ORIGINAL

In the

Supreme Court of the United States

LAWRENCE CANTOR, d/b/a SELDEN DRUGS COMPANY, individually and on behalf of all other retail sellers of light bulbs similarly situated,

Petitioner,

v. No. 75-122

THE DETROIT EDISON COMPANY, a Michigan corporation,

Respondent.

Washington, D.C.
January 14, 1976

Pages 1 thru 73

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The above-entitled matter came on for argument at 11:20 a.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
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

BURTON I. WEINSTEIN, ESQ., Boehm & Weinstein, 33 North LaSalle Street, Chicago, Illinois 60602, for the petitioner.

ROBERT H. BORK, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, as amicus curiae.

APPEARANCES: (Cont.)

GEORGE D. REYCRAFT, ESQ., One Wall Street, New York, New York 10005, for the respondent.

HOWARD J. TRIENENS, ESQ., Sidley & Austin, One First National Plaza, Chicago, Illinois 60603, as amicus curiae and the Michigan Utilities Group.

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I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Lawrence Cantor against the Detroit Edison Company.

Mr. Weinstein, you may proceed when you are ready.

ORAL ARGUMENT OF BURTIN I. WEINSTEIN ON BEHALF OF PETITIONER

MR. WEINSTEIN: Mr. Chief Justice, and may it please the Court: This case is here on a writ of certiorari granted by this Court on October 6, 1975, from the U.S. Court of Appeals for the Sixth Circuit. This is a private treble damage action seeking an injunction by Lawrence Cantor. Mr. Cantor is a retail druggist in the Detroit area who sells lightbulbs or lamps -- the two terms can be used interchangeably, both in the briefs and arguments here -- in competition with Detroit Edison.

QUESTION: When we read and hear about lamps, we are talking actually about light bulbs.

MR. WEINSTEIN: That's correct. The technical term for light bulbs is lamps, and they have been used interchangeably.

QUESTION: Lamp has another meaning, you know.

MR. WEINSTEIN: It is not a floor lamp, your Honor, no.

Edison is an investor-owned private electric utility. It serves a large area of southeastern Michigan and

it secures its monopoly as an electric utility via a franchise granted to it by the municipality in which it serves.

The gist of this action is that Edison via its monopoly power has unlawfully extended this monopoly by means of an illegal tie-in. That is to say, every residential customer of Detroit Edison must when he purchases electrical energy pay a price, included in the charge for electrical service, to Detroit Edison for lamps or light bulbs. It doesn't make it different --

QUESTION: He doesn't have the choice of not accepting that additional service.

MR. WEINSTEIN: He does not have that choice at all.

QUESTION: He has to take it.

MR. WEINSTEIN: The fact that makes it a tie-in, in fact, that is different than commercial customers who do not have that program at all.

Edison is unique, as a matter of fact, Mr. Justice Blackmun, in the country. They are the only electric utility company that continues to have this program in its present format. Edison's program --

QUESTION: ... for a great many years, hasn't it in most utilities?

MR. WEINSTEIN: Yes, your Honor. In fact, Thomas Edison in 1886 helped devise the program before regulation even began.

QUESTION: It has not been used in recent years very widely, has it?

MR. WEINSTEIN: No, your Honor. In fact, in .. of many regulatory agencies, many courts, including the Supreme Court of the State of Illinois in the Consumers' Stores case said this was a monopolistic practice, it was unreasonable. Wisconsin did this. And this is one of the major contentions that Detroit Edison is the only one doing this now after everyone else has decided it is either unreasonable or monopolistic and the people don't take advantage of the program and they subsidize others.

What really happens here, you have to know physically the facts. The customer of Edison walks in with some burned out lamps in a shopping bag. He goes over to one of the distribution centers where these bulbs are given to them. There is a list of bulbs, approved bulbs, and I would like to put quotes around the word "approved" because the only approval that exists here for this list of bulbs is Detroit Edison's list of bulbs which they have changed from time to time.

He walks in with these bulbs and picks up a few bulbs that he needs and hands in the burned out lamps.

QUESTION: I gather the manufacturer is not Detroit Edison, of the bulbs.

MR. WEINSTEIN: No, your Honor. Edison makes a point of the fact that they are able to purchase great quantities of

bulbs because they can (a) deal direct with the manufacturers with large quantity discounts. And there is a vice in there, your Honor, because within the various service centers, they sell regular light bulbs, and if you look at page 276 of the Appendix, this is a point of purchase retail advertisement, and it shows -- this is probably stuck in a bin in their stores and it says, "These lamps available for free exchange."

