In the

Supreme Court of the United States

FEDERAL POWER COMMISSION,

Petitioner,

v. No. 74-1619

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,

Respondents.

- - - and - - - - - - - - - - - - - - - -

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,

Petitioners,

v. No. 74-1608

FEDERAL POWER COMMISSION,

Respondent.

Washington, D. C.
February 25, 1976

Pages 1 thru 49

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- - - and - - - NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al., Petitioners, v. FEDERAL POWER COMMISSION, Respondent.	No. 74-1608

Washington, D. C.,

Wednesday, February 25, 1976.

The above-entitled matters came on for argument at 1:43 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

DREXEL D. JOURNEY, ESQ., General Counsel, Federal Power Commission, Washington, D. C. 20426; on behalf of the Federal Power Commission.

HOWARD A. GLICKSTEIN, ESQ., Howard University Law School, 2935 Upton Street, N. W., Washington, D.C. 20008; on behalf of the NAACP.

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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 1619, Federal Power Commission against the NAACP, and 1608, NAACP against the Federal Power Commission.

Mr. Journey.

ORAL ARGUMENT OF DREXEL D. JOURNEY, ESQ.,

ON BEHALF OF THE FEDERAL POWER COMMISSION

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

This proceeding comes before you with a history of six years in which the EEOC, the FPC, the Justice Department, the Civil Service Commission, and others have been seeking an answer to a question. And that question is the proper interrelation of the Equal Employment Opportunity laws and economic regulatory laws.

We've tried three approaches to get a definitive answer. We've tried administrative procedures. We've tried the legislative route. And we've tried the judicial route. In all of them we've failed.

What we now require is for this Court to set the fences by which economic regulatory agencies, equal employment opportunity agencies, like the EEOC, the regulated gas and electric utility industry and others may function.

QUESTION: Mr. Journey, your statement that what you now require from this Court is such-and-such raises a question

in my mind that bothered me while reading the briefs and bothered me in the Court of Appeals opinion, it seems to me that there is a certain abstractness about the question that is presented here, and I don't know whether it's standing or case or controversy, or rightness. But obviously this Court doesn't just respond to the request of both parties to tell us when to -- tell you what you can do and what you can't do.

You've got to show that you've got a concrete controversy. And I'm somewhat disturbed by the fact that this wasn't any specific attack on a rate hearing or a license application, but simply a request for a rule, and the FPC turned it down because it had no jurisdiction.

MR. JOURNEY: Your Honor, if you look at the history of this, the PG&E case, which is quoted in the Commission's declaratory order No. 623, you will see that this started -- this controversy started out in an FPC hydro licensing case, raised initially by the California Rural Legal Assistance, Inc.

The matter in that case was whether economic -- the issue, the precise issue there and here is whether economic regulatory statutes are an alternative enforcement strategy for the equal employment opportunity laws.

The PG&E case, 44 FPC, that's quoted in declaratory order 623, didn't go to court. The Commission, when it faced the issue in the PG&E case, invited the NAACP in. They invited others in, to hear the points of whether there was

jurisdiction and whether economic regulatory laws could be used as an enforcement strategy.

The Commission concluded in the PG&E case that it could not.

The NAACP then brought a general proceeding which culminiated in Opinion 623, which was directed basically to the gas and electric utility industry throughout the United States.

We think that the question is important and should be resolved by this Court. We think it is ripe for judicial review.

NAACP argues that there's a constitutional requirement that the Power Commission have affirmative action employment regulatory programs. They argue also that under the public interest concept there is enfolded within the umbrella of the public interest notion a requirement in the Power Commission to resolve these questions.

The Court of Appeals said no. It said when you look at the function of a regulatory agency, such as the FPC, you must look at its delegated authority. It found that we had, under the Power and the Gas Acts, three things to do basically. We were to look at conservation of natural resources, we were to look at adequacy of supply of electric energy and natural gas. And that we were to protect the consumer from exploitation.

The Court went on, after making that finding, and holding that we had no jurisdiction, to determine what employment practices should be to reach into the operation of the economic regulatory function, and it found in our ability to disallow costs what I call an ancillary jurisdiction in the Commission. Which seems to say, by reason of the things the Court of Appeals would have us do, namely, get the EEOC forms and let people intervene who claim they were victims of discrimination in unequal employment, hearings and opportunity to be heard.

Well, we think what this comes down to is an endless procession of litigation for us, in terms of why would we hear these questions if we are not being told by the Court of Appeals that we can do indirectly that thing which they said we could not do directly. They said we could not regulate employment practices, per se.

Now, when we discussed this matter with the Solicitor General, the Solicitor General said that he thought the case had been properly decided by the Court of Appeals, holding that we do not have regulatory jurisdiction, per se.

We think that in looking at the additional findings of the Court, they pose a most difficult situation for the Commission to --

QUESTION: Do you read the Court of Appeals as saying that in individual proceedings you could look into employment

practices as such, or only in connection with cost?

MR. JOURNEY: The latter. But we --

QUESTION: And if you thought, if you concluded that if they had legal employment practices, their cost might be lower, it might make some difference.

MR. JOURNEY: Your Honor, we think that the Court of Appeals decision suggests that we can, one, either deny rate relief or deny a certificate because of what might be our independent views of what should be their employment practices, --

QUESTION: Yes, but only because of its impact on cost.

MR. JOURNEY: Cost impact and service impact. But the way the equal employment opportunity laws are structured, and the way the regulatory laws are structured, there is now in being, under the Employment Act of 1972, a comprehensive control mechanism administered by the EEOC.

QUESTION: I understand that, but let me -- let me get your position clear. Suppose that the FPC on its own now, in a rate proceeding, was asked to give rate relief to a company and it thought that the company was engaged in illegal employment practices which, if cured, would lower their cost. Would you have the power, under your present statute, to tell the company that you would not give them rate relief because they have -- because their legal cost wouldn't justify it?

MR. JOURNEY: If the legality question had been determined in the forum --

QUESTION: Well, I'm not asking you that. I asked you, do you have the power to determine it in your own proceeding?

