In the

Supreme Court of the United States

FEDERAL POWER COMMISSION, Petitioner, vs. LOUISIANA POWER & LIGHT COMPANY, et al., Respondents.	No. 71-1016
UNITED STATES GAS PIPELINE COMPNAY and PENNZOIL UNITED, INC., Petitioners, vs. LOUISIANA POWER & LIGHT COMPANY, et al., Respondents.	No. 71-1040

Washington, D. C.
April 19, 1972

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HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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Wednesday, April 19, 1972

The above-entitled matter came on for argument at 1:11 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

[Appearances on page following.]

APPEARANCES:

GORDON GOOCH, ESQ., General Counsel of the Federal Power Commission, Washington, D. C. 20426, for the Federal Power Commission.

WILLIAM C. HARVIN, ESQ., 3000 One Shell Plaza, Houston, Texas 77002, for United Gas Pipe Line Company.

ANDREW P. CARTER, ESQ., 1424 Whitney Building, New Orleans, Louisiana 70130, for the Louisiana Power & Light Company.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 71-1016, Federal Power Commission against Louisiana Electric Power, and 71-1040, United Gas Pipe Line against Louisiana Light & Power, consolidated cases.

Mr. Gooch, you may proceed whenever you're ready.

ORAL ARGUMENT OF GORDON GOOCH, ESQ.,

ON BEHALF OF THE FEDERAL POWER COMMISSION

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

This case presents two basic issues. First is the issue of whether the Federal Power Commission has jurisdiction to protect the interstate consumers of natural gas transported in interstate commerce regardless of whether the ultimate customer of that gas is a customer of the distribution company or a direct purchaser from the pipeline.

The second issue is whether or not--

Q State that first one again.

MR. GOOCH: Yes, sir. It's whether the Federal Power Commission has jurisdiction under Section 1(b) of the Natural Gas Act and Sections 4, 5, and 16, to regulate the curtailments of service of gas transported in interstate commerce by interstate pipelines regardless of whether the customer is a customer of a distribution company or a direct purchaser from the pipeline.

The second issue is whether the Fifth Circuit properly found that the Federal Power Commission did not have jurisdiction over certain facilities when the Federal Power Commission subsequently has found that they did have jurisdiction over those facilities due to the injection of substantial quantities of interstate gas.

The case arose when Louisiana Power & Light filed suit in the District Court in Louisiana, seeking to enjoin United Gas Pipe Line from implementing any curtailment program which would result in the reduction of gas delivered to two of their generating plants. At the time the suit was instituted two separate proceedings were pending before the Federal Power Commission. The first proceeding, a curtailment proceeding, was to determine the Federal Power Commission's jurisdiction to allocate the supplies of interstate natural gas pipelines when their gas supplies were so depleted that they were unable to meet the contracts of all of their consumers in all states served by the pipeline, directly or indirectly.

And a second proceedin was pending to determine the jurisdictional status of certain facilities that are part of the United Gas Pipe Line system that part of the time in the past had been operated in intrastate commerce with a separate system of supply, but subsequently quantities of interstate gas had been injected into the former intrastate system.

And the question presented was whether or not those facilities therefore were subject to federal and not state jurisdiction.

Louisiana Power & Light Company obtained a temporary restraining order, ordering United to make their full deliveries without curtailment on LP&L's claim that domestic customers did not need the gas that was ordered curtailed. In time sequence now, and I'll skip some procedural matters, in time sequence the Federal Power Commission then held in the curtailment proceeding that under Section 1(b) of the Natural Gas Act, Sections 4 and 5, and decisions of this Court in the transport case in Panhandle in 332 U. S., that the Federal Power Commission had plainly jurisdiction under its transportation authority over gas dedicated to interstate commerce being transferred in interstate commerce and had the power to curtail any and all customers of a pipeline in order to be sure that a fair allocation of gas supplies would be available to all interstate consumers.

Next in time sequence the Fifth Circuit held that the Federal Power Commission had no jurisdiction to order curtailments of deliveries of gas dedicated to interstate commerce, transported in interstate commerce, but delivered to direct industrial consumers as distinguished from deliveries to distribution companies for ultimate resale to public citizens and industries.

Subsequently--

Q It held that the Commission had the power neither under under 1(b), 4 and 5, nor under Section 7, I take it.

MR. GOOCH: Sir, it would appear to me that the Fifth Circuit held that under Section 7(b) the Commission could have an abandonment proceeding and order the direct industrials completely off an interstate pipeline. The Fifth Circuit said that between the initial certification under Section 7--

Q Yes, but they held that they could not have a curtailment proceeding.

MR. GOOCH: That's correct, sir.

Q Under Section 7.

MR. GOOCH: No, sir, they didn't really approach that. They only said to the extent the Federal Power Commission has any jurisdiction it's under Section 7, and that would be limited to the initial certification of the abandonment but othing in between.

Q Yes.

MR. GOOCH: And the curtailment proceedings are handled under Sections 4, 5, and 16, not under Section 7.

