In the

Supreme Court of the United States

FEDERAL POWER COMMISSION, Petitioner, v. NEW ENGLAND POWER COMPANY, ET AL., Respondents.	)	No. 72-1162

Washington, D. C.

December 3, 1973

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v.	:	No. 72-1162
NEW ENGLAND POWER COMPANY, ET AL., Respondents.	:	

Washington, D. C.
Monday, December 3, 1973

The above-entitled matter came on for argument at 11:03 o'clock a.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:

KEITH A. JONES, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; for the Petitioner.

STANLEY M. MORLEY, ESQ., 1700 K Street, N. W., Washington, D. C. 20006; for the Respondent Independent Natural Gas Association of America.

THOMAS M. DEBEVOISE, ESQ., 745 Shoreham Building, Washington, D. C. 20005; for the Respondent New England Power Company.

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C O N T E N T S

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Afternoon session begins at page 38.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-1162, Federal Power Commission v. New England Power Company.

Mr. Jones, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF KEITH A. JONES, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on the government's petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. The issue is whether the Federal Power Commission, under Title V of the Independent Offices Appropriations Act of 1952, which we have been discussing, whether the Federal Power Commission is authorized under that Act to impose annual fees upon the electric energy and natural gas companies for the purpose of partially defraying the costs of regulating those industries.

This issue is, of course, closely similar to the one discussed in the preceding case.

The application of Title V in any given case depends in large part upon the nature of the --

Q It is not only similar, but it does raise the same issue, doesn't it?

MR. JONES: One of the issues is identical, Mr. Justice Douglas, that is correct. But, as I was saying, the application of Title V in any given case also depends upon the nature of the governmental activities in question, and for that reason I will discuss at the outset the particular activities of the Federal Power Commission for which the fees here have been assessed.

The Federal Power Commission has authority to regulate two industries, electric energy and natural gas industries. In connection with its regulation of the natural gas industry, at issue here are certain annual fees which the Commission has imposed in connection with its regulation of the sale of natural gas. There are two types of sales in question. One, from producers to pipeline companies, and the second is the resale by pipeline companies in interstate commerce.

In regulating producer sales, the Commission reviews the contracts between the producer and the pipeline company for delivery of natural gas at the wellhead. The delivery of natural gas at the wellhead cannot commence until the Commission approves the contract as to amount, price and other terms and conditions of sale. The approval of the contract takes the form of what is called the issuance of a producer certificate. This certificate permits the pipeline company to take delivery of the natural gas at the wellhead and to begin transporting it in interstate commerce.

Instead of imposing a fee for the issuance of each particular certificate, the Commission has determined to impose an annual fee on each pipeline company based upon the amount of natural gas reserves certified for delivery to that company in connection with the producer certificate program during the year.

This so-called added reserve fee is the first of the fees at issue in this case.

The Commission is also responsible for regulating the sales of the pipeline companies, as I have indicated. The review of the sales by the pipeline companies takes the form of review and approval of pipeline rate schedules, and this review procedure is invoked normally by the filing by a pipeline company of a new rate schedule.

Ordinarily, or at least frequently, the Commission permits a new rate schedule to go into effect without holding a rate setting hearing. But when hearings are held, as is frequently the case, they can be time-consuming, expensive and quite complicated. As a consequence, the rate setting proceeding of pertaining to any particular filing of a new rate schedule may bear little direct relationship to the dollar amount of the rate increase which is being sought. For that reasons, the Commission has determined that it is more equitable to impose a fee not on the basis of each particular rate increase filing but rather in the form of an annual fee imposed

upon all pipeline companies on the basis of annual sales. That is the second fee at issue in this case. And those are the two pipeline company fees in question here.

Now, the Commission also regulates the electric energy companies. Its regulation of those companies is similar in basic outline to the regulation of the natural gas industry. The Commission has responsibility for regulating the transmission of electric energy in interstate commerce and the sale of that energy for resale.

In carrying out this responsibility, it conducts what is called a coordination and reliability program. This program consists of a region-by-region monitoring of the adequacy of electric transmission and generating facilities in relation to the growing demand for electric energy and the shifting pattern of its use from season to season and daynight and nighttime.

In connection with this program, the Commission is authorized to direct electric utility companies to interconnect their transmission facilities, one with the other. These interconnections minimize the likelihood of blackouts and brownouts and permit the electric utility companies to share their generating facilities in effect, rather than relying entirely upon their own generating facilities.

Since this coordination and reliability program is conducted on an industry-wide basis, and not at the instance of any particular company, the Commission has determined that the

only fair and practicable means of allocating the cost of the program is through an industry-wide assessment, and that assessment is a third of the fees at issue here.

The Commission also regulates the rates charged by electric utility companies in their sale of electric energy for resale. The electric utility companies file new rate schedules and the Commission has imposed a sliding scale fee for the filing of a rate schedule. And it is anticipated that this sliding scale fee will cover the major portion of the cost of the Commission's electric utility rate-setting activities. But since those activities or the cost of those activities cannot be known until the end of the year for any given year, and also because the Commission undertakes certain incidental regulatory activities for which there is no set fee, it is anticipated that the sliding scale fees will not cover the full pertinent regulatory costs here, and for that reason the Commission has also imposed an annual fee on the electric utility companies to cover the residual costs of rate-setting and other incidental costs.

To recapitulate, there are four fees here at issue: The added reserve fee on the pipeline companies, in connection with the producer certificate program, the fee on the pipeline companies to cover the costs of rate-setting activities, the fee on the electric utility companies to cover the costs of the coordination and reliability program, and, finally, the fee

on the electric utility companies to cover certain residual and incidental costs.

The Court of Appeals held all four fees to be invalid. The court determined that a fee is justified under Title V only if it is in return for the conferral of a special benefit, and the court concluded that there was no special benefit conferred on the two industries here in question.

But the court went on to add that in its view the imposition of fees of this kind was somehow inconsistent with the Commission's responsibility for regulating in the public interest.

I will now turn to the legal issues which are raised by the Court of Appeals opinion.