MR. JOURNEY: I believe not in the first instance. We apply the doctrines of prudence, of just and reasonableness, and we disallow costs for rate purposes which do not meet the standards of the Power and Gas Acts.

QUESTION: Well, what if somebody -- what if somebody comes in to one of your rate proceedings, one of the customers of the utility, and complains that the utility -- that some of the costs claimed by the utility are forbidden by law?

MR. JOURNEY: If they are forbidden by law, there is --

QUESTION: Don't you inquire into that?

MR. JOURNEY: Yes, sir.

But we think, Your Honor, that is not what this case is about, and in the historical context, --

QUESTION: But only because there's another mechanism for determining whether there are legal costs?

MR. JOURNEY: We think that that's the orderly way to relate the equal employment opportunity control machinery versus the economic regulatory machinery.

QUESTION: Well, pursuing my brother White's inquiry a little bit, let's say a customer comes in and says some of these costs are forbidden by law, because they were bribes, they were bribes of municipal officials. Are you suggesting that you, your Commission would not and could not consider that until or unless the courts had convicted somebody of bribery?

MR. JOURNEY: I am saying, Your Honor, that for cost purposes, Account 426.5 would disallow that for FPC rate purposes upon a showing of substantial evidence. And relating it to the questions of rate-making under the Power and Gas Acts.

But I'm suggesting also to you that when you read the Court of Appeals opinion and the arguments that were made before the Court of Appeals, and the arguments that are made to you, that's not the question that's being put to you.

You're being asked to -- because of the administrative workload of the EEOC, the 100,000-plus cases in the backlog, to have us, through the economic rate-making procedure, determine what the employment conditions should be of the utilities whose services we regulate.

QUESTION: What if a customer comes in in a rate proceeding, Mr. Journey, and says the utility defended a lawsuit and paid $350,000 in lawyers' fees, and we don't think it should have defended that lawsuit, we think it should have just capitulated.

Now, would the FPC inquire in that case as to whether

or not the utility should have defended the action on the merits?

MR. JOURNEY: Yes, sir, there's been litigation on that question on legal fees, and we have determined that the Commission makes the determination on a cost basis, applying the just and reasonable standards, whether it should be allowed for rate purposes or disallowed.

But it is up to the utility management in the first instance to engage the lawyer, and the lawyer then determines with management what they do or don't do.

QUESTION: Well, but supposing the utility shows that it followed the advice of a lawyer in deciding to defend the action, and there's no question about the size of the fee. The customer's complaint is that the lawyer's advice was wrong, you shouldn't have defended the action, you really had no defense, you should have settled it and avoided this cost. And therefore, take the cost out of the rate base.

MR. JOURNEY: We have had that question, Your Honor, and we have disallowed some of the costs, and that has gone up through the Fourth Circuit. But that question has been litigated.

QUESTION: And what standard do you apply in disallowing those costs?

MR. JOURNEY: For just and reasonable standard, and the prudency tests.

QUESTION: The what?

MR. JOURNEY: Prudency test. For --

QUESTION: To pursue what Mr. Justice Rehnquist was just raising, with a variation: suppose the claim was the president of the company had caused the employment of a law firm, at a retainer of a quarter of a million dollars a year, the law firm being headed up by the son of the president of the company, and that these payments were for unnecessary services. You would inquire into that kind of a claim?

MR. JOURNEY: Disallow that, yes.

QUESTION: Yes. Just as though the president had a yacht or an airplane that he didn't need, but was charging it off to the utility, you'd inquire into that, too?

MR. JOURNEY: Yes, sir. That has all been litigated in the early history of the Power Commission, after the passage of the Holding Company Act. You will find the cases that related to the cost disallowance and rate disallowance coming up in the early Supreme Court history.

But I submit to you that that is not what's being asked here, and that's not what was involved. And --

QUESTION: Mr. Journey, could I ask you a follow-up question?

MR. JOURNEY: Yes.

QUESTION: Supposing it was proposed that there be a rule defining when attorneys' fees and like costs would be

allowed in litigation involving charges of discrimination against the power company. Would you have jurisdiction to adopt the rule that would say in certain circumstances those costs would be allowable, and in others they would not?

MR. JOURNEY: I think, for purposes of fixing the regulated utility's costs, we would.

QUESTION: Then you do not -- Judge McGowan, in his opinion, said they didn't know whether your holding of no jurisdiction was that no jurisdiction to adopt the specific proposed rule that the petitioners had submitted, or any rule relating to employment discrimination. The one you've said you could adopt would be a rule relating to employment discrimination.

MR. JOURNEY: Well, I think, Your Honor, as I understood the question put to me, it was whether we could disallow the costs of the utility whose rates we were fixing.

QUESTION: Right.

MR. JOURNEY: In Judge McGowan's opinion, what he really is suggesting that we do is permit people to intervene and through, we believe, by indirection, fix the employment practices of utilities.

We regulate the services and costs of utilities in interstate commerce.

What this is all about is the Commission is being asked to grapple with the economic conditions of admittedly

disadvantaged portions of the society. Now, I --

QUESTION: But Judge McGowan didn't require you to make any rules, he permitted you, as I understand it, or as the Court of Appeals would permit you to go at it on just a case-to-case basis.

MR. JOURNEY: But if there's jurisdiction --

QUESTION: And that -- and only in connection with cost.

MR. JOURNEY: But if there's jurisdiction, Your Honor,--

QUESTION: Yes?

MR. JOURNEY: -- whether it's rule-making or ad hoc, it really means that -- that that opinion means one of two things. We can do by indirection that which he said we can't do directly, or it means that we have an ancillary investigatory review authority to consider facts.

QUESTION: Have you ever considered in a rate proceeding whether a company has unneeded employees?

MR. JOURNEY: We have looked at -- the answer to that is yes.

QUESTION: Yes. And you do look -- you do look into charges of featherbedding and --

MR. JOURNEY: Yes, sir.

QUESTION: Yes. So you do look into labor questions.

MR. JOURNEY: As they relate to costs.

QUESTION: Yes.

MR. JOURNEY: Now, here, what we're talking about is using the economic regulatory process not to, in effect, control service or rates or costs, but to reach back in and cure things which are socially and legally undesirable. The employment practices of utilities which may be on a discriminatory basis.