Q I know, but wasn't one of the claims for the Fifth Circuit that there could be a curtailment short of abandonment under Section 7?

MR. GOOCH: Yes, sir.

Q And they rejected that?

MR. GOOCH: I can't say that, sir. I think that they would permit an abandonment proceeding if it had the result of reducing permanently the services to a direct industrial customer. I don't think there is any question in the Fifth Circuit that curtailments could be handled--that is to say, abandonments of service could be handled under Section 7. That wasn't an issue. The issue was whether or not it could be handled under Sections 4, 5 and 16.

But this Circuit went on to hold that the Federal Power Commission could not exercise jurisdiction over the former intrastate facilities because in the Fifth Circuit's view the quantities of gas injected into that system were de minimis, and there was a possibility that another affiliate of the pipeline could have put the same quantities of gas into the system, they were interstate gas.

In the Federal Power Commission's opinion subsequently issued, the Commission found that the gas being injected into the system was substantial--in fact, made 67 percent of the peak day deliveries for the New Orleans system and found that the affiliate of the United Gas Pipe Line did not have sufficient quantities on a deliverability basis to make up the difference, and that the interstate gas was needed in order to maintain the peak day viability of the formerly

intrastate system.

Both Commission decisions, both deciding its authority under curtailment and also deciding its authority over the green system, as it's called, are now pending before the Fifth Circuit Court decision.

The Commission, through the Solicitor General, requested certiorari because if the Fifth Circuit's decision is correct and the Federal Power Commission has no jurisdiction over gas transported in interstate commerce, except as an initial certifying matter or except at the conclusion of an abandonment proceeding after the individual customer is being compelled to abandon, then the Federal Power Commission is powerless to prevent the interstate consumers of natural gas, the domestic consumers, the homes, the schools, the hospitals, from being certain that they have a chance for their fair share of the scarce gas supply when the pipelines are unable to meet all of their contracts.

LP&L has put a question that the Louisiana Commission is better able to determine the public interest of Louisiana citizens for the use of gas supply than the Federal Power Commission, and they argue that the elected officials of the State of Louisiana would be more likely to protect the interests of Louisiana citizens than would the Federal Power Commission. We don't argue that point. Our point is that it's our responsibility, as we read the Natural

Gas Act and the decisions of this Court under it, it is our responsibility to protect the gas supply of all consumers in all states served by the interstate pipeline and in this case gas from United gets as far away as Boston, because they resell Texas Gas, Texas Eastern, Transco, Southern Natural, and that gas then is transported not only in interstate commerce by United but by other pipelines throughout the eastern portion of the United States. And if the Federal Power Commission has no authority to curtail or divert the volumes that are dedicated to industrial consumers in the state of production or in any other state, then the Commission has no authority either to prohibit undue preferences or discriminations under Section 4, which is a clear grant of authority to the Commission, nor any action under Section 5 or 16 of the Gas Act.

Section 1(b) of the Natural Gas Act from which our authority derives states clearly we have three alternate bases of independent responsibility and jurisdiction. The first is jurisdiction over transportation of gas in interstate commerce. The second is over sales for resale of gas in interstate commerce. And the third is over the natural gas companies themselves. And this Court in the East Ohio case in 338 U. S., and the Panhandle case in 332 U. S., has clearly set out those as independent grounds of the Federal Power Commission's jurisdiction. And in two cases, the Panhandle

332 and in Transco 365, this Court has specifically recognized that when curtailments are necessary, that curtailments and interruption of service are a matter that relates to transportation and therefore within the jurisdiction of the Federal Power Commission to control in allocating the competing demands among the several states.

Q Transco was an initial certification proceeding.

MR. GOOCH: Yes, sir. In the Transco case in recognition the Court recognized the types of authority that the Federal Power Commission had. Both the Panhandle case and the Transco were not curtailment cases--that is to say, where the issue was presented. But in both of those cases the Court recognized that in a matter of allocating gas supply among the several states that it was the type of authority that was granted to this Commission.

Q Would United have to get consent of the Federal Power Commission to curtail transportation to LPL?

MR. GOOCH: Yes, sir.

Q Under what section?

MR. GOOCH: They would have to--you mean--assuming the contract--

Q Let's assume there was no contract.

MR. GOOCH: No contract at all.

Q Just been selling gas to LPL over a long period

of time and they suddenly decided they want to sell it all--to transport it all farther east.

MR. GOOCH: No, sir, they could not do that.

Q They would have to get consent?

MR. GOOCH: Yes, sir.

Q Under what section?

MR. GOOCH: The Federal Power Commission has ordered all pipelines that are unable to meet all their contracts--all their contracts, direct or indirect--to file under Section 4.

Q I know they've ordered, but that's sort of assuming the answer to this case, isn't it?

MR. GOOCH: Well, sir, it seems to me that the Federal Power Commission has three choices. The Federal Power Commission may proceed under Section 4 and 5 as one choice. The Federal Power Commission may proceed under Section 7 and order abandonment, if it so chooses.