Q Mr. Jones, before you do, I want to ask you this primarily out of curiosity. We heard in the last case about the fees charged by the Communications Commission and in this one about the fees charged by the Power Commission. Are these exceptional or is it the rule rather than the exception? In other words, does the Securities and Exchange Commission, does the Interstate Commerce Commission, does the various other agencies, independent agencies and commissions these days, under Title V, charge the industry generally, quite apart from the question of filing fees and so on, or not? Do you know?

MR. JONES: Well, frankly, I don't know the answer to that question. I have assumed that such industry-wide fees of

this kind have not been imposed by the other regulatory commissions as of yet, but I can't say that with any certainty.

Q Your impression is --

MR. JONES: That is my impression.

Q That is your impression.

MR. JONES: That is correct.

Q That these are perhaps the only two agencies that do it in this way, apart from filing fees.

MR. JONES: It may be that other agencies have recently imposed such fees or are giving serious consideration to doing so, but so far as I know there are no other annual fees of this kind. But again, I say that I am not positive.

Q Thank you.

MR. JONES: Before turning to a discussion of the kinds of issues that were discussed under Title V in the previous case, it is necessary I think to deal with what properly considered is probably a peripheral issue here. Title V, when it authorized the imposition of certain fees, included a proviso which stated that no statute prohibiting the collection or imposition of any fee was thereby repealed. And the New England Power Company here has seized upon that proviso and contended that the Federal Power Commission derives no authority at all under Title V. And I think it is necessary to turn our attention to that only briefly.

The Commission's argument is that since the Federal

Power Act itself did not authorize the imposition of fees of this kind, therefore that must be taken to be an implicit prohibition on the filing of -- on the imposition of fees, and therefore that the proviso prohibits the Federal Power Commission from imposing any fees, but the Title V proviso by its very terms was intended only to insure that the statute would not be construed as repealing any express prohibition that was already on the books.

The House report accompanying Title V described it, and I quote, as "providing authority for government agencies to make charges for services in cases where no charge is made at present." The basic purpose of Title V was to confer authority where none previously existed, therefore it seems to us clear beyond any serious question that the Commission does have authority under Title V to impose fees. And the issue posed by this case is whether that authority extends to the particular fees in question.

Title V speaks in terms of work performed, services or benefits provided or privileges granted to or for any person, including groups. Now, one of the major points of contention in this case is whether the statutory phrase "any person, including groups" can in an appropriate case be applied to an industry as an entity.

It seems obvious to us that that statutory phrase does embrace the companies that comprise a single industry. An

industry consists of a group of companies, and groups are covered by the explicit language of the statute. Moreover --

Q Where is the statute? Have you got it in your brief?

MR. JONES: In our brief it is on pages 2 and 3.

Q I rather thought that the groups included the definition of person. Let me see here --

MR. JONES: That's right, it says "to or for any person (including groups, associations, organizations," et cetera," reading on the bottom of page 2.

Q Yes, "to or for any person," and the parenthetical material simply makes clear that the definition of person is a broad definition. Isn't that right?

MR. JONES: That is correct.

Q Your argument ultimately has to be then that a whole industry can be a person. Is that right?

MR. JONES: Well, I suppose there would be two parallel arguments, one is that a whole industry can be a person, secondly that when each member of an industry has work performed on its behalf, then a fee as to each member is appropriate and therefore a fee as to all members is appropriate.

Q Because it is "to or for any person," and you would agree that the parenthetical material following that is directed to the definition of person or the understanding of

the meaning of the word person in this statute. Would you not?

MR. JONES: Definition or elaboration of the meaning of --

Q Of the word person. And there you say that within that parenthetical material is the word "groups," which you say can mean therefore the whole industry, but it comes back to whether or not the word "person" can mean a whole industry, doesn't it?

MR. JONES: Well, as I say, the fee of course is not imposed on the industry, it is imposed on each of the separate members of the industry.

Q Each constituent of the industry.

MR. JONES: And clearly each company is a person, so that in that sense a fee is to each member of the industry, which clearly would seem to be authorized under Title V.

Q Well, "thing of value or utility performed, furnished, provided, granted, prepared, or issued."

MR. JONES: The question would be, I suppose, whether were performed for the industry is for each member of the industry.

Q It is whether or not "thing of value...to or for any person" can be read, because of this parenthetical phrase to mean two or for an industry, doesn't it, or all persons in the industry generally?

MR. JONES: Well, I think I understand you, and I

think I agree with you, but I am not wholly sure.

Q But I wonder if that isn't the question, as a matter of statutory construction.

MR. JONES: Well, I think the question, as a matter of statutory construction, as it arises in this case, is whether an industry-wide benefit, that is a benefit or work performed for the whole industry indivisibly nevertheless is a benefit to or for the constituent members of that industry for purposes of Title V. And our position is that the bare language of the statute certainly permits that construction and, furthermore, that there is certainly no policy reason why an agency which confers a benefit on an industry as a group should not be able to assess a properly allocated fee as to each member of that industry. That, at any rate, is our contention with respect to this aspect of Title V.

Q So long as I have already interrupted you, Mr. Jones, how much of a problem would it be for you to supply us, after some time within a reasonable time, with the practices of the other major agencies like the CAB and the SEC and the Interstate Commerce Commission --

MR. JONES: We could make a search of that kind and let you know.

Q -- about whether or not they charge the industry they regulate a fee or the component parts of the industry an annual fee?

MR. JONES: We would be happy to do that and supply the Court with that information.

Q Mr. Jones, let me just enlarge on it a little bit, if I may. I notice that the language of Title V is that -- at the top of page 3 -- "the head of each Federal agency is authorized by regulation" to work out some kind of fee schedule. I have wondered whether, when you responded previously to Mr. Justice Stewart, that as far as you knew only the FCC and the Federal Power Commission have moved, whether this was a first step in an experimental exercise of the authority, these were two first steps, or whether the others just haven't got around to it, or what the situation is. I think if there is any governmental policy that is relevant, I think that that should be included with your information about what agencies have proceeded to exercise this authority.

