No. 00-568

In the Supreme Court of the United States

People of the State of New York and the Public Service Commission of the State of New York, et al.,
Petitioners,

v.

Federal Energy Regulatory Commission, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' BRIEF ON THE MERITS

LAWRENCE G. MALONE
GENERAL COUNSEL
Counsel of Record

JONATHAN D. FEINBERG
DIANE T. DEAN
ASSISTANT COUNSEL

PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK
THREE EMPIRE STATE PLAZA
ALBANY, NY 1223-1350
(518) 474-2510

Becker Gallagher Legal Publishing, Inc.
800.890.5001

QUESTION PRESENTED

Inasmuch as the states in 1935 regulated all aspects of the delivery of electricity to retail customers (including retail transmissions) and Congress, when it enacted the 1935 Federal Power Act (FPA), stated unequivocally that it was not disturbing state regulation, can the 1935 Federal Power Act be read as endorsing FERC preemption of state regulation of the rates, terms and conditions of retail transmissions?

PARTIES

Petitioners joining in this brief are the Public Service Commissions of New York, Florida and Wyoming, the Public Utilities Commissions of Idaho and North Carolina, the New Jersey Board of Public Utilities, the Vermont Board of Public Utilities, the Virginia State Corporation Commission, theWashington Utilities and Transportation Commission, and the National Association of Regulatory Utility Commissioners (NARUC). Pursuant to Rule 29.6, none of the Petitioners/Intervenors State Utility Commissions, which are governmental agencies, needs to file a corporate disclosure statement.

NARUC is a quasi-governmental non-profit corporation organized under the laws of the District of Columbia. It has no corporate parents or affiliates and has not issued shares of stock or debt securities to the public. Within its membership are the governmental bodies of the 50 states engaged in the economic and safety regulation of carriers and utilities. A full list of parties is provided in the Appendix for State Petitioners (States App.) R.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit (States App. C) is *Transmission Access Policy Study Group v. Federal Energy Regulatory Comm'n*, 225 F.3d 667 (D.C. Cir. 2000). The court's order on rehearing (States App. A) is not officially reported. FERC Order 888 appears at FERC Stats. & Regs. & 31,036, 61 Fed. Reg. 21,540. FERC's rehearing decisions (Orders 888-A and 888-B) are reported, respectively, at FERC Stats. & Regs. & 31,048 and 81 FERC & 61,248 (1997). Pertinent portions of FERC orders are supplied in States App. D through F.

This Court granted Certiorari on February 26, 2001.

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered June 30, 2000. The order denying rehearing was issued August 22, 2000 and the petitioner States sought review within 60 days. The grant of Certiorari was issued February 26, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

16 U.S.C. § 824(a)-(e)
(FPA § 201(a)-(e)) provides:

Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

Clyde Seavey (speaking for the whole Commission, 401) at 402 ["Everything is left to the State Commissions that they are performing now."]. It has also acknowledged to this Court that it "has no authority" to regulate the rates for energy transmitted across state lines "to ultimate consumers" (FERC December 1944 Brief to Supreme Court in *Connecticut Light & Power Co. v. Federal Power Comm'n*, p. 28). Finally, this Court has held that the FPA draws a bright retail/wholesale jurisdictional line that leaves retail matters to the states. *Federal Power Comm'n v. Southern California Edison Co.*, 376 U.S. 205 (1964) (Point II.B.1.).

FERC's second premise also fails. Inasmuch as Congress, by FERC's own admission, did not envision unbundling (J.A. 593-594, States App. E-40, FERC Order 888-A at 30,339-40), it could not have intended the retail/wholesale bright line to change with unbundling (J.A. 347-348, States App. D-42, FERC Order 888 at 31,780; J.A. 400-01, D-100, FERC Order 888 at 31,971-72; J.A. 593-594, E-40, FERC Order 888-A at 30,339-40). Further, inasmuch as FERC has preempted states that unbundle the commodity, but not distribution, FERC's assumption that unbundling isolates transmission from state regulated services is inaccurate. Finally, even if unbundling of the commodity creates a separate transmission service, FERC's second premise still fails because the FPA does not authorize FERC to regulate retail transmission service (Point II.B.2.).[1]

The third premise of FERC's syllogism (a claim that

---

[1] Sections 206(b), 205, 201(b), 201(c) and 212(h), when read together and in concert with their legislative history, soundly rebuff FERC's claim that Congress empowered it to regulate retail transmission service.

