it.

13 That statutory language, Section 220(b), was  
14 taken virtually verbatim from Section 220(5) of the  
15 Interstate Commerce Act enacted in 1920. The Interstate  
16 Commerce Commission has interpreted that language in 118  
17 ICC in 1926, its major decision on depreciation, as  
18 establishing that ICC depreciation rates would preempt  
19 when the ICC adopted them.

20 That information was no secret to Congress when  
21 it came to frame the Communications Act because the  
22 states bitterly complained of it. Nevertheless, Congress  
23 reenacted that identical language which the ICC had  
24 interpreted as being automatically preemptive if and when  
25 the depreciation rates were determined.

1 Third, Congress refused a specific state  
2 request to enact a reservation which would have  
3 specifically entitled the states to prescribe their own  
4 depreciation rates for intrastate ratemaking purposes.  
5 Congress considered the proposal.

6 It listened to a lot of testimony on it,  
7 including explanations that it would be a deviation from  
8 the existing law, and the sponsors of that amendment, the  
9 House report, Congressman Rayburn, said that it would be  
10 a change in the existin law if that reservation were  
11 adopted, and Congress refused to adopt it.

12 The Pacific Gas and Electric case was mentioned  
13 earlier. Justice White at Page 220 of that case pointed  
14 out that it is an improper construction of a federal  
15 statute to read it as embodying a statement which  
16 Congress considered and specifically refused to enact,  
17 and that is exactly what the states are requesting here.  
18 They are asking you to read Section 220 as if Congress  
19 passed a provision about which it considered specifically  
20 and refused to enact it.

21 QUESTION: So your argument, of course, is that  
22 the statute does the preempting, and it is not a case of  
23 agency preemption. The agency couldn't do anything else  
24 but.

25 MR. BOUDIN: Well, the agency is entitled under

1 220 to cede the authority to the state if it wishes to,  
2 so it could do something else, but only after an --

3 QUESTION: Why is it entitled to do so?

4 MR. BOUDIN: The section provides, 220(h), that  
5 it can cede its 220 powers to the states if it wishes  
6 to.

7 QUESTION: And did it for a long time or not?

8 MR. BOUDIN: It prescribed the depreciation  
9 itself, but it did so after consultation, the three-way  
10 meeting with the states. All that the FCC is doing here  
11 is insisting on the continuation of a practice that has  
12 been going on for 30 years. Now that the states have  
13 decided on this particular method of calculating  
14 depreciation, they no longer want to follow the FCC's  
15 lead.

16 And I say again, to close, this is a two hands  
17 on the steering wheel case on this single issue. It  
18 involves only depreciation. There are good economic  
19 arguments for having separate rates of return. There is  
20 much less statutory authority, certainly no legislative  
21 history suggesting that the FCC could regulate it, and it  
22 is simply an issue that does not get reached if the Court  
23 agrees that Section 220 resolves this case.

24 And I might add that Section 220 also solves  
25 the Section 2(b)(1) argument without having to parse

1 2(b)(1) for 25 other situations, because I ask the Court  
2 to consider this. If Congress did, as we think the  
3 legislative history clearly shows, decide in 1934 that it  
4 should continue to allow the federal agency to determine  
5 this common issue of depreciation, then the one thing you  
6 know is that some general language elsewhere in the  
7 statute can't be read to contradict that specific  
8 legislative intent.

9 Most preemption cases are quite difficult.  
10 They involve guesses as to what Congress would have done  
11 if it had thought about the issue. They involve  
12 occupation of the field conjectures, possibilities of  
13 frustration. This is not such a case. This is a case  
14 where we know that Congress thought about this precise  
15 issue, and on depreciation, as on one or two other issues  
16 in the Act, it decided in favor of federal authority.

17 QUESTION: Well, what about -- what was your  
18 response to -- his response to 152(b), Section 152(b),  
19 where the commission is denied jurisdiction with respect  
20 to charges and so on with respect to intrastate  
21 communication?