Now, it seems to me, --

QUESTION: Mr. Journey, can I just interrupt again? How is that different from disallowing the cost of a bribe to a public official, for example?

MR. JOURNEY: A bribe --

QUESTION: If the cost is associated with a violation of law, why is discrimination any different than any other kind of violation?

MR. JOURNEY: When the official is bribed, presumably there is a determination that he has been bribed, and there is --

QUESTION: But you said you'd act on substantial evidence, as I understood it, without --

MR. JOURNEY: We would act on substantial evidence --

QUESTION: Supposing you had substantial evidence of unnecessary costs incurred in connection with racial discrimination. How is that different?

MR. JOURNEY: If there was a question of -- if I may answer in the context of your bribery question, if there was a

proceeding to determine the bribe question, I would recommend to the Power Commission that it defer processing of that until the bribe trial question had been resolved, because under --

QUESTION: Well, but the question is one of power. Would it be essential as a matter of jurisdiction that you defer until after there had been an adjudication? I think not.

MR. JOURNEY: It is not essential to defer for cost disallowance purposes, Your Honor, but what it does require is if the other proceeding is going forward, and if it's determined that there was not a bribe, and indeed those costs should be disallowed, and we had kicked them out under Account 426.5, then we'd be in the process of needing to put them back in again.

You see, we don't operate in a vacuum --

QUESTION: I guess everybody can make a mistake, but you concede, as I understand you, that you do have jurisdiction to consider the significance of costly illegal conduct in the bribe area, do you make the same concession with respect to costly illegal conduct in the discrimination area? And if not, why not?

MR. JOURNEY: If it is for cost incidence purposes, we could review it and we could disallow it.

QUESTION: If you could review it, could you also make a rule in advance indicating the circumstances under which you would disallow it?

MR. JOURNEY: Not if it went to the question of saying that we could prescribe what would be the labor requirements of the regulated utility.

You see, the rule that was proposed to us is that we undertake and determine an affirmative action program like the Philadelphia Plan, or one of the other plans, to determine the over-all employment conduct and practices of the electric and gas utility industry.

MR. CHIEF JUSTICE BURGER: You're a little too close to the microphone, Mr. Journey, I think that's our static problem.

MR. JOURNEY: We don't, as a matter of course, get to that question, for this reason: The Commission regulates ten percent of the revenues of the electric utility industry. We regulate about ninety percent of the revenues of the interstate gas and electric utility industry. That a good part of the employment of the gas and electric utility industry is covered by State fair employment practice laws, it's covered by the equal employment opportunity laws, it's covered by the federal Office of Contract Compliance, and the General Services Administration is the one that fixes the standards and criteria by which utilities must comport themselves.

We take account of their requirements, just as we take account of the IRS requirements, or any other requirement.

We might want to disallow an income tax thing, or something of that nature, but we wouldn't in the first instance make the determination of whether someone had violated the income tax laws.

QUESTION: Mr. Journey, assume you had a situation in which a utility had been found guilty of discriminatory practices and ordered to pay back-pay in a fixed amount. Would you, as of today, under the practices presently prevailing, disallow the back-pay ordered by, say, a court?

MR. JOURNEY: Yes, sir. That would be a question of putting it into the cost to service, and having determined that it was not a just and reasonable item, if in fact it wasn't just and reasonable, then disallow it.

QUESTION: But in that situation, you would have a quantified cost.

MR. JOURNEY: Right.

QUESTION: And I suppose in many situations involving alleged discrimination, there would be no quantification.

MR. JOURNEY: That's right.

QUESTION: Do you want to pursue that topic a bit?

MR. JOURNEY: Well, there are -- there are areas of penalties, of back-pay, and other things, where items can be liquidated and we can handle them through the economic regulatory process. We find it most difficult, however, to speculate as to what might be the loss of morale, what might be

the inefficiency, what might be a lot of the other factors associated with this.

We submit that under the end-result test of Natural Gas Pipeline in the case law progeny, where from 1940 on you have reviewed our cases on a functional appraisal basis, you should not find that we have this jurisdiction.

QUESTION: Well, do you think you would be acting contrary to the Court of Appeals opinion if in a specific case you came to these very conclusions that you have just now stated, that you have looked at this and you really can't arrive at anything, anything substantial or definite, and that it's wholly speculative and you just put the issue aside?

MR. JOURNEY: We think that what would happen there is we would then get into a question of interpreting the opinion, if I advise the Commission --

QUESTION: Well, yes, but what do you think about it right now, about the Court of Appeals?

MR. JOURNEY: I think that probably that Court of Appeals opinion means that we could go in and regulate the employment practices of the utilities.

QUESTION: Yes, but suppose you didn't. Do you think you would be required to under the Court of Appeals opinion?

MR. JOURNEY: Then it would be a question of whether we abused our power.

QUESTION: Well, --

MR. JOURNEY: See, if you have the power --

QUESTION: -- I still am asking you whether or not, under the Court of Appeals opinion, it would permit you to conclude just what you said a moment ago, that you just -- and you've looked into it, but it just isn't a quantifiable matter.

MR. JOURNEY: We -- I certainly would take that position that the Commission should not be forced to do this.

QUESTION: Well, what about the Court of Appeals opinion, though? Does that -- would it permit you to do that, or would it require you, nevertheless, to regulate the employment practices?

MR. JOURNEY: The Court of Appeals opinion would have us back up here again after I had so advised the Commission, because the people would not be satisfied. The proof of the pudding in this was that until --

QUESTION: Well, I know. Somebody might bring you up here, but all I wanted to know is what your opinion was of the Court of Appeals opinion.

MR. JOURNEY: I think that the Court of Appeals opinion means that there is an ancillary authority in the Commission to determine employment practices.

QUESTION: Well, I know that's what you say, but that isn't my question.

My question is, if you exercise that authority and found out that you just couldn't quantify, and so there was no relief given, would that be contrary to the Court of Appeals opinion, in your view?

MR. JOURNEY: If we could defend successfully against the challenge that we abused our discretion in not acting, I would --

[Laughter.]

QUESTION: That's what Justice White is asking you: yes or no.