Q Or forbid it.

MR. GOOCH: Or forbid it. Yes, sir, that's correct.

And the third is under Section 16 or otherwise, as we had a rulemaking on 4 or 5, which considered the possibility of adopting regulations nationwide that would handle this problem so that we wouldn't run the risk of householders having--

Q Would United hage to get consent from the

Federal Power Commission if it cut down its deliveries to its domestic--to the utilities for resale?

MR. GOOCH: Yes, sir.

Q So, one way or another, if they can't satisfy both direct users and the utility customers, they are going to have to--

MR. GOOCH: Somebody is going to be curtailed.

Q Somebody is going to have to go to the Commission.

MR. GOOCH: Yes, sir.

Q One way or the other.

MR. GOOCH: Yes, sir. But the Fifth Circuit has held that the direct customers do not come to the Commission. They are free to sue for their full contract quantities in court and then it's up to the court to determine who had to allocate the gas and decide who gets the gas.

Q There are some contract provisions in the contract sale under which United could curtail without coming to the Commission.

MR. GOOCH: Well, sir, the problem with that is there are some three hundred and some odd contracts on United's system. All the contract provisions are not the same. And the extent to which you rely on contract rather than regulation to decide who gets interrupted you then have two problems. One, a court, assuming a state court is

handling it, it has the jurisdiction to affect gas in other states, that is to say, divert it from an interstate stream to serve a local need; he has got to determine if it has a domestic preference in it. He has got to determine what all the domestic needs on the entire interstate system is before he can do it. That's what the Commission does. The court would have to do it too.

Secondly, in this very case on LPL's sworn allegation the District Court entered a temporary restraining order saying that the domestic customers did not need the gas and therefore LP&L could not be interrupted. So, we run the risk of multiple litigation on contract by contract basis with no one, unless every distribution company and every customer participates.

Q So, a court could decide that United had to satisfy its deliveries to LP&L, and the Commission could refuse to give United the permission to cut down its gas deliveries to the utility resellers.

MR. GOOCH: That's a possibility, sir. Basically, what the Commission is doing--

Q In exactly the same circumstances.

MR. GOOCH: I think so. I'm not sure I understood your question.

Q I mean, the Commission and the permission, the courts could decide differently on this.

MR. GOOCH: Oh, yes, sir; no question about that. And the other proposition is the Federal Power Commission is claiming the right to override the contracts, no matter what they say, so that a rational system of interstate priorities can be set up so that the interstate customers will not have their gas diverted on the basis of a state regulatory commission or state or other court and instead there will be an interstate regulation of an interstate gas stream.

Q May I ask, Mr. Gooch, this gets back to a question Mr. Justice White asked you earlier. You said that you did not think that the Section 7 issue, jurisdictional issue, had been decided by the Fifth Circuit?

MR. GOOCH: No, sir, I don't mean to say that. I don't think there is any question in the Fifth Circuit's decision that the Commission could proceed by way of abandonment and knock a direct industrial or any other customer off an interstate pipeline.

Q What does this mean 17(a): The issue is, Does the FPC have the authority to modify or condition the certificate issued for facilities used to make a direct sale? Or, more briefly stated, Does the Commission have continuing jurisdiction? The FPC asserts that it does and it needs to have this jurisdiction to make active what it conceives to be the full extent of its regulatory powers. We deny this assertion.

MR. GOOCH: We didn't claim that, sir. We weren't claiming that we had a modification of the certificate. What we were saying was that under Section 4 and 5 of the Natural Gas Act that says that the Commission has certain powers, among which is to prevent discrimination against any person, that we have the power to override the contracts that were behind those certificates.

Q Are you saying then that to do what you're doing in this case you could not operate under Section 7?

MR. GOOCH: No, sir, we could not, because until the end of a lengthy proceeding, until the end of a lengthy proceeding, I don't know who would determine where the interstate gas supply would go. That would depend on who got to the courthouse first or who was closer to the interstate source in the producing states--

Q Couldn't that be gotten on an individual pipeline company basis?

MR. GOOCH: Yes, sir.

Q And individual contract basis rather.

MR. GOOCH: Not an individual contract basis.

Q But each individual pipeline.

MR. GOOCH: Yes, sir, it does. Because the Federal Power Commission has no jurisdiction whatsoever to order interstate pipelines to exchange gas among themselves. Nor can we order gas from the intrastate market into the

interstate market, nor can we order a producer to sell gas to the interstate market.

May I have the remaining time for Mr. Harvin, please?

MR. CHIEF JUSTICE BURGER: Very well, Mr. Gooch.

Mr. Harvin.

ORAL ARGUMENT OF WILLIAM C. HARVIN, ESQ.,

ON BEHALF OF THE UNITED GAS PIPE LINE COMPANY

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

While the question before the Court is a limited one of the curtailment jurisdiction of the Federal Power Commission, the Commission has graciously conceded five minutes of its presentation to United, its co-petitioner here, to speak to a few of the practical aspects of this problem that we hope the Court will keep in its mind as it decides the question of FPC curtailment jurisdiction or not.