QUESTION: What page?

MR. WEINSTEIN: I'm sorry. 275. Excuse me.

QUESTION: 275a.

MR. WEINSTEIN: Yes, your Honor. "These lamps available for free exchange." Then it lists and entire new list of bulbs that are not part of the program. Edison sells these bulbs at a regular price, and you can assume that if they are able to get such a great deal from the manufacturer because they buy in such large quantities these bulbs, that the bulbs that are sold at the regular price, they make a much greater profit on than any other bulb seller than Detroit Edison.

The program is carried on in 35 distribution centers in the service area. There are 50 agents selected by Edison at their own whim and caprice throughout the service area who also are able to give these bulbs away, and they call it a free light bulb program. The fact of the matter is it is not free. The fact of the matter is it is not an exchange.

The program is highly promoted in Detroit. Detroit Edison is the best-loved utility in the country. They have got this great free program. And if the customers knew what the program was really about, I would begin to wonder myself whether they would still love Detroit Edison.

Edison itself justifies this program by keeping the sockets filled. They want the lamps, the lights, to be used. This also brings them increased revenue the more the lights are used. If your light burns out, you don't bother about getting until you get over to the store to buy some, but if you have got a whole supply of bulbs in your house, you just screw another bulb into place, it doesn't cost you anything, supposedly, and you have got more electricity, more light.

QUESTION: If the utility could show that it is passing on to the customer the benefit or a substantial part of the benefit of its bulk sales purchase advantage, they might deserve to be well loved, wouldn't you think?

MR. WEINSTEIN: Not necessarily, your Honor, because, especially when you take into consideration that these are longer light bulbs. Now that's a great PR term, "longer light bulbs."

QUESTION: This I want to know about. Do these bulbs last longer than the ones you and I might buy from Mr. Cantor?

MR. WEINSTEIN: Yes, they do last longer, but they

are more inefficient. Edison in its brief, I believe it is on page 7, admits that these bulbs are 8 percent less efficient because they are longer life and the last part of their life they keep on giving you less electricity. And this is really an insidious device. If you want to read a book and you need a 60-watt bulb to read that book and the last hundred hours of the longer light bulb, you might need two of those bulbs. So you have got more electricity going. You are burning up more electricity and you are increasing Detroit Edison's revenues.

QUESTION: Is there any other issue in this case besides the Parker v. Brown issue?

MR. WEINSTEIN: I don't believe there is any other issue in this case whatsoever.

The customer satisfaction issue has been raised here for the first time. I don't believe it is an issue, because in the trial court a stipulation was entered into. After Edison filed an answer and there was a lot of discovery, it was stipulated that the only issue for summary judgment would be whether or not this program received justification to be shielded or exempt from our antitrust laws because of the doctrine of Parker v. Brown. And we submit that the Michigan Public Service Commission, MPSC, which is the regulatory agency in Michigan, neither had the authority to approve this program within the doctrine espoused by Parker v. Brown and also if the

authority here is granted just for the sake of this argument, we don't believe Edison's program was regulated in the manner in which to grant them an exemption from our antitrust laws, which this Court has said is the magna carta of economic freedom in this country.

I would like to go into this Michigan analysis of what Michigan has done with the authority question, because that is the best way to analyze whether or not there is authority here.

Remember I said that the way to determine -- we feel there are two questions. Did the Michigan Public Service Commission have the authority to regulate? And assuming for the sake of argument they did have the authority, did they regulate?

QUESTION: You mean did they have the authority to regulate under Michigan State law?

MR. WEINSTEIN: That's correct, your Honor. You see, the Michigan Public Service Commission is stringently limited in its authority here.

QUESTION: But presumably the Michigan Public Service Company has decided it had that authority. Judge Feikens, who was a Michigan lawyer sitting on the bench in Detroit, ruled against you; the Sixth Circuit which handles a lot of Michigan cases likewise ruled against you. You wouldn't ask this Court to superimpose its judgment of Michigan

law against them, would you?

MR. WEINSTEIN: Mr. Justice Rehnquist, on the contrary, the Michigan Public Service Commission in a case we have submitted in a typewritten brief due to the delay here, in 1937. It's McCrae v. Detroit Gas, I believe, and it's cited in our typewritten brief, but the cite to it is 24 P.U.R. 225. In that case the prosecuting attorney for Wayne County in 1937 asked the Michigan regulatory agency there, a successor to the regulatory agency that exists today, they asked them to investigate monopolistic practices and schemes engaged in by Detroit Edison. And the Michigan Public Service Commission, or at that time it was called the Michigan Public Utilities Commission, stated, and I am quoting from the order of the MPSC there, that it is without jurisdiction to investigate the acts, practices, devices, and schemes under which the present rates were established in order to consider and report how such evils may be remedied.