MR. JONES: Well, the origin of the fees in these two cases is fairly clear from the statement of the facts in the respective briefs. The relevant appropriations committees of the Congress have been urging these two commissions certainly for some time in the past to impose fees of this kind, and it is in response to the Congress' suggestion that these fees have been imposed. For that reason, I doubt that there has been a coordination of policy by all the independent agencies. I think that these two agencies are moving in response to perceive congressional demands.

Q Title V has been in existence now for more than twenty years, so there has been room for more than a first experimental step, hasn't there?

MR. JONES: That's right.

Q A twenty-year period.

MR. JONES: That's right.

Q But it hasn't been exercised until now, is that not correct?

MR. JONES: It has been a discretionary authority which at least by these two agencies has not been exercised in this manner in the past. The Federal Power Commission did impose fees upon the certification of -- excuse me, upon the issuance of certificates of public convenience and necessity several years ago, and that was the exercise of authority under Title V.

Q The Post Office has been doing this I guess since the first year of our Nation, hasn't it, something similar to this?

MR. JONES: It certainly imposes a user fee, that's correct.

The respondent's contention about the fee not being applicable to industries on account of industry-wide benefits is based upon the Budget Circular A-25, which was discussed in the preceding case. We would simply point out here that that Budget circular does not require the kind of restrictive

reading which the power company and the natural gas companies would give it. That does speak in terms of measurable unit of service to identifiable recipients, but again if an industry as such is the identifiable recipient of a benefit, then nothing in the Budget circular by its terms would prohibit the assessment of an industry-wide fee.

Furthermore, as my colleague Mr. Korman pointed out in the preceding case, that Budget circular does not apply to independent agencies, it merely sets forth a general fee setting policy for the Executive Branch agencies.

I turn now to the question of whether the Commission, in performing the regulatory activities here in question, performs work, provides a service or benefit or grants a privilege to or for the companies in these industries. And this is a question which must be considered I think on a fee-by-fee basis. I turn first therefore to the added reserve fee which the Commission has imposed upon the pipeline companies in connection with the producer certificate program.

That fee, it should be pointed out at the outset, is not an industry-wide fee. That is, it is not a fee which is assessed in amount and then arbitrarily allocated among the constituent members of the industry. It is a fee which is imposed only on those pipeline companies for which new reserves have been certified for delivery under the producer certificate program during that year. The certification of a contract for

the delivery of reserves of that kind is analogous in purpose and effect to a license for the conduct of additional business, and it is clearly of benefit to the company because it thereby secures additional supplies which would not otherwise be available to it.

And this added reserve fee which is imposed is imposed in a manner directly proportional to the amount of reserves which have been certified to that company for the year, therefore it is proportional to the benefit actually received by the company in connection with the producer certificate program. Because of this, we believe that no matter how this Court decides the other issues in the case, the added reserve fee is clearly valid under Title V.

Now, the other fees at issue here are imposed on an industry-wide basis, that is the full amount of the fee is first determined and then it is allocated among the various members of the industry. The fee imposed upon the electric utility companies to pay for the cost of the coordination and reliability program relates to beneficial service which is provided to the entire industry as a whole. In conducting the coordination and reliability program, the Commission comprehensively studies the growing market for electric energy, and it also studies the ability of the existing generating and transmission facilities to meet the needs of that market, and this study assists the companies in planning their capital budgeting and it facilitates

their interconnection and cooperation with other electric energy companies.

As a consequence, they save money, they don't have to invest in generating facilities to the extent that they otherwise would, and moreover, the delivery of electric energy becomes more reliable. The incidence of blackouts and brownouts is reduced, and this increased reliability of the electric energy transmitted by the companies enhances the competitiveness of the companies vis-a-vis other fuel suppliers.

Because of this, it seems fairly clear that this program is beneficial to the industry. Indeed, it seems likely that if the Commission did not conduct a program of this kind, the industry as a whole or the various members of the industry would have to conduct similar programs themselves. And as I read their brief, the New England Power Company in this case does not even contend that this program is not beneficial. Their contention instead is that the fee is invalid because the program is conducted primarily in the public interest for the public benefit.

As Mr. Korman indicated in the preceding case, the implication of this argument is simply to read Title V out of the United States Code. Every regulatory program is supposed to be conducted primarily for public benefit. In enacting Title V, Congress understood that it was conferring authority to impose fees for a wide range of regulatory services and

activities, required by law to be conducted primarily in the public benefit. We see no incompatibility between the Commission's authority to impose fees and its responsibility for regulating in the public interest.

This leaves for discussion the two industry-wide fees imposed to cover the costs of rate-setting activities or the residual costs of such activities.

We feel that as to each individual company whose rates are reviewed and approved by the Commission, there is a direct benefit conferred. The approval of the new rate schedule is analogous to the issuance of a license for the conduct of business, that is the company could not continue its business at the higher rate schedule unless it receives the approval of the Commission.

The respondents, however, seem to make the general argument that this kind of benefit is really no benefit at all. They say that they would be better off with no rate regulation. We feel that that is not the issue in this case. In the first place, the merits of that argument are far from clear. These companies are insulated from destructive competition by the regulation of the Commission. The numbers of pipeline companies, electric utilities are regulated by the Commission and the kind of competition that might otherwise exist has been meted out.

But whether or not regulation as such benefits the

industries, and economists might well differ on that point, we feel that that as such is not the issue here. Title V, when it speaks in terms of the benefit, speaks in terms of benefit conferred within the context of a preexisting regulatory scheme. Even the Budget circular, which talks in terms of a special benefit, recognizes this because it gives as examples of regulatory activities the issuance of licenses, of certificates of convenience and necessity, inspections, all of which would be unnecessary without regulation. These are all benefits which are conferred only within the context of a preexisting regulatory scheme.

And like the issuance of license, the approval of a rate schedule does confer a benefit within this context. Indeed, even the electric utility companies have recognized this because they raise no objection to the sliding scale fee which is substantial that the Commission now imposes on the filing of new rate schedules.

Well, this leaves only the contention of the respondents that it is unfair to impose a fee for rate-setting activities on a company who doesn't file a new rate schedule during the year.