United is an interstate gas transmission system covering the states of Texas, Louisiana, Mississippi, Alabama and Florida, and supplying some five other jurisdictional pipelines which in turn supply much of the gas that's eventually consumed in the Midwest and in the East.

In addition to people such as Louisiana Power & Light and in addition to those other jurisdictional pipeline customers, we serve over 200 other direct industrial

customers, including some 14 different power plants, such as Louisiana Power & Light. We serve over 100 distribution companies that in turn supply gas to some 800 different communities. And of extreme significance is the fact that some 37 percent of our volume is taken up in these direct industrial sales. And this makes the decision of the Court of Appeals, excluding direct industrial sales from the curtailment jurisdiction of the Federal Power Commission, extremely important, not only to United but to United's other customers as well. For it's undisputed that the total gas requirements of all of United's customers just cannot be met irrespective of what this Court decides about whether the FPC has curtailed that jurisdiction or not.

The electrical utilities and the other direct industrial customers all assert different theories about why they should have priority to get their full requirements, and they do so without regard to the impact or effect that these postions they're taking may have on the distribution companies and the domestic consumers along the length and the breadth of our system.

If these conflicting interests are to be resolved in times of a system-wide shortage without effective regulation, the priorities will have to be based on such factors as who has the physical capacity by virtue of his geographical location, close to the source of the supply of

United's gas or who is able to get to the courthouse first and enjoin United's reduction of deliveries. Gas beyond curtailed levels that's obtained by such means is simply going to be taken away from others of United's customers. So, we get right down to the question of who is going to determine the priorities to an interstate pipeline's limited supplies of gas among a variety of customers in many, many states.

Reducing deliveries to industrial customers as may be necessary to meet human needs requirements is basically a matter of interrupting service, not abandoning contracts. And it calls for interruption of services all along the interstate pipeline system. And this Court had announced on two occasions that interrupting service was a matter largely related to the transportation jurisdiction of the Federal Power Commission, thus within its jurisdiction. That was the procedure United followed to implement and seek FPC approval of a curtailment program, a curtailment which had its impact on industrial sales. It has thus far had no impact and foreseeably and hopefully it will have no impact on domestic consumers. The same is true with respect to the gas that's supplied to the power plants. Their deliveries are reduced to the extent that they use gas for the generation of electricity for industrial consumption but their human needs requirements are supplied without any reduction whatsoever.

Under FPC jurisdiction we believe that this program

of orderly reduction of deliveries can be handled in the public interest. It can be handled uniformly whether exceptional circumstances that apply to one customer; they can be viewed in light of the interests of all of the customers.

State regulatory agencies for the practical and legal purposes are not equipped to handle such problems of an interstate pipeline system and to allow it to be conducted by random litigation and conflicting court decisions based upon different facts relating to different special interests in different states, is to put us in a complete state of chaos in the gas industry. This is not to suggest that need creates federal power and the curtailment jurisdiction in the Federal Power Commission. It is to suggest that since Congress specifically wanted to avoid any regulatory gap and since the job cannot be done at the local and the state level, that the logical place for it to be done is within the parameters of the Natural Gas Act by the Federal Power Commission.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Harvin.

Mr. Carter.

ORAL ARGUMENT OF ANDREW P. CARTER, ESQ.,

ON BEHALF OF THE LOUISIANA POWER & LIGHT COMPANY

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

LP&L's affirmative position in this case is that its contracts with the United are direct sales contracts, direct industrial sales contracts, exempt under Section 1(b) of the Act. The Fifth Circuit has so held. That's the decision we're here on for review.

The FPC in order to skirt that holding is arguing that it has a plenary jurisdiction under what it terms its transportation authority. And it points to the first part of Section 1(b) to say that that is where its transportation authority resides.

Our brief we believe adequately talks about the direct sales aspects and we believe the Fifth Circuit opinion adequately speaks to that subject, and we are going to spend our time today in rebutting the position that the FPC takes about this plenary transportation authority.

I think that while there is a lot of chaff in this case we can get to the essence very quickly by my saying that in order to determine the jurisdiction here, all we have to look at is three key factors, and I'm not going to say as Mr. Plotkin said earlier that this is a simple issue. But I believe if we look at the three factors, it will simplify the case for the Court. Those three factors are, first of all, the congressional history. And in this case I don't believe I can emphasize too strongly the effect of that congressional history on this whole matter.

The second thing is the decisions of this Court, and I'm speaking now of the Panhandle Indiana case, 337, and of the Transco case in 365 U. S.

And the third is the actions of the FPC itself.