Communications Comm'n, 476 U.S. at 374-75 ["To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress."]; *California v. Federal Energy Regulatory Comm'n*, 495 U.S. 490, 497 (1990) ["Just as courts may not find state measures pre-empted in the absence of clear evidence that Congress so intended, so must they give full effect to evidence that Congress considered, and sought to preserve, the States' coordinate regulatory role in ourfederal scheme."]. Likewise, if states were regulating an area *before* Congress enacted a statute upon which a federal agency relies for preemptive power, then the burden of demonstrating congressional intent to authorize federal agency preemption rests with the federal agency seeking to override the traditional state regulation. *Hillsborough County v. Automated Medical Labs, Inc.*, 471 U.S. 707, 713 (1985) (*quoting Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)); *Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 377 (1983) [preemption requires a showing of "clear and manifest" congressional purpose]; *DeBuono v. NYSA-ILA Medical and Clinical Serv.*, 520 U.S. 810 (1997); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995); *BFP v.Resolution Trust Corp.*, 511 U.S. 531, 546 (1993); *Cipollone v. Liggett Group Inc.*, 505 U.S. 504, 518 (1992); *United States v. Bass*, 404 U.S. 336, 349 (1971) [when a statute is alleged to preempt pre-existing state regulation, the statute must evidence a clear congressional purpose to authorize such preemption].

The "clear and manifest purpose," or anti-inference, standard of review essentially refutes claims that Congress might inadvertently preempt pre-existing, traditional state regulation. *See Connecticut Light & Power Co. v. Federal*

Power Comm'n, 324 U.S. 515, 532 (1944) quoting *City of Yonkers v. United States*, 320 U.S. 685, 692 (1944) ["'Where a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence offederal authority to act should appear affirmatively and not rest on inference alone'."]. It, therefore, defeats the ability of federal agencies to jerrybuild new, preemptive power by tying technological changes to out-of-context statutory provisions and inferring either that Congress would have endorsed preemption of the traditional state regulation had it known of today's developments or that although Congress did not consider preemption, it inadvertently permitted preemption by assigning a federal agency a particular power, which -- when coupled with subsequent developments -- became preemptive. *Chemehuevi Tribe of Indians v. Federal Power Comm'n*, 420 U.S. 395, 422-423 [an assertion of "tremendous growth in size and efficiency of the modern thermal-electric power complex and the concomitant increase during the past half century in the quantity of water used by steam plants and change in the nature of that usage. . . . is properly addressed to Congress, not to the courts"]; *Building and Constr. Trades Council of Metro. Dist. v. Associated Builders and Contractors of Mass./R.I.*, 507 U.S. 218, 224 (1993) ["We are reluctant to infer preemption"]; *Louisiana Public Serv. Comm'n v. Federal Communications Comm'n*, 476 U.S. 355, 376 (1986) ["only Congress can rewrite this statute"]; *see American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 513 (1981); *Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993) [a statute is to be read as a whole, since the meaning of statutory language depends on context].

The standard of review requiring a showing of "clear and manifest" congressional purpose to endorse preemption applies to this case because in 1935, when the

supported by the recent decision in *United Distribution Companies v. FERC.*[460]

Many of the rehearing arguments focus on the fact that states historically (even prior to the FPA) regulated retail transmission insofar as it was a component of bundled electric service to an end user, and they argue that by asserting jurisdiction over unbundled retail transmission, the Commission is somehow "taking away" jurisdiction the states previously had. The flaw in these arguments is their inherent assumption that jurisdiction over transmission service turns upon the question of whether the transmission service is being provided for "wholesale" or "retail" power sales. That is not the case. The question of jurisdiction rather turns upon the extent of the Commission's exclusive jurisdiction over transmission in interstate commerce under the FPA. The fact that states historically regulated most retail transmission service as a part of a bundled retail power sale is not the result of a legal requirement; it is the practical result of the way electricity has historically been bought and sold. However, the shape of power sales transactions is rapidly changing. Rather than claiming "new" jurisdiction, the Commission is applying the same statutory framework to a business environment in which, as discussed below, retail sales and transmission service are provided in separate transactions.

In the past, retails ales occurred almost exclusively on a bundled basis (i.e., the same entity provided a delivered

---

[460]88 F.3d 1105, 1152-53 (1996) (*United Distribution Companies*).

product called electric energy and transmission was part and parcel of that product). The FPA clearly reserves the right to regulate retail sales of electric energy to the states. As we explained in the Final Rule, however, in today's markets, and increasingly in the future as more states adopt retail wheeling programs, retail transactions are being broken into products that are being sold separately: transmission and generation. Moreover, these products are being sold increasingly by two or more different entities. For example, a transaction may **[30,340]** involve transmission service from one or more transmission providers who move power from a distant generation supplier, over the interstate transmission grid, to an end user. Because these types of products and transactions were not prevalent in the past, the jurisdictional issue before us did not arise and, contrary to IL Com's argument, the Commission cannot be viewed as "disturbing" the jurisdiction of state regulators prior to and after the Attleboro case.[461]

As we also explained in the Final Rule, the legislative history of the FPA and the relevant case law similarly reflect the historical market structure in which electricity and transmission generally were bought on a bundled basis.[462] Today's unbundled world simply was not contemplated and the cases do not resolve dispositively this jurisdictional issue. The case law focuses primarily on the bright line between wholesale sales and retail sales of energy, and transmission in interstate as opposed to intrastate commerce. It does not

---

[461] *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

[462] The case law is addressed extensively in Appendix G to the Final Rule and will not be repeated here.