22 MR. BOUDIN: The answer to that is twofold.  
23 First, that if you accept the reading of 220, you do not  
24 even reach the question of how 2(b) might be parsed in  
25 general, because this issue has been resolved, but the

1 second answer is, if you turn to the language --

2 QUESTION: What if you -- if you read (b), you  
3 don't even get to 220.

4 MR. BOUDIN: No, it is circular. It can go  
5 around either way. If you assume that Congress had a  
6 specific intent on the subject of depreciation and  
7 resolved that in a particular way, then the specific  
8 resolution of that issue prevails over any general  
9 language.

10 QUESTION: Because 220 deals specifically with  
11 depreciation?

12 MR. BOUDIN: Exactly, and also involves the  
13 preemptive --

14 QUESTION: I thought charges included  
15 depreciation.

16 MR. BOUDIN: The term "charges" in Section  
17 2(b)(1) in our contention is a reference to rates charged  
18 to customers. There is linguistic evidence to that  
19 effect in the Act. Mr. Justice White, just to underscore  
20 that point, because I don't want to trespass further on  
21 the Court's time, we know what Congress was worried about  
22 when it enacted Section 2(b) because the legislative  
23 history addresses that, to.

24 It was not concerned with depreciation  
25 charges. It was concerned with the Shreveport doctrine

1 and rates charged to customers.

2 I thank the Court.

3 CHIEF JUSTICE BURGER: Do you have anything  
4 further, Mr. Malone?

5 MR. MALONE: Yes, Your Honor.

6 CHIEF JUSTICE BURGER: You have five minutes  
7 remaining.

8 ORAL ARGUMENT OF LAWRENCE G. MALONE, ESQ.,  
9 ON BEHALF OF THE APPELLANT AND THE PETITIONER - REBUTTAL

10 MS. HAGUIGAN: Thank you very much.

11 Your Honor, the telephone industry has argued  
12 that the Congress merely reenacted Section 25 of the  
13 Interstate Commerce Act which the ICC had read as  
14 allowing preemption although no court had, and rejected a  
15 number of arguments by the states and provisions which  
16 would have preserved the status quo, which at the time  
17 was the state's regulation of depreciation in accounting  
18 matters.

19 What the telephone industry has ignored is that  
20 Congress indeed did provide, and the legislative history  
21 clearly supports this, a number of provisions in response  
22 to the state's request that its authority be clarified.  
23 Sections 220(j), 152(b), and 213(h) were all additions to  
24 the Communications Act from the Interstate Commerce Act  
25 clearly designed to protect the states.

1           With respect to the history, what has gone on  
2 for the last 50 years, the Solicitor General suggests  
3 that the three-way meetings have led to the FCC setting  
4 rates which the states have followed. The facts are  
5 otherwise.

6           We have in our briefs references to state  
7 decisions which were published in the fifties, sixties,  
8 seventies, and eighties which deviated from the FCC  
9 practices. We have a letter which is appended to the --

10           QUESTION: Are we supposed to decide here which  
11 one of you is right about the history, what was the  
12 status quo at the time?

13           MR. MALONE: Your Honor, the decisions -- it is  
14 documented in our briefs. There is a letter from the FCC  
15 appended to the Louisiana brief which says to the state  
16 of New York, we know you have deviated from our rates and  
17 you have every right to because you have jurisdiction  
18 over these matters. It is in black and white. It is  
19 signed by the secretary of the FCC. It is appended to  
20 the Louisiana reply brief.

21           At Page 45 of the California petition, the  
22 appendix to the California petition, the FCC says  
23 unequivocally, the states have the right, they have the  
24 right to deviate. They have done so for 40 years. We  
25 have no right to tell them to do otherwise. I think the

1 history is very clear. Justices Rehnquist and Stevens asked, is it not  
2 true that accountants have differed over depreciation and  
3 accounting. The answer is clearly yes, and so has the  
4 FCC, and the FCC admits that at Page 23 of the joint  
5 appendix, where it says there is no right or wrong to  
6 depreciation, and the suggestion by the telephone  
7 industry here today that unless there is one regulator  
8 setting depreciation charges, we won't have accurate  
9 depreciation is belied not only by the FCC's statement at  
10 Page 23 of the joint appendix, which it made before  
11 attempting to preempt, but also the fact that there are a  
12 number of telephone companies who are not here today.