Addressing myself to the congressional history first, and I'll dwell on it a little bit because, as I said, it is so important to this whole matter. We did a rather comprehensive study of that legislative history, and it became more interesting all along because we found that the history is taking place during 1936-37-38, which I believe we all will agree were the high water marks of the Roosevelt Administration in terms of the passage of regulatory legislation and an example of that, I would say, is the National Labor Relations Act, which as I think the Court knows so well has an exclusive or peremptory nature to it, and I think all of that legislation at that time was of the same type, with the clear exception of this Natural Gas Act. And that's the interesting thing about this congressional history, is that Congress--and apparently it was getting a lot of heat, I'll say, from the National Association of Railroad and Utility Commissioners, the representatives of the state authorities, and speaking for the states they made a strong case for the proposition of dual regulation here. And as a result, you had running like a thread through the congressional history the proposition that we were to have

dual regulation and that we were going to leave to the states those things that the states had already been regulating and that Congress felt they could reach and the courts felt they could reach.

Section 1(b) reflects that history because Section 1(b) really is a two-part sort of statute. In the first part of the statute, it tells what matters will fall into the ambit of FPC jurisdiction, and then it has block clause in it, a conservatory proviso, which refers to the states those things that are to be for state regulation, and it is in that conservatory proviso that we find the saving grace to our position here because it was there that Congress reflected in the statute that Congressional history that I just described.

The second aspect that I find in the congressional history that's so pertinent here is that Congress indicated plainly and unqualifiedly that it knew of the court decision and the reach of the states under those court decisions, and specifically mentioned the Pennsylvania Gas Company case during the congressional debates. I think that without dwelling on any long quotes from the congressional history, I do have a sample that's only one short couple of sentences that sums the whole matter up here. In House Report 709 of the 75th Congress, which is the--I would say it's the foundation report in all of this congressional history, and

the Court will find that this Court has many times discussed that House report and cited it in its decisions. And in that House Report 709 it is said, "The states have of course for many years regulated sales of natural gas to consumers in intrastate transactions. The states have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to state regulation," and they cite the Pennsylvania Gas Company case. And then they say, "There is no intention in enacting the present legislation to disturb the states in the exercise of such jurisdiction."

Now, Your Honors, it seems to me plain from that congressional history that the FPC's claim to a plenary transportation jurisdiction just is completely contradicted by that history, because the Congress knew that these direct industrial sales were being made through interstate facilities, which is what the FPC says gives them this plenary authority. And yet they exempted in Section 1(b) all of their sales, even though they were through interstate facilities. So, I think the first key furnishes us a rather adequate peg for the FPC coffin.

Q Mr. Carter--

MR. CARTER: Yes, Your Honor.

Q --turning to 1(b), isn't there a very specific

exclusion there that you're relying on?

MR. CARTER: Yes, Mr. Justice Rehnquist, we're relying on the exclusion that comes about from the conservatory proviso that commences with "but shall not apply to any other transportation or sale of natural gas."

We say that that language, when compared with the language of the remainder of that section, means to reflect the congressional history that I just talked about of exempting all direct industrial sales, even those made through interstate facilities. And that's what that language has been held to mean. This isn't my interpretation.

Let's go to the second factor I said was a key here. Let's talk about for a moment the decisions of this Court, and I'm speaking now again of Panhandle Indiana and Transco. The Panhandle Indiana case involved an effort by a pipe line to make a direct sale in Indiana. The Indiana Commission sought to regulate both the rate of that sale and the service term. And, by the way, you'll find in the briefs, although it didn't come out in this oral argument, that they are the-- I part company and I think the Fifth Circuit does too with the FPC when they tried to talk about separating out rate by equating it with sale. I think it's perfectly understandable from the whole, you might say, congeries of jurisprudence on this whole subject that a sale includes not only rate but other terms, and their knowledgeable former chairman,

Mr. Swidler, certainly admitted that during his efforts in Congress. But back to the Panhandle case. In that case the state commission was trying to regulate both the rate and the service terms, which is what's afoot in this case, because we're arguing here about curtailment.

The pipeline went into court and sought an injunction on the ground that the FPC had jurisdiction, and this Court held that the FPC had no jurisdiction over a direct industrial sale of the type LP&L has here. And it said that the state could regulate the rate and the terms--the rate and the terms.

Now, may it please the Court, it is from that decision way at the end of the decision, about the last paragraph or two, that we find a random sentence from Mr. Justice Rutledge that lo and behald has furnished what I call in my brief the straw dictum that the FPC is hanging on desperately here. That's a sentence where Mr. Justice Rutledge talked about interruptions of service and suggested that the FPC might be able to handle those in accommodation with the states.

To take that random sentence at the end of that decision after the majority--after the holding had been made that there was this exemption of a direct industrial sale in both its rates and its terms--means certainly that it had to be dictum because otherwise it would contradict the main

holding. But it also rather much peaked our curiosity and we went to the brief of Panhandle that Mr. Justice Rutledge was speaking to when he got to that point. It looked to me like he was just trying to tidy up his opinion and answer all of Panhandle's little complaints, and he sure enough was doing that because Panhandle's brief was arguing that there might be a conflict between state and state and state and federal power commissions if this Court were tc hold that the state had jurisdiction of the rates and terms.