QUESTION: Well, maybe I misunderstood you. Your point, then, isn't that the Michigan Public Service Commission didn't have the authority to approve Detroit Edison's plan, but that it had no authority to investigate the monopolistic implications of it?

MR. WEINSTEIN: That's also true. It's unlike --

QUESTION: You say that's also true. But it is it part of your contention that the Michigan Public Service

Commission had no authority to approve Detroit Edison's light bulb plan?

MR. WEINSTEIN: That's exactly right, sir.

Another case that describes this, your Honor, is the Huron Portland Cement case, and in that particular case Huron Portland Cement asked the Michigan Public Service Commission to force a utility to render service to them. And as justification for that, they cited -- and I think it's important to look at the statute; it is in our appendix at page 5, it is section 460.6. And in 460.6 it appears to be -- and I say appears to be -- a grant of complete power. But then in the Huron Portland Cement case, which is a Michigan Supreme Court case, the Michigan Supreme Court said that this is just a mere grant of jurisdiction over utilities. In order to determine what the Michigan Public Service Commission can do, what authority it has, you must look to the other statutes. And the statute that they refer you to for electric utilities in the Huron Portland Cement case is called the Transmission of Electricity Act. It is also part of our appendix, and it's at page 9. Those two sections are at the bottom of the appendix. They are 460 -- now I say 460, I mean the chapter in which they talk about utilities generally -- 552.

QUESTION: Could you summarize at all the contention you are trying to make here?

MR. WEINSTEIN: Sure. The contention I am trying to

make is that the Michigan Public Service Commission talks about just the meat and potatoes of rates, the cost to the consumer. They have a twofold duty. They have a duty to see that the rate is reasonable. They have another duty to see that the investor in the company gets a fair rate of return. They have nothing further to do. They talk about conditions of services, and those services refer basically to the transmission of this electric service. In fact, Detroit Edison knows very well what it means by service. It describes the term "service" in its rate book, which was attached to defendant's response in their motion for summary judgment. And in four different places they talk about character of service. And each time they talk about it, they talk about it as alternating current service, primary high voltage service.

So they are only talking when they discuss service here the question of whether or not the rate was fair. And that's the cost of electrical service.

Remember -- you know, it's difficult for me to be able to express because the lamp or the light seems to be an integral part of this thing that we call light up here. But it really is another commodity, it's a product like a refrigerator. If Edison tied in the sale of refrigerators, it would be a more obvious situation. But we don't have that; we have a little innocuous thing called a lamp or light bulb.

This light bulb, being a product, is beyond the

jurisdiction of the Michigan Public Service Commission to regulate that.

The Constitution in Michigan -- I understand this goes back to years ago when the farmers in the upper peninsula were complaining about the setting of rates down in Lansing and they wanted to retain jurisdiction over the rate-making process. And the Constitution says that the municipalities will reserve to themselves jurisdiction over the streets and alleys and that the Michigan Public Service Commission does not grant the monopoly.

QUESTION: So you say then that the Commission wasn't authorized to approve Detroit Edison's plan.

MR. WEINSTEIN: Absolutely not.

QUESTION: Then it seems to me you have got these real hurdles to overcome. And if you have a district judge who is a Michigan lawyer in the Sixth Circuit as well as the Public Service Commission saying they did have that power, you are asking us to superimpose our judgment of Michigan law on them.

MR. WEINSTEIN: No, your Honor, I am asking you to follow Michigan law. We feel very strongly that the Michigan Public Service Commission didn't do anything in this program because they didn't have a job to do. They knew their job. This is no attack on the regulatory agency here at all. The Michigan Public Service Commission knew they couldn't

regulate light bulbs. They didn't do so. And that's the second point of my argument, that there is no evidence whatsoever in the record indicating any regulation by the Michigan Public Service Commission to bring it within the ambit of a shield from the antitrust laws. If you examine the record, and it is extensive here, there are many, many things that they did not regulate.