I would first point out about this contention that it does not go to the Commission's authority to impose a fee to recapture the entire amount of rate-setting activities. That contention only goes to the reasonableness of the method that

the Commission has employed for allocating this fee. And as we understand the opinion of the Court of Appeals, which did not purport to reach questions of reasonableness, that issue is not one which is before the Court in this case.

We nevertheless feel that the allocation chosen by the Commission is reasonable. Each particular company, whether or not it files a rate schedule during a given year, is going to file rate schedules from time to time in the long run and, therefore, it benefits from having the Commission's services available and it also especially benefits whenever its rate schedule is considered and approved. And it seems to us not unreasonable to allocate this fee on an annual basis over time rather than on a filing basis.

If there are no further questions, I would like to reserve the remainder of my time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Morley?

ORAL ARGUMENT OF STANLEY M. MORLEY, ESQ.,

ON BEHALF OF RESPONDENT INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA

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

I am confining my argument to the portions of the decision of the Court of Appeals which relate to the natural gas industry. And I would like to point out at the outset -- and I

think it is important that we keep in mind that so far as this case is concerned as to the natural gas industry, it involves simply natural gas rate-making costs incurred by the Federal Power Commission in the regulation of the pipeline industry on the one hand for its own costs incurred with respect to the Power Commission's own costs incurred in regulating pipeline rates, but it is also imposing upon the pipelines the costs incurred by the Federal Power Commission for the regulation of the producers incurred in connection with their certification procedures, which are essentially rate-making procedures inasmuch as the only real problem that ever arises with respect to producer certificates involves the price which they are to receive for their commodity.

Now, in the Court of Appeals decision, the court below did not reverse the Federal Power Commission on the basis that it was rendering benefits not to special beneficiaries but to the gas industry as a whole. As is shown in the opinion -- and I am referring to pages 9a and b of the government's petition for certiorari -- it is made abundantly clear that the court there was confining itself to this Court's interpretation in the Hope case and in the so-called ATCO case, Atlantic Refining Company v. Public Service Commission of New York.

Q What page is that, sir?

MR. MORLEY: This is in the government's petition for certiorari, Your Honor, in Appendix A. What I am looking at,

Your Honor, is at the bottom of pages 9a and the top of 9b.

Q Thank you.

MR. MORLEY: And you will notice there in the footnote that the Court did determine the Hope and ATCO cases to be controlling inasmuch as it is concluded that the only benefits derived from the Federal Power Commission's rate-making actions is for the public benefit, namely the ultimate consumers of the natural gas for whom the Gas Act was enacted.

Now, when the Court of Appeals decided this case, it went through the legislative history and made specific reference to the Federal Power Commission's earlier determination in Order No. 317, which was a rule-making order, which proposed for the first time the assessment of fees under the Natural Gas Act pursuant to the requirements of Title V of the Independent Appropriations Act of 1952 and the Budget Bureau Circular No. A-25.

He there stated that he wholeheartedly concurred with the Commission's interpretation of Title V and Order A-25 in its earlier rate-making -- its earlier notice of fee schedules.

Now, in that notice, it is clear --- and we have set it forth, it is set forth in the Court's opinion at page 10a of the Appendix to the petition -- they there point out that they have reviewed their functions under the Natural Gas Act and are of the opinion that the assessment of user charges or fees with respect to the exercise of the regulatory activities

under the Act and accounting provisions would not be appropriate since these activities are primarily for the benefit of the general public rather than the regulated companies. And they also make clear that they didn't think it was appropriate to charge the producers the costs of the Commission in administering the producer programs.

They first pointed out that it was difficult for administrative convenience and that there was an -- in overall they felt that it did not come within their entitlements under Title V. Now this --

Q Well, a regulatory agency can and they sometimes do change their minds about these things, don't they?

MR. MORLEY: Well, no doubt about it, Your Honor. However, the Commission passes this off in their order denying rehearing as mere dicta of the Commission, as though they had not given serious consideration to these interpretations of Title V. But I submit that if the legislative history of Title V does show that not only the Commission but the Congress has given most serious consideration to the very application of Title V which we are concerned here with today.

Now, the legislative history is rather sparse, and I assume that the main reason for that is that it was attached as a rider to an appropriations act and wasn't considered a serious matter as conferring legislative authority on the federal agencies.

But in any event, it is abundantly clear and is made -- if any doubt exists by the statement of Representative Yates on the floor of the House when he was discussing Title V of the Independent Offices Appropriations, and he there makes specific reference to two agencies, namely the Federal Communications Commission and the Interstate Commerce Commission.

Q What brief are you on now there?

MR. MORLEY: I am on our brief, the green one, and it is Appendix B, pages 3a through 5a. And you will notice on page 3a, Your Honor, he refers to the type of services for which they intended to recoup the costs of the government, and with regard to the Federal Communications Commission he refers to franchises, licenses, certificates which obviously are grants to identifiable receipients as is contemplated by Title V and Budget Circular A-25.

The same is true with respect to his reference on page 4a to the Interstate Commerce Commission, which makes inspections for locomotives of railroads, safety appliances, signaling systems, and also for the issuance of certificates of public convenience and necessity for bus lines and other common carriers -- clearly identifiable receipients of special services rendered in their behalf.

Now, after the enactment of Title V, the Budget Bureau, on November 5, 1953, issued its first circular which was also designated A-25, but that circular was superseded by

the one which we are here concerned with, which was adopted on September 23, 1959.

Shortly after the promulgation of the Budget circular, the Federal Power Commission got out its first notice of proposed rule-making for the assessment of fees. That was issued on February 3, 1954. And they therein proposed a rule-making to prescribe fees for the filing and processing of export-import authorizations under the Natural Gas Act and also for the charging of fees for certificates of public convenience and necessity under section 7.