So, upon looking at Panhandle's brief, lo and behold we find that what they were talking about and therefore what we have to assume Mr. Justice Rutledge was talking about was a proposition of the initial certification of a direct industrial sale. And unquestionably there is no quarrel in this case about their initial certificate authority as a transportation matter. And that's what Mr. Justice Rutledge was talking about, and it furnishes the FPC no comfort here whatever.

Now, over to the Transco case which I think is really the dispositive situation here. That case, Your Honors, was a transportation case. In that case an electric utility in New York State bought some case down in Texas and wanted the pipeline company to haul it for them, transport it for them, to New York. And the matter came before the FPC on a transportation certificate, the very thing that is in dispute

here and the thing that they say they have a continuing jurisdiction over. What did the FPC do there? If they are ever going to be right, it would be in this case, and what happened? This Court held just as squarely as can be-- Chief Justice Warren said there is only a veto power in the transportation authority of the FPC, only a veto power. And, of course, I think veto power implies initial power anyhow. But those are Chief Justice Warren's exact words, and then in less than one page later he said that the FPC, as it itself understands, does not have allocation power, complete allocation power, to use his exact words.

So, Your Honors, it seems to us just as plain as can be from Panhandle and Transco that you have the second peg in the FPC coffin, because there is absolutely no authority in the FPC over a direct industrial sale or the transportation of gas for a direct industrial sale--

Q I take it if the contract here between United and LPL had expired and United said to LPL, "We're only going to sell you half as much gas from now on," and ceased transporting that much to LPL, that you say the United wouldn't have to get permission from anybody?

MR. CARTER: No. I think, Your Honor, at that point, at the termination of a contract, you have a situation then developed that is akin to a new certicicate, because now you are going to have a new contract. So, I think if United

took that position--

Q What if United said we aren't going to sell you anything?

MR. CARTER: If they said we aren't going to sell you anything, I think we would just have to look for another supplier, Mr. Justice White.

Q I know you would probably have to, but would United have to get consent of the FPC before it terminated this transportation?

MR. CARTER: Actually I have my own debates within myself as to that, to give you an honest answer.

Q I mean, if LPL came up to the Commission and said please don't give them consent, would the FPC have veto power over that termination?

MR. CARTER: I would think probably not, Mr. Justice White. I would think they might be able to--

Q You must say that, mustn't you?

MR. CARTER: No, I don't think so. I haven't really thought it through to find out whether it helps me or not actually. [Laughter]

In other words, you're a little ahead of me.

I think the third key, and I'll have to try to travel through this rather quickly, although it's a halting sort of thing, and that third key is the FPC actions themselves. And to try to briefly cover it, I'll put it this way. In the

City of Hastings case back in 1954 in footnote three of that case, the Court commented on the Commission's statement that it had been to Congress to recommend that it extend our jurisdiction over interstate sales by natural gas companies to include direct sales to industries and sales to utilities which are not for resale. That's the case you have before you today. That's us. And the Commission obviously didn't get that sort of authority. Nothing has been done to the act since 1954 and then up to 1963 we come and we find that in 1963, Mr. Swidler, who was then the Chairman of the FPC and who has a reputation as a very knowledgeable man in this field, had this to say to Congress. He is talking now to Congress, and he says, "Under existing law the Commission's authority is limited to sales for resale in interstate commerce. Hence, the price and other terms"--that's my emphasis, and other terms--"of a direct sale by pipeline to an industrual customer"--that's us--"outside the sphere of this Commission's regulatory authority." That's the Chairman himself speaking, and he then went on to ask Congress to give them the authority to require that interstate industrial gas sales, that's us, will be made at such prices and on such terms as to realize the potential benefits of such sales to both domestic and industrial consumers, and Congress turned him down.

So, now we come up to 1970 and we're getting rather

close up to date. In 1970 this same commission that is appearing before this Court and saying we've got this plenary authority said to Congress that its recommendation was that Congress enact "a new subsection to Section 7 of the Natural Gas Act that would enable the Commission to determine when an emergency exists so as to require"--and now I'm emphasizing--"load curtailment and allocation"--that is what's being attempted here--"load curtailment and allocation of gas by any gas company, whether or not it is otherwise subject to the Commission's jurisdiction."

Now, the FPC says in its reply brief that the effort there was to reach distribution companies in intrastate pipelines. Your Honors, with all respect to the FPC, and I'm not saying this meanly, but that's just solemn nonsense on their part because they already have a reach of distribution companies by way of their authority over the pipelines.

Q Mr. Carter--

MR. CARTER: Yes, Your Honor.

Q Getting back to 1(b) and then some of this authority in the first part of the section, do you conceive the reservations in the latter part of the section to take away the parts that were granted in the first section, or are they simply a statement of the observe side simply pointing out what wasn't granted?