Service: **Get by LEXSEE®**
Citation: **452 U.S. 490 (1981)**

*452 U.S. 490, *; 101 S. Ct. 2478, **;*
*69 L. Ed. 2d 185, ***; 1981 U.S. LEXIS 5*

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., ET AL. v. DONOVAN, SECRETARY OF LABOR, ET AL.

No. 79-1429

SUPREME COURT OF THE UNITED STATES

452 U.S. 490; 101 S. Ct. 2478; 69 L. Ed. 2d 185; 1981 U.S. LEXIS 5; 49 U.S.L.W. 4720; 11 ELR 20736

January 21, 1981, Argued
June 17, 1981, Decided *
* Together with No. 79-1583, National Cotton Council of America v. Donovan, Secretary of Labor, et al., also on certiorari to the same court.

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

DISPOSITION: 199 U. S. App. D. C. 54, 617 F.2d 636, affirmed in part, vacated in part, and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioners, representing the interests of the cotton industry, appealed the decision of the United States Court of Appeals for the District of Columbia Circuit upholding the standard promulgated by respondents, secretary and labor organizations, limiting occupational exposure to cotton dust pursuant to § 6(f) of the Occupational Safety and Health Act of 1970, 29 U.S.C.S. § 655(f).

OVERVIEW: Respondents, secretary and labor organizations, acting through the Occupational Safety and Health Administration (OSHA), promulgated a standard limiting occupational exposure to cotton dust. Petitioners, representing the interests of the cotton industry, challenged the validity of the standard pursuant to § 6 (f) of the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C.S. § 655 (f). Petitioners argued that the Act required OSHA to demonstrate a reasonable relationship between the costs and benefits associated with the standard. The lower court held that the Act did not require OSHA to compare costs and benefits. The court affirmed in part and held that the standard was reasonably necessary under the Act, that substantial evidence supported the fact that the standard protected employees against material health impairment to the limits of technical and economic feasibility, and that OSHA did not need to perform a cost-benefit analysis. However, the court vacated the affirmance of OSHA's wage guarantee program for employees unable to wear a respirator because OSHA failed to determine that such program was related to the achievement of a safe and healthful work environment.

OUTCOME: Court affirmed in part, holding that standard was reasonably necessary under Occupational Safety and Health Act of 1970, that it protected employees' health to

Service: **Get by LEXSEE®**
Citation: **461 U.S. 375 (1983)**

Select for FOCUS™ or Delivery

*461 U.S. 375, *; 103 S. Ct. 1905, **;*
*76 L. Ed. 2d 1, ***; 1983 U.S. LEXIS 28*

ARKANSAS ELECTRIC COOPERATIVE CORP. v. ARKANSAS PUBLIC SERVICE COMMISSION

No. 81-731

SUPREME COURT OF THE UNITED STATES

461 U.S. 375; 103 S. Ct. 1905; 76 L. Ed. 2d 1; 1983 U.S. LEXIS 28; 51 U.S.L.W. 4539; 52 P.U.R.4th 514

January 17, 1983, Argued
May 16, 1983, Decided

PRIOR HISTORY:

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

DISPOSITION: 273 Ark. 170, 618 S. W. 2d 151, affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant electric company sought review of the decision of the Arkansas Supreme Court, which upheld appellee, Arkansas Public Service Commission's (PSC), assertion of regulatory jurisdiction over the wholesale rates charged by the electric company to its member retail distributors. The electric company argued that this was contrary to the Commerce Clause and Supremacy Clause.

OVERVIEW: The electric company argued that federal authority should take precedence because it dealt in interstate commerce. The court found that the retail sale of gas was subject to state regulation, even though it was brought from another state. While the transportation of gas from one state to another was interstate commerce, the delivery of the gas to distributing companies ended the effect on interstate commerce. The court applied this same rationale to the distribution of electric power. The court determined that the Commerce Clause was not involved when the distributors received the product. The court held that where the state statute regulated evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce were only incidental, it would be upheld unless the burden imposed on such commerce was clearly excessive in relation to the putative local benefits. The court found that the PSC was properly applying the statute against the electric company.

OUTCOME: The court affirmed the judgment of the Arkansas Supreme Court, holding that the PSC's assertion of jurisdiction over the wholesale rates charged by the electric company to its members was not contrary to the Supremacy Clause or the Commerce Clause.

CORE TERMS: cooperative, wholesale, rural, state regulation, regulation, rates charged, interstate commerce, retail, Rural Electrification Act, pre-emption, Federal Power Act,