Now, there is a great deal of consideration given and discussions in the Senate's Report No. 1467, which we have referred to in our brief at page 22. This report was adopted on February 1, 1956, pursuant to Senate Resolution 140. And in those hearings, the Senate committee was considering the very question of these fees and whether or not they should be done in a manner prescribed by Title V or whether or not there should be individual legislation enacted which would be directed to each of the individual agencies. And in the course of the hearings that were held, the Senate Committee on Interstate and Foreign Commerce adopted a resolution stating it was the sense of the committee that the agencies under its jurisdiction -- which obviously included the Federal Power Commission -- should suspend until July 1, 1955 any pending or proposed proceeding involving the imposition of fees and charges pursuant to

Title V.

Then Senator Bricker also stated on the floor of the Senate at about this same time that the Committee on Interstate and Foreign Commerce is of the unanimous opinion that such a proposal for assessing fees raises basic questions with regard to the fundamental philosophy of regulation. "The committee feels that the Congress should set up the basic standards for each agency to follow in imposing charges for licenses."

So in the course of the hearings, the then Chairman of the Federal Power Commission, Mr. Kuykendall, wrote a letter to Senator McClellan, then Chairman of the Committee on Government Operations, in which he responded to a request from the Federal Power Commission respecting the status of fees charges as a result of the enactment of Title V.

Mr. Kuykendall referred Chairman McClellan to the fact that they had issued the earlier rule-making notice, which I have referred to, and then stated that "that proceeding" -- the initial rule-making proceeding -- "is still pending but lies dormant in view of the resolution of the Senate Committee on Interstate and Foreign Commerce that such proceedings should be suspended until July 1, 1955, and the introduction of the Brooke bill, S. 2203, in the 83rd Congress, prohibiting other than nominal fees."

Then Chairman Kuykendall concluded that Title V does not provide a sufficiently explicit expression from Congress

with respect to method of attaining the goal of self-sustaining. What seems lacking, he stated, is the necessary particularity as to the distinction between "services" to particular groups and service to the public interest.

Q This completely separates those things into tight little compartments in a regulatory agency, Mr. Morley. Some things benefit both the public and the regulated industry, some are more particularly for the public, some are more particularly for the benefit of the industry. Is that not true?

MR. MORLEY: There is no question about it, Your Honor, in that regard though. But what we are concerned here with so far as the natural gas pipeline industry is concerned are rate matters, the annual fee assessment for their pipeline programs which they say is the cost for administering the rate-making --

Q Now, doesn't that benefit both the public and the utility?

MR. MORLEY: Not in my opinion, Your Honor.

Q Doesn't it fix an assured return on a particular formula?

MR. MORLEY: No, it doesn't. The Federal Power Commission says, what they do, they can't guarantee you a profit. They will give you the opportunity to make a profit, but that doesn't mean that you are necessarily going to do it. Now, sure enough, they fix --

Q Well, some of it depends on management then.

MR. MORLEY: Beg your pardon?

Q Some of it depends on management. But within the framework, there is a formula that is designed to give a profit, is there not?

MR. MORLEY: Well, I think the situation is more or less like Mr. Justice Brennan put it earlier, that this isn't sort of a Blue Cross plan. There are a lot of people --

Q That was Mr. Justice Stewart's conception of Blue Cross-Blue Shield.

MR. MORLEY: Excuse me -- that we are aced here with an industry which many pipeline companies don't have a rate case for years, and other pipeline companies will have several in one year, and now the whole industry is not going to benefit because one company is having difficulty raising its revenues and maintaining an adequate stability to its economic environment. I don't think that it necessarily follows that the whole industry -- I think it doesn't follow that the whole industry benefits from any of the rate-making activities of the Federal Power Commission. It is not my position, as stated by counsel for the government, that INGAA is saying that there should not be any rate regulation. We don't say that. We say that the cost of it is incurred for the benefit of the ultimate consumers for whom this Court has said the Natual Gas Act was enacted.

Q Mr. Morley, in your brief, the statement of Congressman Yates that you were reading from earlier, in Appendix B, at page 4a, the first kind of home-spun example he gives of the type of thing he is talking about there, at the end of the first paragraph on 4a, is the Chicago elevator inspection program in his home town, and he says this is the kind of thing that the City of Chicago required a license from each elevator owner from in order to underwrite the cost of this inspection. Well, certainly that inspection is for the benefit of the public, isn't it, and not for the benefit of the individual elevator owner?

MR. MORLEY: Well, if Your Honor please, I don't consider this apropos of the problem of the natural gas industry being regulated in its rates. Obviously, elevator inspections are for the benefit of the public.

Q And yet that is the example that he cites as being the first example that comes to mind in the whole bit.

MR. MORLEY: Well, he has more -- this is sort of an aside, as I read the thing. He is more concerned with the Federal Communications Commission and the Interstate Commerce Commission. Now, there is no question that this man, when he pays his fee to have his elevator inspected, he has got to have it as a prerequisite to getting to putting the thing into operation, just like a pipeline has to get a certificate of public convenience and necessity to operate in interstate commerce.

We're not challenging those fees.

Q But on the point of benefit, there simply isn't any real benefit to the elevator owner.

MR. MORLEY: Well, there is a benefit to the extent that he is permitted to operate his elevator.

Q Well, you can say that about any type of thing, I suppose. But so far as conferring some sort of an affirmative benefit, this would strike me at any rate as being something that is just completely for the public, and yet Congressman Yates thought it was clearly the kind of thing that would be included under Title V.

MR. MORLEY: Well, it is our view that the ultimate consumers who are the beneficiaries of rate regulation under the Natural Gas Act, the activity has been undertaken for them, the benefit goes to them, and they are the ones that should pay for it. The natural gas pipeline company, what benefit does he receive from a rate reduction or a rate increase of less than what he thought was appropriate? He is not benefiting by that, and I --

Q Well, the elevator owner can make exactly the same point though, can't he, and yet apparently that wouldn't have been good enough for Congressman Yates.

MR. MORLEY: I don't think so, because in my view, with all due deference to your own view, I think that this is more analogous to a certificate applicant before the Federal

Power Commission, the elevator owner is more comparable to a pipeline seeking a certificate than is the elevator operator with his tenants in the building.