MR. CARTER: I think they are a very carefully

phrased reservation of the powers to the states so that you could look at it this way, and I'm not saying that it's the only way to look at it, but you could look at it as though those first portions of that section or the statement of jurisdiction by the FPC and that the latter conservatory proviso is to indicate which portions of that upper part are actually reserved to the states.

Q So, you say then were it not for the proviso, the granting would give broader power if it stood by itself?

MR. CARTER: I'm not sure I understand that question, Your Honor. If you mean if the two parts were separated?

Q Yes. Assume that the granting provisions stood by themselves and what you heard was the conservatory provisions were absent, I take it then you would feel that there was more authority conferred in that situation than the way the section is written now?

MR. CARTER: Yes, I do think that.

Now, I think I had just about finished saying what I had to say about the FPC actions themselves, of going to Congress to ask for an authority that they are now saying to this Court that they have. And I think that the best evidence of an agency's lack of jurisdiction is the agency's own admission of that lack of jurisdiction. So, I consider that the third peg in the FPC coffin here. And I turn at that

point to the issue involved in what is known as the green system. And if Your Honors would refer to the first appendix in our brief, which is about midway--it's a foldout map, and I assure the Court that we have no idea of emulating any popular magazine, but this fold-out map shows, I think, the location and the configuration of the green system very clearly. And Your Honors will note that the green system lies in the very deep part of the south part of Louisiana, which means you're really getting down south. And that green system, Your Honors, is a system that was designed and constructed to be an intrastate system, as you can see merely by looking at it. And it's a self-contained separate system, and in the court below by United's own witnesses we were able to prove that this line is located wholly in Louisiana, the gas going into that line produced wholly in Louisiana, it's shipped wholly in Louisiana, and it's consumed wholly in Louisiana.

We also showed that there was 2.6 or .7 percent of gas from what's known as the black system, which is an interstate line nearby, was artificially injected into that green system by United in 1970, and I say artificially for this reason: The proof also shows that they need not have put that black gas into the green system, and indeed one of their wholly owned subsidiary companies breached some of its contracts in not putting enough green gas into the system.

So, you had a situation there where practically everything about it is intrastate.

The Fifth Circuit looked at that whole situation and they, on the teachings of the Lo-Vaca case out of this Court decided, not as the FPC has said to the Court today that this matter was de minimis, this 2.6 percent, that had nothing to do with the holding. Actually the Court will find upon reading the Fifth Circuit decision that the decision on the green system went off on what is known as the channel of constant flow, which is a teaching coming out of the Lo-Vaca case and also and quietly out of Amirada.

Q Didn't our recent case in Florida's tend to undermine your position on that?

MR. CARTER: Not at all, Mr. Chief Justice, because you have in the case of the green system a wholly different channel. There is a different pressure from the black system. Unlike in Florida Power where you had some interconnection--you see, electricity is traveling on the same level, let's put it that way. Here the pressure in the green system is a wholly different pressure than the black system. So, in order to put gas from the black system into the green system, you have to manipulate valves and push it into that system, and you can't get it back out of the green system because the pressure is lower. So, this just guides you naturally into this theory of the channel of constant flow,

and that's what the Fifth Circuit went off on, which was Lo-Vaca all over again.

Finally on the green system, I think we just get down to a case of commonsense, Your Honor. Here is a pipeline--looking at that map you see where it is. It's laying right on top of some of the largest natural gas fields in the Western Hemisphere, and you have here people telling us that they've got to inject some black gas, some interstate gas, into this green system in order to make it viable? That's like chopping ice in Greenland and shipping it to Alaska. There is just no sense to that sort of--

Q What was the Court's power to do this ab initio in a suit like this rather than on review of the Power Commission?

MR. CARTER: Mr. Justice White, the FPC voluntarily walked into this case. This case started out as a simple injunction suit--

Q Let's assume it hadn't walked into it and the United had pleaded primary jurisdiction.

MR. CARTER: Even if it had not walked into it, I would say to you that once it got into it and took court, then the Panhandle case applied.

Q Let's assume it never was in it.

MR. CARTER: If it never was in it, I don't think you'd ever have the question of primary jurisdiction arise.

Q Well, I don't know. United easily could have raised it. It's the way it's usually raised. Let's assume United had raised it.

MR. CARTER: It might have made a difference.

Q Do you think there would have been an arguable primary jurisdiction of the Commission?

MR. CARTER: I don't think it would have been, but it might have.

Q But, in any event, the Commission coming in and litigating the issue cured it?

MR. CARTER: I think it did in terms of what has actually happened here, yes, Your Honor.

I imagine my time, since I see the white light, has apparently just about expired. I'll just close, Mr. Chief Justice, by saying to the Court that what we're saying in essence here, and all that we're saying is, that we think this Court should stick by the duality of regulation that Congress prescribed, that was put into the act, and that this Court went by in Transco and Panhandle.

I thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Carter; and,Mr. Gooch, you have six minutes of the ten that you reserved.

