

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

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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; :

-----x
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:

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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.

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QUESTION: Well, there --

(General laughter.)

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

(General laughter.)

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

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

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

QUESTION: The what, the preemption calculation?

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. Richards

(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;

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

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

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

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

BY Paul A. Richardson

(REPORTER)

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