MR. JOURNEY: I think that we would have difficulty in maintaining that position.

QUESTION: May I suggest, though, isn't the problem that you confront, not the one you've been articulating, but the fact that in every rate case or in every request for the licensing of an applicant, this issue would be raised and you'd have to try it, and it might you six weeks or six months to litigate it.

MR. JOURNEY: Well, that's the burden, the administrative burden question.

QUESTION: Well, I was wondering when you were going to say that.

MR. JOURNEY: Well, we had that in our brief, Your Honor, and we think that this would be an unmanageable workload for us. We think that under the end-result test of Natural,

there are three reasons why you shouldn't find this: one, we aren't equipped to do it; two, we're otherwise busily occupied with gas and electric matters; three, there already is in place and functioning a mechanism under the equal employment opportunity laws by which equal employment practices are regulated.

The 1972 Amendments did not give us that authority. The basic '64 Act did not. Our Act does not give it to us. You're being asked to read it into our statute, and you're being asked to have us ask -- answer in each case substantial questions of relevance and materiality. We think we would be in a hopeless morass. We would like the fences fixed.

Either the economic regulatory process is an alternate enforcement strategy for the equal employment laws, or it is not. We think it is not.

QUESTION: Mr. Journey, you gave -- you were asked a question about the possible example of quantified costs in a back-pay award, and you said, you expressed the opinion that those might well be disallowed by the Commission.

Has there ever been an issue such as that actually presented to the Commission, or are you just giving an opinion based on your judgment as to what they'd do?

MR. JOURNEY: In terms of disallowing --

QUESTION: If -- a utility which might have been found guilty of employment discrimination, having assessed

against it a back-pay award, you suggested that such an amount might well be disallowed as a proper cost. Has that issue ever actually been passed upon by the Commission?

MR. JOURNEY: It has not been passed on in the employment context, but it has been passed on in the context of other things --

QUESTION: Right.

MR. JOURNEY: -- as litigation ensued out of the Holding Company and the divestiture proceedings, and as the gas and electric industry was unscrambled in terms of its financial control.

QUESTION: Has it ever come up, Mr. Journey, in connection with back-pay awards for unfair labor practices?

MR. JOURNEY: It is -- to the best of my knowledge, it has not come up in terms of a decision that the Commission rendered. How this actually happens is when the auditors go in and check the books, they, in effect, kick out, as a matter of course, duplicate labor costs.

You see, the gas and electric utility industry, the labor costs are all handled by in-place-and-functioning accounting requirements, and it's broken down by the functions of production, transmission, distribution, and general.

So that when the auditors go in and look at the books of the gas and electric companies, they kick out these duplicate costs.

QUESTION: So that, would I take it, then, would be the procedure that would be followed in connection with an EEOC back-pay award; wouldn't it?

MR. JOURNEY: The same thing. And if it was a penalty question, it would be kicked out under Account 426.3. If it was an unreasonable charge, it would be kicked out under 426.5.

QUESTION: Well now, just say, you know, some of these back-pay awards run into a lot of money, a million or more dollars, many millions in some of them. Are they handled just administratively this way?

MR. JOURNEY: They would be kicked out by the auditors, yes, in the accounts. If they were duplicate costs or penalties.

So they are not left without a remedy. They have one.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Glickstein.

ORAL ARGUMENT OF HOWARD A. GLICKSTEIN, ESQ.,

ON BEHALF OF THE NAACP, ET AL.

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

The FPC's position in this case appears to be that it has jurisdiction to do what is easy and lacks jurisdiction to undertake what is difficult. The FPC seems to have converted an alleged burden into a jurisdictional barrier.

What the FPC appears to contend is that after employment discrimination has produced costly consequences,

after the costs of employment discrimination have been assessed by some other agency, then and only then is it proper for the FPC to disallow such costs in a rate-making proceeding.

This is the limited extent to which the FPC recognizes any relationship between a duty to eliminate employment discrimination --

QUESTION: What would be the situation, Mr. Glickstein, if your view should prevail, and the Federal Power Commission undertakes these evaluations, and the EEOC and the complaining parties all disagree with it? In other words, suppose they had a rather fixed pattern of rejecting all such claims.

Have you exhausted your remedies when you've gone to the Federal Power Commission, or do you get another bite at the apple over in the EEOC?

MR. GLICKSTEIN: Well, Mr. Chief Justice, if the Federal Power Commission refused to disallow specific costs against a utility in a rate-making proceeding, for example, --

QUESTION: No, no, I mean passing on what you want them to pass on; namely, to get into the substantive aspect of forbidden employment practices.

MR. GLICKSTEIN: We concede, Mr. Chief Justice, that there are remedies before the Equal Employment Commission, there are remedies under 1981.

We do contend, however, that the costs of employment discrimination are a very relevant factor for the FPC to con-

sider, and not to consider it merely after the costs have been assessed by some other --

QUESTION: No, no, I'm not making my question clear.

They do just what you ask them to do. They go into the subject of employment practices, with respect to minorities. But you don't like their decision. Assuming that you were bringing such a case. Do you think the Federal Power Commission has not followed EEOC guidelines, and a number of other things; what do you do about that? Just routinely take it, as you would any other Federal Power determination, to the Court of Appeals?

MR. GLICKSTEIN: If the Court were to hold that the FPC had jurisdiction in this area, and a particular rate was challenged as including costs that related to employment discrimination, if the particular license was challenged as being applied for by a company that had a record of employment discrimination, and the FPC refused to take that into account, or discounted it, then that would be an additional proceeding in which an appeal would be taken from the FPC's conclusion on that score.

QUESTION: Just as you would in any other -- in a rate case or any other issue? Is that it?

MR. GLICKSTEIN: That's right.

QUESTION: But I don't think you've answered, at least what I understood the Chief Justice's question to be; and that

is, if the Federal Power Commission does what you ask it to, investigates discrimination in the employment practices of the utility, and includes "there was no discriminatory practice here"; may you then, or may people who claim they were discriminated against, who were parties to the FPC proceeding, go to the EEOC and start all over again?