Now, I admit to this Court that I am sort of back-dooring the situation. I have a difficult case before me, I admit that, because I cannot prove the lack of existence of something. I can only show you what --

QUESTION: Mr. Weinstein, I gather you are arguing that even if you are wrong --

MR. WEINSTEIN: I'm sorry, I couldn't hear you.

QUESTION: You are arguing that even if you are wrong and we have to accept what the Michigan judges have said is Michigan law, namely, that the Commission did have authority to approve this practice, you are nevertheless arguing that this doesn't constitute a State command, aren't you?

MR. WEINSTEIN: That's correct.

QUESTION: Why don't you get to that?

MR. WEINSTEIN: All right. The Parker v. Brown case --

QUESTION: It's the relevant issue here. You may as

well argue it.

MR. WEINSTEIN: All right. I believe that without authority to regulate the program, without an interest in the State, there is no statute in Michigan mentioning lamp sales.

QUESTION: Why don't you accept the premise for the purpose of argument that the Commission could approve this practice?

MR. WEINSTEIN: Very well, your Honor. For the sake of this argument, I will concede that point that they did have authority --

QUESTION: You don't have to concede it.

MR. WEINSTEIN: OK, assume it arguendo. There is nothing in the evidence to show that they did regulate this program. And the only way I can show you how they did not regulate this program is to show you what they have not regulated and what Detroit Edison has not chosen to reveal to the Michigan Public Service Commission.

Remember, this is a motion for summary judgment, and the facts should be looked at in the best light to the person opposing that motion for summary judgment. And the most revealing fact again is that there is no evidence. If there was evidence of considered judgment and the kind of regulation that would exempt an antitrust activity, Detroit Edison would be the first ones to bring it to this Court's

attention.

QUESTION: Let's assume for the moment again for the sake of argument that the Public Service Commission did approve, had the power to approve and did approve exactly what the company did. Now, does that mean that it's exempt from the antitrust laws?

MR. WEINSTEIN: I don't believe so, your Honor, because there has been no State institution --

QUESTION: But I thought you have argued in your brief that it didn't make any difference whether it had the power to approve or not.

MR.WEINSTEIN: It doesn't make any difference.

QUESTION: Or whether they actually approved it or not. They didn't order the company to do this.

MR. WEINSTEIN: That's correct, your Honor.

QUESTION: The State statute didn't order them to do it.

MR. WEINSTEIN: Exactly right.

QUESTION: Why don't you argue that?

MR. WEINSTEIN: I have been trying -- I thought I was (inaudible).

QUESTION: Before you leave that, before you get to that point, may I ask this question: Assume that the legislature of Mississippi had adopted a statute directing electric utilities in the State to include this service as a

part of that service to the public, what would your response to that sort of legislation be?

MR. WEINSTEIN: If there were that type of legislation by the State legislature evidencing a statewide interest in the sale of light bulbs akin to the statewide interest in agricultural commodities under Parker v. Brown, then I would say to you that would be State action.

QUESTION: Suppose the legislature went a bit further and directed the utilities to provide electric refrigerators, electric stoves, electric dishwashers and other designated appliances, would that trouble you any?

MR. WEINSTEIN: That would trouble me because it would be more difficult to foist those types of commodities on the consumer. Remember, the consumer has no choice here. He has got to take those light bulbs. A light bulb is a commodity like salt, we all need it.

QUESTION: But if this case depends on whether or not the State has directed something, why do you draw a distinction between lamps and refrigerators?

MR. WEINSTEIN: I don't believe I understand the question.

QUESTION: If the issue in this case is whether under Parker this case before us today must turn on whether or not the State has directed the utility to do this, if that is the issue, what difference would it make whether the State

directed that the utility provide lamp bulbs or electric refrigerators?

MR. WEINSTEIN: I believe that there are a number of cases that this Court has addressed itself to a position, both in the Continental Ore case where there is an assertion made by Union Carbide that their subsidiary was directed to preclude Continental from the vanadium market, and this Court said that that was not State action because certainly the Canadian Government didn't approve this thing.

Also, in the Schwegmann case there was a situation where in the fair price area, fair traded prices, there was a Louisiana statute that was enacted saying that non-signers shall be bound. And this Court by Justice Douglas said that flies in the face of the antitrust laws.

And I believe that lamps fly in the face of the antitrust laws. I believe refrigerators most certainly fly in the face of the antitrust laws as well. The tie-in contract is so venal. The program itself is so venal in that its only purpose is to increase the revenues --

QUESTION: Wouldn't a State law requiring all companies to charge the same prices for milk be an exception to the antitrust laws?