13  
14 Part of the Bell System, Pacific Telephone and  
15 Telegraph, they are not supporting this preemption case,  
16 because in those states the FCC is setting rates faster --

17 QUESTION: Didn't Mr. Boudin say to us that all  
18 of the telephone companies were in support of this  
19 position?

20 MR. MALONE: They absolutely are not in support  
21 of it. Pacific Telephone and Telegraph is not in support  
22 of the FCC's position.

23 QUESTION: That is something else we have got  
24 to resolve?

25 MR. MALONE: Your Honor, I think by just

1 checking the service list to the telephone company's  
2 brief, we will see that there are many, many telephone  
3 companies -- the telephone companies who are getting  
4 rates higher from the states are not supporting  
5 preemption because there is one issue here from the  
6 telephone company's point of view. It is not accurate  
7 depreciation rates, it is money.

8 QUESTION: Then when you refer to the telephone  
9 industry, it isn't the entire industry.

10 MR. MALONE: Well, as far as Mr. Boudin is not  
11 representing the telephone industry, that is correct. He  
12 is representing the telephone companies which have  
13 supported the FCC.

14 QUESTION: Well, are there any who have not  
15 appeared here --

16 MR. MALONE: Oh, yes.

17 QUESTION: -- who are supportive of your  
18 position?

19 MR. MALONE: Who are supporting the --

20 QUESTION: Affirmatively supporting your  
21 position?

22 MR. MALONE: Any telephone companies supporting  
23 our position affirmatively? No, there are not, Your  
24 Honor. That would be heresy. I don't think that they  
25 would go quite that far.

1 (General laughter.)

2 MR. MALONE: Your Honor, with respect to  
3 valuation, there is no question that the cannot tell the  
4 states how to accrue specific depreciation charges  
5 without telling them the valuation of the assets that are  
6 at issue. They seem to concede indirectly that that  
7 would be a very difficult case to take over valuation,  
8 but yet that is precisely what they are trying to do, and  
9 I would refer you to Page 35 of the FCC's brief.

10 QUESTION: Why would it be such a difficult  
11 case? Why would it be such a difficult case? 220(a)  
12 specifically says the Commission may prescribe forms of  
13 any and all accounts. Why can't they just do that  
14 literally?

15 MR. MALONE: Because 213(h), the valuation  
16 statute, says that the states have the right to set  
17 valuation.

18 Your Honor, with respect to the final point,  
19 which is whether there are in fact two hands on the  
20 wheel, and whether our position is the same as that which  
21 has been rejected by the lower courts with respect to  
22 Section 152(b) in the past, it is clearly not the same  
23 position. You can uphold this in this case without  
24 touching those opinions at all, because we are dealing  
25 here with joint costs which have been separated and are

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in the jurisdiction of each, the state and the federal jurisdictions.

Thank you very much.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:02 o'clock p.m., the case in the above-entitled matter was submitted.)

*Paul A. Richard*

(REPORTER)

**CERTIFICATION**

Person 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:

4-871 - LOUISIANA PUBLIC SERVICE COMMISSION, Appellant V. FEDERAL COMMUNICATIONS COMMISSION, ET AL;

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4-889 - CALIFORNIA AND PUBLIC UTILITIES COMMISSION OF CALIFORNIA, ET AL., Petitioners v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES.

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4-1054- PUBLIC UTILITIES COMMISSION OF OHIO, ET AL., Petitioners V. FEDERAL COMMUNICATIONS COMMISSION, ET AL. : and

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4-1069- FLORIDA PUBLIC SERVICE COMMISSION, Petitioner V. FEDERAL COMMUNICATIONS COMMISSION, ET AL.

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BY Paul A. Richardson

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