MR. GLICKSTEIN: Yes, they may. They certainly may. I think it's clear from the decisions of this Court that there are multiple remedies available for victims of discrimination.

QUESTION: I take it that your claim isn't that the FPC would have the power to enjoin employment, certain employment practice, or order reinstatement or back-pay or things like that.

MR. GLICKSTEIN: I think they would have the power to disallow costs related to a practice of that sort.

QUESTION: That's all, just the costs, just the cost factor.

MR. GLICKSTEIN: In addition to that, Mr. Justice White, it's not merely in the rate-making proceeding where the Court of Appeals said that the Federal Power Commission has jurisdiction to consider this question, it's also in licensing and certificating proceedings. And there, if a company is shown to be a known discriminator, and there perhaps is a competing company for the license, that isn't -- that is a factor we contend the Federal Power Commission could

take into account.

QUESTION: Well, you're not -- do you think that you're barred from raising those issues in licensing proceedings now?

MR. GLICKSTEIN: Well, we are barred, Your Honor, because the FPC has prohibited the raising of such an issue in the licensing proceedings.

QUESTION: In license proceedings.

MR. GLICKSTEIN: Yes. We cite the case on page 47, I believe, of our brief.

QUESTION: Not only in rate cases, but --

MR. GLICKSTEIN: In both. In both, the Federal Power Commission has barred the raising of such issues.

QUESTION: Would the same argument apply to the nuclear regulatory commission, do you think?

In licensing.

MR. GLICKSTEIN: Well, to the -- I think the factors that the nuclear regulatory commission would be considering in granting a license for a nuclear regulatory plant would be somewhat different than the factors that the Federal Power Commission considered when it grants licenses or sets rates. To the extent that the nuclear regulatory commission has the authority to consider the -- whether or not the consumers are being exploited, whether or not unjust and unreasonable costs are being passed on; then I suspect it would apply.

QUESTION: Did you have the same problems, or have

you raised it with the ICC, for example, in certificates of public convenience and necessity?

MR. GLICKSTEIN: Mr. Chief Justice, the ICC has a --

QUESTION: You just promoted me!

MR. GLICKSTEIN: -- has published a notice of rule-making, and we have the same problem. They haven't done anything about this.

QUESTION: Do they have a rule against it?

MR. GLICKSTEIN: No, they don't have a rule against this.

QUESTION: How about the FCC?

MR. GLICKSTEIN: The FCC is the only one of the -- well, one of the two federal regulatory agencies that has issued a rule prohibiting employment discrimination by its regulatees. The FCC does have such a rule.

QUESTION: FCC?

MR. GLICKSTEIN: The FCC, Federal Communications Commission.

QUESTION: And what other agencies?

MR. GLICKSTEIN: I think the Federal Home Loan Bank Board, I believe, has issued a similar rule.

QUESTION: How about the SEC?

MR. GLICKSTEIN: No, the SEC has not issued such a rule.

As the Solicitor General indicated in his amicus brief

in this case, a number of the federal regulatory agencies apparently are awaiting the outcome of this proceeding before they determine what they should do.

QUESTION: Incidentally, in a rate-making procedure, how would you determine the costs which would be disallowed?

MR. GLICKSTEIN: One cost, Mr. Justice Brennan, that I guess is readily assessible, is the cost of the back-pay award.

QUESTION: Yes.

MR. GLICKSTEIN: Now, Mr. Journey told you that under the Uniform System of Accounts this would be treated as penalties. First of all, I am somewhat puzzled by that, because the Uniform System of Accounts is just that, a system of accounts that tells utilities how to keep their books.

QUESTION: Well, this is upside-down, isn't it? I mean, you're talking about a back-pay award, but you would want -- you would want the -- I thought you were going to be asking the Commission to disallow certain costs that were invalid because of discrimination. I thought that's what you'd be asking them to do.

MR. GLICKSTEIN: And one such course would be a back-pay award. That would --

QUESTION: To disallow?

QUESTION: It disallows the rate case.

QUESTION: After you've persuaded them to do it?

MR. GLICKSTEIN: Well, we would not allow -- we would

urge the FPC not to take the back-pay award that the utility had to pay out into account in setting its rate.

QUESTION: What interest do you have in whether, after the back-pay award has been made, what difference does it make to your clients whether that's considered in the utility's rates or not?

MR. GLICKSTEIN: Well, the interest that our clients have is in the over-all question of discrimination by --

QUESTION: Now, the over-all question, I should think your position would be one that would be aided by encouraging back-pay awards rather than penalizing them. I'm just wondering if you're representing the best interests of your clients.

MR. GLICKSTEIN: Well, Mr. Justice Stevens, we look forward to the day when it's no longer necessary to award back-pay under Title VII, because the problem that that statute is directed toward is eliminated. And one of the purposes of our request in this case is that if the labor force is used more efficiently, if persons, regardless of sex or race, are permitted to obtain employment, it won't be necessary for there to be back-pay awards.

QUESTION: See, the irony of this case, as it strikes me, is that so often in the employment discrimination field, it's the company that's defending on the ground that if we were to comply it would be very costly. And here we're suggesting

that compliance -- we're suggesting just the opposite.

MR. GLICKSTEIN: Well, I certainly concede, Mr. Justice Stevens, that some companies make that contention. I believe that's a rather short-range point of view.

I think that the testimony of economists is quite clear, that in the long run the elimination of employment discrimination is economically efficient. It was for that very purpose that Congress passed Title VII and concluded that employment discrimination raised a great cost and burden to the economy.

QUESTION: How would the FPC ever get at this in a case? You certainly don't suggest the FPC itself is going to award back-pay; it hasn't got any authority to do that.

MR. GLICKSTEIN: Mr. Justice White, we are urging that the FPC -- and the purpose of our rule-making proceeding was to have the FPC take preventive steps, to issue a prophylactic rule, to prevent these costs from arising; to prevent it being necessary to --

QUESTION: Well, you lost on that issue in the Court of Appeals, I take it, in the sense that the FPC was not ordered to adopt a rule?

MR. GLICKSTEIN: It wasn't ordered to undertake a rule-making proceeding, but Judge McGowan indicated some aspects of the rule that we were proposing, that it might be appropriate for the FPC to adopt.