MR. WEINSTEIN: In the early thirties, the Nebbia case in New York there was that situation. But in that situation there was venous competition in milk.

QUESTION: I know, but it nevertheless is a State policy to have uniform prices in a certain industry. Do you think the companies following that State law are subject to the antitrust laws?

MR. WEINSTEIN: I believe that in my case, since Detroit Edison is the only private utility that does this program, there is no State interest.

QUESTION: I am positing a situation where the State has ordered the companies to charge the same prices. Here you say the State has never ordered Edison to do this.

MR. WEINSTEIN: I understand the question a little bit better now. You are talking about prices. Now, if the State is interested in the rate -- we have no quarrel here with the rate that Detroit Edison charges. We only have a quarrel with the method by which they tie the lmaps into the sale of electricity.

The program has not been regulated. They have advertised this program as free. They have never submitted anything to the Michigan Public Service Commission seeking approval.

In 1954 Detroit Edison on its own,again without going back to the regulatory agency, stopped home delivery. There has been no regulation of the other bulbs that they sell when I addressed myself to page 275 of the appendix. There is nothing here to indicate that the Michigan Public Service

Commission investigated the competitive effect -- the anti-competitive effect of this program.

There is a survey made by an independent company in the Appendix at page 290, and that tells you what the program is really all about, on page 292, and what they have really tried to do here. It says "We believe that the free" -- and they do not understand the program themselves -- "lamp renewal policy helps raise the wattage on lamps used, thus giving better lighting service to the public and resulting in lighting revenues to The Detroit Edison Company considerably above average."

Now, this program has a lot of aspects to it, the longer life aspect to it of the bulbs, also means that revenues of Detroit Edison go up.

Another aspect of the program -- and all of these facets which are more fully set out in the facts in our brief -- have never been subjected to the regulation of the Michigan Public Service Commission. It's similar to, if this were a gas company involved here, that the gas utility company says, "You have got to run all your furnaces at 75°, forget about energy conservation, forget about those things, in order to get our gas, you have got to run at 75°." That's the same thing as using these longer light bulbs. They want to keep the sockets full.

QUESTION: If you plan on reserving five minutes for

rebuttal, the Solicitor General's time is approaching.

MR. WEINSTEIN: Thank you, your Honor. I would like to reserve that time.

I just wanted to conclude by saying that there were two questions I thought I would address myself to in the beginning, and those questions are: Does the Michigan Public Service Commission have authority to regulate? And the answer to that question we believe heartily is no. Even if it did have authority, it did not do so. And without authority, there was no compulsion by the State, there was no acting by the State. This entire program was begun, created, initiated by Detroit Edison. They have done this by themselves and they should have to suffer for the risks involved in doing this. They certainly didn't have their heads in the sand in the 1930's when other companies knew that this program was unreasonable and monopolistic.

Thank you.

I have one request, your Honor. Due to the fact that we have received the two briefs from the amicus around January 5, we would like to have leave of the Court to file a response to the amicus briefs.

MR. CHIEF JUSTICE BURGER: You may within -- how soon can you do it? A week?

MR. WEINSTEIN: A week I think would be fine.

MR. CHIEF JUSTICE BURGER: You are ahead of me. I

haven't received them yet. January 5th?

MR. WEINSTEIN: Yes, sir.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF ROBERT H. BORK AS AMICUS CURIAE ON BEHALF OF PETITIONER

MR. BORK: Mr. Chief Justice, and may it please the Court: The United States is here as amicus curiae in support of the petitioner because any rule announced in this case will heavily affect the Government's enforcement policy. This is a relatively new field of antitrust enforcement and it's that way because there has been a modern proliferation of regulatory agencies, licensing agencies, and so forth at State and local levels which offer ever-increasing opportunities for quite sophisticated businesses to get anticompetitive policies immunized in some way by regulation, or appear to be immunized in some way by regulation. And we think it's quite important to the Federal antitrust policy that any immunity that is granted be one that arises because there is a deliberate and affirmative regulatory policy of the State to command the activity which is questioned.

We think here that if the position or the doctrine espoused by Detroit Edison becomes the law, then the immunity of Parker v. Brown will be expanded and will in fact shield anticompetitive conduct that no State particularly wants and certainly that no State requires.

Now, I should make it clear that I express no opinion on the legality of the underlying conduct here. I don't know whether this is an illegal tie-in or not. I don't think the record permits us to tell. There is much play on both sides by the petitioner and by the respondent about whether or not this program is good for consumers. I frankly don't know, and I don't think the question is before this Court at this time, so I intend not to address that.