Q Now, what Congressman Yates thought perhaps was what follows in the very next succeeding paragraph: "The Interstate Commerce Commission is required to inspect locomotives of railroads, safety appliances, signaling systems, various facilities of that type." "In addition to that, much of the work of the Commission is involved with hearings," and so forth.

Now, you said the government pays every cent for this operation, i.e., the inspections, the safety inspections under the Safety Appliance Act, I suppose. That perhaps was the analogy that Congressman Yates saw to the inspection of elevators in his home town of Chicago, and that you submit is quite different from rate regulation.

MR. MORLEY: I do, Your Honor.

Q All right.

MR. CHIEF JUSTICE BURGER: Mr. Morley, if my calculations are correct, I think you are impinging on Mr. Debevoise's time.

MR. MORLEY: Excuse me, Your Honor. I just want to say one thing, that in connection with the request of both Your Honor and Mr. Justice Stewart, the ICC does assess fees for activities such as are mentioned here in Congressman Yates' statement, but they do not assess fees for the costs of their

rate-making activities, and the same is true with respect to the Federal Communications Commission, that it does not have any fee assessments for its common carrier rate activities.

And with respect to Your Honor's question about the situation with respect to Budget Circular A-25, you will find in the Senate report to which I have made frequent reference, No. 1467, 84th Congress, that that Budget Bureau circular was circulated to all of the federal agencies, including the Federal Power Commission, and notice is taken of it by the congressional committee in this report, so I think that that does indicate some congressional sanction of the application of it to Federal Power activities.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Debevoise?

ORAL ARGUMENT OF THOMAS M. DEBEVOISE, ESQ.,

ON BEHALF OF THE RESPONDENT NEW ENGLAND POWER COMPANY

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

In the time before lunch, I will try to get you to think in completely different concepts under an act which has no similarity basically to the ones you have heard so far this morning and an industry that is not regulated at the federal level in any way, shape or form like the ones you have just been hearing about.

The Federal Power Act gives the Commission no

licensing authority over any facility; contrary to what government counsel stated this morning, the Federal Power Act does not let the Commission insulate the electric utility from destructive competition. In the period since it was passed, the companies regulated by the Commission have had its share of the market decreased by over 20 percent. It does not have comprehensive rate jurisdiction over the industry.

Q From what source is the competition that you are suggesting?

MR. DEBEVOISE: It is from the other parts of the industry, Your Honor. In the case of your natural gas pipelines, the Commission regulates the whole industry. That is not true of the electric utility industry.

There were, when the Act was passed, already in existence public, local public agencies. Today their number is over 2,000. There were just starting in 1935 REA cooperatives. Today their number is 960. The federal government dam building program was just starting. TVA had not yet expanded to take over the northern part of Alabama and the parts of Kentucky and other places that it has today.

Now, as far as rate jurisdiction is concerned --

Q When you say they are not protected from competition, do you mean within their own area or they are not protected from competition in the sense that they can't expand into areas where, for example, the REA or TVA is operating or

municipal ownership?

MR. DEBEVOISE: I am speaking of it in FPC terms. Their only jurisdiction is over sales from one utility system to another. Now, they will not protect a company such as Ottertail Power Company, which you had before you, from having the other systems which it serves taken away from them. There is no way they can. As the federal dams have been built, with low-cost federal power, more and more of the smaller systems have naturally desired and been able to switch to taking the federal power, to which they get preference. And this is what I mean. There have been new local public agencies established just as there have cooperatives. A retail service area in most areas that I know of is free to elect to oust the electric utility that is serving them, if it is an investor-owned company, at the end of its franchise, or otherwise, and to set up a system. There is no market protection for the electric utility industry under the Federal Power Act.

Now, this is true because of the history of the development of the industry. By 1935, when the Federal Power Act was passed, the industry was already in existence, it already was regulated extensively at the state level, federal regulation came about for two reasons in the Public Utility Act of 1935. One was to give some regulation for the benefit of investors over the mushrooming holding company systems which were competing with one another for retail properties across

the country, and in some instances were abusing financial accounting and other records to the detriment of investors. That was part one, the Public Utility Holding Company Act.

Part two of the Public Utility Holding Company Act was the Federal Power Act, and here the effort was just to regulate at the federal level those parts of the electric utility business which it was felt the States could not regulate, and it spelled out right in section 201 that the regulation is limited to the interstate transmission and sale in interstate commerce of electric energy.

The Federal Power Commission has no jurisdiction under parts two and three over any generating station, it has no certification authority over any transmission line, it does not regulate any rates except the interstate rates of the local power companies.

Now, until 1965, and your decision in Southern California Edison case, the percentage of revenues over which the FPC even claimed jurisdiction was down around two or three percent. Today they claim jurisdiction over seven percent of the revenues of the electric utility industry. They have jurisdiction over none of the revenues of some of the companies they regulate, because, again contrary to what the government said this morning, every public utility subject to FPC jurisdiction does not have rate schedules on file with the FPC because they do not sell in some cases to other public utilities.

Q No counsel up to now has intimated that the Fifth Circuit might have been correct and that the D.C. Circuit might have been correct, and I wonder if after lunch, if you have any views on that that you would care to suggest if you would address yourself to them.

MR. CHIEF JUSTICE BURGER: We will resume there after lunch.

[Whereupon, at 12 o'clock noon the court was recessed until 1:00 o'clock p.m.]

AFTERNOON SESSION - 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: Mr. Debevoise, you may proceed.

MR. DEBEVOISE: Mr. Chief Justice, to turn directly to your question, it is our position that if the certificate of compliance that was discussed this morning is a license or certificate, there is no conflict between the two circuits.

Now, turning to the other agency practices which Justice Stewart mentioned this morning, on page 47 of our brief there is a listing of them. The only one that I am aware of that has taken full advantage of Title V for annual licenses is the Atomic Energy Commission. There they do charge annual -- make annual charges that cover two licensees, that cover the regulatory costs associated with the processing of licenses and health and safety compliance and inspection activities. They do not attempt to charge back in those annual fees the costs related to rule-making, development of standards, codes and criteria, safeguard activities, and the administration of state relation programs. But the costs directly associated with their licensing program they do charge back under Title V.