QUESTION: They might -- they might, but they weren't required to.

MR. GLICKSTEIN: They weren't required to hold a rule-making proceeding; correct.

QUESTION: Now, tell me again, tell me a cost in a rule-making proceeding -- Mr. Justice Brennan's question -- tell me a cost in a rule-making proceeding that you would ask to be disallowed because of a --

QUESTION: In addition to back-pay.

QUESTION: -- in addition to back-pay, yes.

MR. GLICKSTEIN: Well, of course --

QUESTION: Would you just say, please make a guess as to how much this discrimination conduct is costing the company in the long run, and disallow that much?

MR. GLICKSTEIN: There are litigation costs that would be disallowed. In addition to that, there are, as Judge McGowan indicated, some unquantifiable costs. And it might well be that the FPC could conclude that a company that engages in employment discrimination is operating less efficiently than another company, and it might take that into account in setting the rate.

We quote in our brief a letter from the Administrator of the General Services Administration, that deals with rate-making -- with utilities that the federal government deals with. And he says, on page 27 of our brief, "since such

practices most certainly effect the utilities' over-all efficiency, the rate of return granted to the utility would be established at the lower end of the zone of reasonableness."

So we do say that if the Federal Power Commission were to find that a company was a repeated discriminator, that it could take that --

QUESTION: So that a percent of that --

MR. GLICKSTEIN: Yes, sir. Something of that sort, yes, sir.

QUESTION: That's almost like a fine, isn't it?

MR. GLICKSTEIN: Well, it would be afactor to take into account in determining the rate of return.

QUESTION: But you wouldn't attack it by the rate base, you would simply lower the percentage of return or you would ask them to --

MR. GLICKSTEIN: That would be one method of proceeding when there are unquantifiable costs.

QUESTION: Let me suggest a question which may have an element of heresy in it, Mr. Glickstein.

Suppose you have a utility down in the southwestern part of the country, and EEOC makes some preliminary determination that they have none but -- they have no people employed in the company or practically none with Spanish surnames. And so, as a result of the negotiation, not litigation, negotiation with EEOC, the company agrees to

appoint three out of every four employees thereafter with a Spanish surname.

And then some years go by, and some objection is made to the rates, and the proof is -- and you have the hypothetical, and you must accept this as being the proof -- that the cost of this affirmative action program has been enormous, that it's taking three Spanish-speaking surnamed people to do the work that two people did before, partly because of their lack of command of English and perhaps their lack of education or whatnot, any reason you want to ascribe.

The conclusion is that it's a wasteful, expensive program.

Now, then, what about disallowing that cost?

MR. GLICKSTEIN: That, Mr. Chief Justice, I think would be a cost that was incurred in furthering a very basic national policy. I think that would be very similar to a utility arguing that what it had to do to eliminate some environmental dangers was very costly. And that expense was challenged.

I think that in --

QUESTION: But my question is directed to who decides this, you're going to say that the Federal Power Commission would have to respond to this kind of a challenge to wasteful expenditure, because, on my hypothesis, there is a determination that this affirmative action program is costly

and will become more costly over a period of years.

So you say the Federal Power Commission then must say, Well, it's true that this is wasteful and unnecessary in terms of operating the company, but because it furthers a desirable social policy, then the rate-makers must -- the rate payers must bear that burden.

MR. GLICKSTEIN: Well, Mr. Chief Justice, if I were writing the opinion for the Federal Power Commission, I would say that this cost is a necessary element in overcoming the effects of past discrimination; it's a short-range expenditure. Once the effects of past discrimination are overcome, this company will ultimately operate much much efficiently, and whatever costs were incurred as a result of the affirmative action.

QUESTION: Well, would you write that opinion if you didn't have any evidentiary basis for that projection?

MR. GLICKSTEIN: Well, I --

QUESTION: Or would that just be your opinion?

MR. GLICKSTEIN: Well, I wouldn't be totally speculating, Mr. Chief Justice. Again I think that the factors that go into the ecoinomics of discrimination have been studied, and the Council of Economic Advisers, for example, estimated some years ago that if employment discrimination were eliminated from our economy, the gross national product would increase by $20 billion.

Discrimination is inefficient. It might cost something to eliminate it initially, but in the long run, when it is eliminated, there will be benefits as a result of this.

QUESTION: Of course part of the question in this case is whether the Federal Power Commission -- now, leaving these very pleasant figures about the gross national product -- whether the Federal Power Commission, which has a very narrow and limited mission, presumably, if we read the Act, is equipped to deal with these broad national, highly desirable, social objectives.

That's really one of the underlying questions in this case, isn't it? If not the underlying question.

MR. GLICKSTEIN: And the Federal Power Commission has acted on jurisdictional grounds in rejecting that, instead of holding some sort of proceeding and asking the question of what sort of costs are feasible to deal with, and what sort of costs are not feasible to deal with.

Perhaps there are some costs that are so difficult to quantify that they could not deal with. On the other hand, there are probably some costs that they can deal with. They haven't considered that. They haven't given us a reasoned response to why this is not the feasible function for the Federal Power Commission.

QUESTION: Would you be satisfied with a reasoned response on an ad hoc case-by-case basis, as the Court of

Appeals intimated might -- would be permissible; or do you insist that it be an actual rule-making legislative type hearing?

MR. GLICKSTEIN: Well, Mr. Justice Rehnquist, I would prefer a rule-making proceeding, and I think that would be in the best interests of the Federal Power Commission.

One of the concerns it has is that it would -- this, what we're proposing, would present a great burden because they would have to consider these questions in a case-by-case basis. But if they don't want to do that, they have a rule-making proceeding and state what their policy is.

In addition, Mr. Journey today says that back-pay awards are penalties. That's the first time I ever heard a back-pay award defined as a penalty. Back-pay awards are equitable remedies, as this Court has said they are; and for the gas and electric utility industry to be suddenly told in a brief to the Supreme Court that in the future back-pay awards are going to be treated as penalties is a rather unusual way to make new policy.

QUESTION: Have they not been, back-pay awards, sometimes been held to be penalties?