REBUTTAL BY MR. GOOCH

MR. GOOCH: Thank you, Mr. Chief Justice. It seems

to me most clear from looking at the legislative history of Section 1(b) of the Act, when you look at the committee report itself, it says that the language--but shall not apply to any other transportation or sale. The legislative history says that the coded words were not actually necessary and were put in to replace language that had previously been in the prior draft of the bill, which was HR 4008.

Q Mr. Gooch, would you concede that if your opponents could bring these curtailment matters within the definition of anything that they refer to as the conservatory portions, that you would lose?

MR. GOOCH: No, sir, because if we are going to lose on that ground, we are going to lose because it's not in the transportation jurisdiction, because I don't think that, based on the legislative history and a reading of the statute, I don't think the "but for" language makes any difference. In other words, as the legislative history said, the but for language is not necessary.

Q If it's within the transportation jurisdiction it shouldn't come within any event.

MR. GOOCH: That's correct.

Q In other words, if it is within one event, then it doesn't come within the transportation jurisdiction.

MR. GOOCH: I agree, sir.

The legislative history of 4008 specifically had a clause in it that said this shall not apply to rates charged to direct industrial users or any other rate. When you look at the hearings, the whole issue was rate jurisdiction and this Commission was not given rate jurisdiction over retail rates regardless of who made the retail rates, whether it's a distribution company or direct. And we don't claim jurisdiction over rates.

This Court in the Transco Extorni case, 365 U. S. 1, on approximately page 27 recognized that that proviso was to take weight jurisdiction out, and these references to Chairman Swidler's testimony was when he was trying to get for the Federal Power Commission jurisdiction over the rates at which direct industrial sales are made; because in a rate case at the Federal Power Commission now, we first allocate the cost to the direct industrial sales and throw them out, and we don't consider them no further and we therefore set rates only to the sales for resale. We exercise no rate jurisdiction over the direct industrial sales, and the cases on Panhandle--this is the first I've heard that Panhandle dealt to allocations of new service because Mr. Justice Rutledge said, "Appellant also envisions in conflicting regulations by the Commission to the various states in its main pipeline search, particularly in relation to curtailment of service when weather conditions or others

require."

I don't believe Mr. Justice Rutledge can fairly be talking about initial licensing when he's talking about curtailment in this matter.

The Commission did report in its annual report in 1970 that it thought that it should have jurisdiction to compel the inner connection, regardless of whether it had jurisdiction over the pipeline's different types of customers, because various distribution companies are occasionally served by more than one pipeline; some distribution companies now have their own imports. Some distribution companies have their own supplies of natural gas and that would supplement and augment our curtailment jurisdiction.

Mr. Justice White, 7(b) does require that United may not abandon a direct sale until it comes in and gets permission from the Federal Power Commission. The mere fact that the contract has expired does not permit an interstate pipeline from terminating any service; 7(b) prohibits the termination of any service until the Commission has authorized it to do so. It's not a question of terminating a sale; it's the service.

Q Did United itself come into this, apply to the FPC?

MR. GOOCH: Yes.

Q Under what section?

MR. GOOCH: It asked for a declaratory order.

Q Under what?

MR. GOOCH: Under our regular rules and practice and procedure for it, just to ask a declaratory order.

Q What kind of power of the Commission did it ask to be invoked?

MR. GOOCH: You see, United already had a curtailment plan as part of their tariff, and they did not have to file a new curtailment plan at that time, and they asked the Commission if they were faithfully following the curtailment plan that the Commission wanted them to follow. And so that would be, in my view, under both Section 4 and 5. And the Commission set it down for a hearing.

Q You said what, Mr. Gooch, they already had a curtailment plan?

MR. GOOCH: Yes, they did. They had a general tariff on file for curtailment. And they asked whether or not that should be applied also to the direct industrial.

Q How long was that on file?

MR. GOOCH: Well, for several years, sir. I don't recall. Six or seven years or perhaps even longer.

And then when the Commission found that seven pipelines were having to go to curtailment, 14 pipelines had to buy emergency supplies of gas; when the Commission could

anticipate that that was happening and the interstate pipelines were unable to meet, the Commission under Order 431 ordered all pipelines to file new curtailment plans, and the Commission now has some 26 of these pending in order to make a full allocation of the interstate supplies of gas among the interstate pipelines, not the intrastate pipelines.

With regard to the green system, the Federal Power Commission intervened. But all we could say to the court when we intervened is, "We have a proceeding pending in which we are taking evidence to determine what the jurisdictional status of this case is," and all of our evidence was this is what's pending before the Federal Power Commission. Until the Federal Power Commission completed the hearing, got the evidence, analyzed it, and took a position, we who intervened on behalf of the Commission were unable to say whether the system was jurisdictional or not. And our findings of the Commission after review of the whole record was that if the interstate supply of gas was shut off from that system on a cold day, 67 percent of the gas used in the New Orleans area would also be shut off.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Gooch. Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:10 o'clock p.m. the case was submitted.]

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