And there is an error in our brief on page 47, in the second paragraph, where we refer to such charges as -- page 47, in the first full paragraph, line seven, the word "nominal" should be stricken. There is nothing nominal about the AEC annual fees to licensees.

Now, NEPCO has one peculiarity from the rest of the companies regulated by the Commission. I have told you that the industry as a whole, only seven percent of their revenues are regulated by the Federal Power Commission. In NEPCO's case, as a member of a holding company, where it supplies the distribution affiliates, the FPC regulates almost 100 percent of their rates, and this becomes important a little further.

But let us turn now to just what the FPC does regulate. First, they have the authority to regulate exports of electric energy from the country. There are very few of the industry which are in a position or location to export.

Second, they have the authority to approve mergers of facilities or the accepting of securities of another system, but that is only where there are jurisdictional facilities involved that excludes generation, excludes distribution, and it is only where the SEC doesn't have jurisdiction under the Public Utility Holding Company Act. Again, it is not a section that has many applications during the year.

Next, they have jurisdiction over security issuances by public utilities, but only over those public utilities which are not organized and operating in a state which regulates their security issuances. There are very few of such companies.

Next, they have rate jurisdiction again only over interstate energy transactions which, as I have mentioned,

amounts to seven percent of the industry's revenues on a combined basis. Now, when I say industry revenues there, I am including revenues from investor owned utilities that are large and are not subject to the FPC jurisdiction at all. The utilities in Texas, for instance, which are not interconnected across the state line, they are not subject to FPC jurisdiction, and their rates to other utilities are not regulated by the FPC.

Now, these are the regulatory activities of the Federal Power Commission over the electric utility industry, and it is the cost of these activities which are not covered by the filing fees they have established, substantial filing fees in the case of rate cases, that they wish to recover back from the industry as a whole, those that are subject to their jurisdiction on the basis of the kilowatts hours of jurisdictional energy transmitted or sold by those utilities.

I submit that for most of those sections, there's no application to most of the utilities subject to the FPC jurisdiction. In connection with the rate regulation, it is the buying systems, the several thousand systems which are not subject to FPC jurisdiction, which are the beneficiaries, it is they who go before the appropriations committees and urge more funds for the FPC for rate regulations.

Now, the FPC, in talking about the benefits which the industry receives from its rate regulation, said that it is redounded to the benefit of the electrics by creating the

economic climate for greater usage which in turn strengthens their financial stability and their ability to sell debt and equity securities. It is this economic climate which the court below very nicely, without going into it, said was not sufficiently defined to be a special benefit to the electrics.

And just what does the FPC mean? As I told you before, until '65 in the Southern California Edison case, you were talking about a couple of percent of the revenues of the electric utility industry. Actually, when Chairman Swidler came on board in '61, there was one man at the FPC looking at rates of electric utilities. We are talking about a small percentage of their revenues. The sales go, of the major categories, 48 percent to industrial customers, 22 percent to commercial. Does the FPC claim that they have created the economic climate by their rate regulation of the electric utility industry that has caused the industrial expansion of the last twenty years? That appears to be what they are doing.

But they go further, and they say that it has strengthened their financial stability and their ability to sell debt and equity securities. Well, NEPCO, as I told you, is 100 percent rate regulated by the FPC. There is an FPC order of March 7, 1972, at 47 FPC 732, where the FPC had to admit that because they listened to NEPCO's customers in 1971, that NEPCO had been unable to sell any debt securities or preferred stock for a period of eight months, and they had to

grant them emergency relief.

Now, most investor owned utilities are not subject to this kind of rate regulation jurisdiction by the FPC, but certainly the rate regulation jurisdiction has not created an economic benefit to the companies which are subject.

Now, the government misstated our position when he said that because part two does not specifically authorize a fee, we say Title V cannot be applied. That is not what we say. We said that the subject was before Congress in 1935 of charging fees under parts two and three, that they specifically amended section 10(e) of part one under which the FPC does charge all of its costs of administration of part one against licensees. They specifically amended it and, in doing so, specifically stated that they were limiting the costs of administration to be recovered through fees to part one. That was enacted, and that is legislative history at page 11 of our brief in 1935.

So we have the case of Congress specifically having it under consideration and then specifically saying just what the FPC could charge fees for under parts two and three, which they then spelled out in section 312 of the Act. And under section 312, the FPC was limited by Congress to charges for special statistical services and other special or periodic services.

Q That is the rule of 1935, is it?

MR. DEBEVOISE: Yes.

Now, in addition to these regulatory features, the FPC increasingly in recent years has been getting into the matter of coordination and reliability. They do so under the authority of section 202(a) and there is specific authority in section 311 where they are required to compile all sorts of facts and information on the industry to have it available for Congress.

Now, we have heard this morning that their activities under this part have saved us money, have meant we do not have to invest as much, have meant that we have become more reliable, and enhances our competiveness. I would say that there is absolutely nothing in the record to support anything of that kind, and in a minute I will read to you from their publications as to what their program is all about.

The one thing that was said that was entirely accurate is that their program consists of monitoring the industry. They attend our regional reliability councils, they don't get involved with the engineering in-depth, they ask the industry to set up task forces to provide them with the information, they coordinate it and correlate it and report it to the Congress and to the American public.

Now, I am not saying there is no benefit when you are regulated to have this exchange, but I am saying that their program is not designed and does not directly benefit the

industry.

In connection with that, if I could read to you just two excerpts from the National Power Surveys, the National Power Survey is a major undertaking by the Federal Power Commission in cooperation with advisory committees drawn from all segments of the electric power industry to give greater impetus to the trend toward integration of the Nation's power systems:

"In our opinion, the technology of large-scale generating stations and extra high voltage transmission interconnections has now reached the stage where closer coordination of construction plans and operations of individual systems in the industry is highly feasible and necessary if the consuming public is to receive the benefits of lower cost electricity which our technology now makes possible."