MR. GLICKSTEIN: Mr. Chief Justice, in the Albemarle case, you referred to --

QUESTION: I'm not speaking of our cases --

MR. GLICKSTEIN: -- back-pay awards as equitable

remedies.

QUESTION: I am not speaking of our cases.

MR. GLICKSTEIN: I am not familiar with any Federal Power Commission case where they have held back-pay awards to be a penalty.

QUESTION: We were told that at least they were disallowed, that double payments for the same employment were disallowed, that one of the payments was disallowed; and that's what a back-pay award would be, wouldn't it?

MR. GLICKSTEIN: Well, it's certainly not clear from their system of accounts, Mr. Justice Stewart.

QUESTION: Well, we were told by their counsel that it --

MR. GLICKSTEIN: Pardon me?

QUESTION: We were told by their counsel, as I understood him, that that's standard operating procedure for their accountants, when they go into a utility's office. And you -- do you take issue with that?

MR. GLICKSTEIN: Well, I don't know whether that has been the practice, whether -- I --

QUESTION: So whatever you call them, penalties or whatever, they are disallowed as costs; or so we were told.

MR. GLICKSTEIN: Well, in the Uniform System of Accounts, it indicates that something that's listed as a penalty might be treated otherwise, in a rate-making proceeding.

And I assume that a company would be able to argue that the reason it incurred this back-pay award was because it was conducting itself in good faith in some particular situation, and it should not be disallowed. It's not -- I don't believe that under the Uniform System of Accounts it's that clear.

The Uniform System of Accounts is analogous to your tax return, where the Internal Revenue Service tells you where to list something; and merely because you list something under contributions does not necessarily mean that that's the way they're going to treat it when they review your return.

QUESTION: Well, supposing that it were found in a back-pay proceeding, like the one that this Court had in Albemarle last year, that the employer had been acting in good faith, but that was not sufficient to ward off a back-pay award?

Now, would you say that that kind of back-pay award should be subtracted from the rate base?

MR. GLICKSTEIN: Yes, I would. I would say that kind of back-pay award should be subtracted from the rate base.

QUESTION: Mr. Glickstein, may I put a hypothetical? Let's assume that a utility, with a rate case pending before the Commission, was charged with having pursued a policy of persistently, say over ten or fifteen years, a discrimination in promotion, involving, let's say, two or three hundred individuals.

What would you -- what sort of relief would you ask of the Commission?

MR. GLICKSTEIN: In that particular case, we would ask the Commission to perhaps condition the rate increase on the utility undertaking a program to eliminate the effects of discriminatory practices in its promotion procedures.

QUESTION: So you have to litigate before the Commission, first of all, the issues of alleged discrimination in promotions. Would you take them up one by one? How else would you deal with them?

MR. GLICKSTEIN: Well, I think that there is an instance of where it would be desirable for the Power Commission to have some rules in advance. They might indicate in the rules under what circumstance they will take allegations of discriminatory practices into account.

For example, if the practice was raised for the first time in a proceeding before the Federal Power Commission, the Federal Power Commission might suggest that we would like to have the expertise of the Equal Employment Commission on this issue.

The Federal Power Commission might decide that if reasonable-cause findings have been made by the Equal Employment Commission in cases, then it will consider charges of discrimination in proceedings before it.

It might decide that if there's been a judicial

finding in some instance, then it will consider these issues when the proceeding is before it.

QUESTION: In response --

QUESTION: The Commission itself would have no authority to order directly any conduct on the part of the utility, would it? It could, as you say, perhaps say, We'll grant you the requested rate increase provided you satisfy us within a specified period of time that these practices have been eliminated.

MR. GLICKSTEIN: I think it could condition the rate increases, it could condition the granting of licenses and certificates on certain type of performance. When -- I think that under some circumstances the Federal Power Commission could order something directly. For example, if it desired that every regulatee submit periodic reports indicating what its employment practices were, it could order something like that directly.

QUESTION: Well, let's assume that the charge was that in the employment of people over a long period of time, discriminatory practices had been pursued, and there were a substantial number of people who claimed that they were entitled to employment and to be put in their rightful place in the union structure. What would you request the Commission to do in that case?

MR. GLICKSTEIN: I would say that the company that

you're referring to was faced with the possibility of substantial costs as a result of putting people in their rightful place, and therefore the Power Commission should definitely condition their rate increase on the curing of that situation and not allow the costs that are incurred by making up for the effects of past discrimination to be taken into account in the rate.

QUESTION: But you -- if you were the counsel for the utility company, you would have to be told -- you would want to be told which of the 150 people who said they had been discriminated against would have to be employed, wouldn't you?

MR. GLICKSTEIN: Yes. And the FPC wouldn't do that.

QUESTION: Who would do it?

MR. GLICKSTEIN: The FPC would not have the power to order that a particular employee be promoted or reinstated; either the Employment Commission would or a federal court would, or a State Human Rights Commission would.

QUESTION: But if the FPC conditioned a rate increase on the utility doing this, would not the Commission have to identify the people who said they had been discriminated against, so that the utility would know how to comply with that condition?

MR. GLICKSTEIN: Well, I think the Federal Power Commission could await the resolution of the problem you suggest

by another agency. If there were --

QUESTION: But that might take two years.

MR. GLICKSTEIN: It might. And the --

QUESTION: Meanwhile, what would the utility do for public financing, for instance?

MR. GLICKSTEIN: Well, the rate increase is allowed to go into effect, and the rate increase would be in effect subject to refund. And if it turned out that there were not costs related to this, so there wouldn't be any refunds involved. If there were costs related to this, there would be some refunds.

The FPC can only suspend a rate increase for five months. And generally it does it just for a few days. And the costs -- I mean the new rates are allowed to go into effect. So the utility would be able to get its increased rate.

QUESTION: Suppose there were dual proceedings pending, regarding precisely the same charges, before the EEOC and the Federal Power Commission. What would be the situation then?

MR. GLICKSTEIN: Again I think that because of the greater expertise of the Equal Employment Commission, the Federal Power Commission might defer to their expertise and condition whatever question was before it on the outcome of the EEOC proceeding. If it were a licensing question, they

would grant the license on condition that whatever remedy is ordered by the EEOC be expeditiously complied with.

QUESTION: Well, then, what do you do by way of implementing that condition? You say you have a license to build a dam, which you've applied for and want now, presumably. And you say when the EEOC provision -- proceeding is terminated, which I take it could be some months or years down the road, you then will have a conditional license to build the dam if you comply with the order of the EEOC.

Now, that's a pretty tough row to hoe for a dam applicant, isn't it?

MR. GLICKSTEIN: Well, Mr. Justice Rehnquist, the FPC has suggested a lot of these fears, that it would have to cut off the licenses for dams, and shut off powerplants and so forth. That isn't the only remedy at their disposal. If appropriate rules are issued and the utility doesn't comply, they can seek court relief. They don't have to take the license away from the hydro-electric plant if they fail to comply, there are other remedies under the Federal Power Act that would be available.

QUESTION: Well, but if the EEOC has ordered them to do something -- the dam applicant to do something, and he isn't doing it, the EEOC can seek court relief; you wouldn't have to have the Federal Power Commission in it, would you?

MR. GLICKSTEIN: Well, the Federal Power Commission

would perhaps be the ultimate weapon, that the Federal Power Commission, if it conditioned the license of this hydro-electric dam on the accomplishment of whatever was ordered by the EEOC, I think that would impose on the hydro-electric dam a sufficient degree of pressure that it would comply with the EEOC order.

QUESTION: And the ultimate remedy would be revoking the license, perhaps after the dam had been built?

MR. GLICKSTEIN: Well, I think that the FPC could undertake a civil action, get an injunction requiring the company to comply.

For ex ample, we cite in our brief some cases where utilities that are government contractors have failed to comply with the government contract provisions, and the federal government is not going to terminate its contract with the utility, it needs the power, and it went to court and sued to get compliance with that provision.

More is involved in this case than the FPC's responsibility, however, to protect consumers and to insure the health of the gas and electric utility industry. Ten years before this Court decided the Brown case, in Steele vs. Louisville & Nashville Railroad, the 1926 Railway Labor Act was interpreted to prohibit railroad employees from being subjected to racial discrimination.

Repeatedly this Court has recognized the critical

importance of employment, and has endorsed the most effective remedies for dealing with employment discrimination.

We contend that in this case that it is entirely consistent with the Federal Power Commission's proper regulatory role that it too be required to take steps to deal with illegal employment discrimination.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Journey, do you have anything further? You have about three minutes left.

REBUTTAL ARGUMENT OF DREXEL D. JOURNEY, ESQ.,
ON BEHALF OF THE FEDERAL POWER COMMISSION

MR. JOURNEY: I would just say, Mr. Chief Justice and members of the Court, that the Commission's brief, I believe, have covered the constitutional points, and I think they have covered the legislative history points. I think that they have covered the reference to the 1972 equal employment laws, and the fact that the procedure there for the EEOC seeking cease-and-desist orders in court review were all set up and created in 1972 to correct what the EEOC said it needed enforcement authority to implement what you have said in the Johnson case is a comprehensive regulatory mechanism for dealing with the equal employment question.

We don't think there's anything in the Power or the Gas Acts that speaks to the question that Mr. Glickstein and

the NAACP want us to undertake.

QUESTION: I take it that Judge McGowan, in writing for the Court of Appeals, indicated that your task -- and I'm reading -- in protecting the consumer against exploitation can be alternatively described as a task of seeing that no unnecessary or illegitimate costs are passed along to the consumer -- to the customer.

That's the way he described your job.

MR. JOURNEY: Yes, sir.

QUESTION: And then he want on, he said: Without attempting an exhaustive enumeration, we identify at least the following as indicative of those arguably within the Commission's range of concern.

Now, I take it that some of these you already indicate the Commission regularly considers, at least in other kinds of cases: one, duplicative labor costs incurred in the form of back-pay recoveries by employees, who have proven that they were discriminatorily denied employment or advancement.

MR. JOURNEY: I spoke to that question earlier and said that for whatever reason, if back-pay and duplicate labor was involved, the auditors would throw that out.

QUESTION: So that this issue -- that this is just not an issue, you don't think?

MR. JOURNEY: Not for rate-making purposes, in terms of cost disallowance.

QUESTION: Even though it's back-pay with respect to a discriminatory practice?

MR. JOURNEY: Well, --

QUESTION: That has been adjudicated by somebody else.

MR. JOURNEY: It's been resolved. Just as, I think it was Mr. Chief Justice said, somebody's relative on the payroll.

QUESTION: All right. Now, how about the three, the cost of legal proceedings? In either of these two categories.

MR. JOURNEY: The cost of legal proceedings has been the subject of litigation and the --

QUESTION: But you don't contend you don't -- wouldn't have jurisdiction, or that you shouldn't consider those things?

MR. JOURNEY: Well, we don't. For cost purposes, no.

QUESTION: Well, it seems to me that several of these things he lists have no real question about either your power or the desirability of considering it.

MR. JOURNEY: If you're looking at the rate regulatory processes, the mechanism by which you adjust the economic relation between the producer of gas and energy and the consumer. We go through and, on a cost to service, prudent investment basis, with a just and reasonable standard, we go

ahead and disallow these things. We do not -- we're not talking about that.

I think the issue here, you're being asked to have the regulatory process as a concept be an alternate enforcement strategy for equal employment laws.

QUESTION: The Court of Appeals said that it was way beyond your power or authority to adjudicate individual instances of discrimination. That's what the Court said.

MR. JOURNEY: Yes, sir.

QUESTION: But it has been suggested -- it has been suggested here today in oral argument, for example, that the Court of Appeals opinion means, or can be read to mean, that you not only can but should say to a utility: You can't have any rate increase at all, regardless of your legitimate increase in cost, you can't have any rate increase at all until or unless you clean up your discriminatory employment practices.

MR. JOURNEY: That's what I --

QUESTION: And that's what you objected to.

MR. JOURNEY: That's what I understood to be the argument.

QUESTION: Right.

MR. JOURNEY: Thank you, sir.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:44 o'clock, p.m., the case in the above-entitled matter was submitted.]