Now, this is the thrust and purpose of the Federal Power Act and everything they have done, lower costs of electricity. They go on: "At stake by 1980 are possible savings of as much as $11 billion a year to the American consumer," not to industry. It is not their thought that by taking advantage of technology, stockholders could line their pockets if stockholders are equated with the industry. It is savings to the consumers, the uniform systems of accounts, the accounting regulations which throw cost to the future and flow-through benefits today are all designed to benefit the consumer.

As far as the stockholders are concerned, in NEPCO's

case, you could sell your stock now for six percent less than you could ten years ago, on an equivalent basis, under regulation by the Federal Power Commission. It is not the industry which has benefited by these things.

Now, going further, where FPC regulation is supposed to have made the public feel secure in the reliability of our systems, you go to the '70 survey, where they say, "In a very real sense, electric power is the lifeblood of a modern nation. Axiomatic to this point is another, namely that it is one thing to take electricity for granted, as all of us have come to do in our daily lives, but quite a different thing to take for granted that it will always continue to be available." And the FPC has no control over whether or not it does continue to be available, even in the segment of the industry that they regulate. They cannot order a generating station to be built, they cannot order a transmission line to be built.

So I think it is appropriate to refer to the legislative history that is set forth in Tennessee Pipeline's brief, Tennessee Gas Pipeline, at length, from the Senate report, it is at page 28 of their brief, where there is joint benefit to a particular beneficiary and to all of the people, the costs should be equitably divided. And where there is doubt as to the degree or preponderance of benefit, there should be no fee.

Here I would say on this record there is considerable

doubt, and I would like to, in closing, quote the next sentence from the one cited by the government in connection with their authority to change their mind. The next sentence in the City of Chicago case from the one the government cited is, "What is required by the rule of law is that agency policies and standards, whether or not modification of previous policies, be reasonable and nondiscriminatory and flow rationally from findings that are reasonable inferences from substantial evidence."

Now, this economic climate benefit is without any substantial evidence whatsoever and does not constitute a reasonable infference once you have determined that their role in regulating the industry is so small.

In this case, we have not objected to the fees for applications in those limited areas where they have authority. We do object to paying or having our customers pay the costs of their whole program. To the extent there is any meaning to it being a benefit to the industry, it is the customers of all the electric utilities in the country which should pay. At the moment they do pay, based on ability to pay through our taxing statutes. To now say that the customers of investor-owned utilities should pay all of these costs because of some benefit to them makes no sense whatsoever. TVA, the cooperatives, the municipal generating systems, they all participate in the national power surveys, in the reliability councils,

we are all interconnected, the customers of the small municipals that we serve, they benefit just as much from reliability to the degree that the FPC promotes it; there is no reason whatsoever, and Title V does not authorize the switching of these costs to just the customersof the investor-owned systems.

Q Mr. Debevoise, would you think there is any difference in approach to the application of Title V to utilities whose rates are regulated and to broadcasters whose rates are not regulated? Is there any basis for distinction on that score?

MR. DEBEVOISE: I think there is a large distinction, which maybe I was too concice on, to the extent that we are talking about license fees, where the government gives you authority. It seems to me, Title V clearly applies. Now, as I understand the CATV, there is no rate regulation there. I think there is a big difference. I think your rate regulation and the implementation of government policy of the FPC to keep electric rates as low as possible, those they have jurisdiction over, is something that can hardly be said to be a special benefit to the regulated, and is certainly more a matter of government policy and a benefit to the purchasers of power.

Thank you.

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

Do you have anything further, Mr. Jones?

REBUTTAL ARGUMENT OF KEITH A. JONES, ESQ.,

ON BEHALF OF THE PETITIONER

MR. JONES: Thank you, Mr. Chief Justice.

I would just like to clarify a few matters of fact. The natural gas companies here have contended that the regulation of producer sales is of benefit to producers and not to the pipeline companies, and we would point out that producers are entitled to sell in intrastate commerce without any permission of the Commission whatsoever. They do not need a producer certificate to sell. The pipeline companies, however, do need the issuance of such a certificate before they can acquire any supplies of domestic natural gas for the introduction of that gas into their business of transporting in interstate commerce.

Secondly, the electric utility company here contends that there are some electric utility companies subject to the regulation of the Commission which do not file rate schedules. We are not aware of any such companies. It is our understanding that the jurisdiction of the Commission which runs to the sales for resale in interstate commerce would require the filing of rate schedules with respect to such sales. However, even assuming that there might be from time to time a company for some reason which did not file a rate schedule, nevertheless the validity of this fee would be a matter of -- the application of this fee to that company would be a question of

the reasonableness of the allocation of the fee. That does not go to the Commission's authority under Title V to impose a fee covering the cost of rate setting activities.

Third, the electric utility company also suggests that, contrary to my statement and earlier argument, the Commission does not insulate them from competition in any way. To the contrary, this Court held last term, in the Gulf States case, that the Commission must consider the competitive consequences of any activity subject to its regulation, and it must act in accordance with what is necessary from a competitive point of view in opposing anticompetitive activity by certain of the utilities.

And, fourth, once again, the electric utility company challenges the Commissioner's assertion that the coordination and reliability program is of benefit to the utilities. And I would simply point out in this connection that this Court, in the Gainesville Utilities case, acknowledged that the interconnection which is ordered by the Commission in connection with this program was of signal benefit to the electric utility companies because it permitted them to draw upon the power resources of other companies in times of need and save them from the major expense of constructing adequate generating facilities to cover all of their hypothetical needs.

And, last, once again, the contention is made that Title V itself extends no authority whatsoever to the Federal

Power Commission. But the New England Power Company, in making this assertion, is in fact being inconsistent because they themselves acknowledge that the Federal Power Commission does have authority under Title V to assess fees for the filing of new rate schedules. Title V is the only origin of that authority exercised by the Commission.

We feel that the question here is not whether the Commission has authority, whether that authority extends to the fees here, and we believe, for the reasons that I have stated, that it does.

If there are no further questions, I am finished.

Thank you.

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

Thank you, gentlemen. The case is submitted.

[Whereupon, at 1:24 o'clock p.m., the case was submitted.]

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