Furthermore, I think the Noerr case which appears in the briefs frequently is not involved here. At least it is the Government's position that any company may petition the State for any rule it wants. We have no objection in any way to any request made by a company of a State.

QUESTION: Or companies can get together to do so under the Noerr case.

MR. BORK: That is true. And we have no objection to anything that Detroit Edison may have asked the State to do or not to do. That's certainly entirely up to them.

The question here is simply whether a Federal court may even examine respondent's practice in the light cast by the antitrust laws, and we think the answer to that is yes. We think the immunity doctrine which derives from Parker v. Brown simply does not cover the situation. The status of immunity depends upon two questions: One, petitioner's counsel has just discussed in part, which is the question of whether

indeed there is a State agency acting with authority to act, the ultra vires question so to speak. I shall not discuss that.

I should like to discuss the question of whether the conduct here was compelled by any affirmative policy of the State. I think not. The record here shows that so far as we can tell on a motion for summary judgment the State of Michigan did not compel or direct Detroit Edison to charge for light bulbs in its rates for electricity. By that I mean this: There is no State statute requiring the practice or mentioning the practice. There exists no order or regulation of the Michigan Public Service Commission that mentions the practice.

QUESTION: Mr. Solicitor General, do you take the position that the defendant could abandon the policy without the approval of the State?

MR. BORK: I think it's quite clear that they could, Mr. Justice Stevens.

QUESTION: Could or could not?

MR. BORK: Could abandon, in one of two ways.

QUESTION: Would they have to adjust their rates?

MR. BORK: They may have to do that, but I think they would have to go back with a new tariff. They might have to go back with a new tariff with a lower rate because of decreased costs. I am not even sure of that because it is typical in regulations that costs may decrease for some reason

and the company does not immediately go in and adjust its rates. There is a regulatory lag there.

QUESTION: Surely there would be jurisdiction on the part of the State Commission to --

MR. BORK: To require lower rates. I think there would be. And here I am told, indeed, that at one time this company had home delivery and a man actually came to your house and installed the light bulbs. When they dropped home delivery for a much less expensive form of dispensation of these bulbs, no mention of that fact was made to the Michigan Public Service Company, no tariff change was instituted. So I think they could drop it. At a minimum, I think they could certainly go back and say, "We have dropped it and we offer you a new tariff without that cost element." I think there is no question --

QUESTION: In accord with ordinary public utility regulation practice they presumably in due course have to make a new filing, wouldn't they, at least?

MR. BORK: Well, if they wanted to change a rate.

QUESTION: If they no longer offered free light bulbs, I would suppose they would have to make a new filing, but I really don't what that has to do with this case.

MR. BORK: I don't either. But I think it's important here that the Michigan Public Service Commission which regulates across the State has never taken explicit

notice of this practice, have never even inquired into it. This is a motion for summary judgment in which Detroit Edison purports to be compelled, and I think it's up to them to show an affirmative policy across the State, and so far as we can tell from this record, Detroit Edison has not shown that other public utilities are required to --

QUESTION: Mr. Solicitor General, neither court below decided that Parker v. Brown applied here because there was an affirmative policy, did it? Didn't it just say that the approval of --

MR. BORK: Of the tariff.

QUESTION: Approval of the tariff was enough.

MR. BORK: That's right, but --

QUESTION: Let's assume we decided that was wrong. We wouldn't go on and,say,examine Michigan law and then decide there wasn't any affirmative policy, would we?

MR. BORK: No, no. No, no. But I'm saying that insofar as someone wishes to say that I am compelled or required or directed by State law as it was possible to say in Parker v. Brown. One would look at least to some compulsion somewhere in the law.

QUESTION: But that wasn't the standard the Court of Appeals used or the district court either.

MR. BORK: No. I take it they were using something that --

QUESTION: Then you are saying that approval of the tariff was enough.

MR. BORK: Yes, that's true, Mr. Justice White. I think it is not,for this reason --

QUESTION: In your view the courts below have said that the State law requires, so there is an affirmative policy.

MR. BORK: That's my point I wish to make about that. And that is that apparently this Commission will approve tariffs without light bulb programs included. As far as we know, it has never disapproved a tariff because a light bulb program was not included. And it seems to me it follows from that that this practice is not in any way required by any agency of the State. The State's policy insofar as it can be said to have a policy is entirely permissive. The initiative about whether or not there is a bulb program included in the tariff is left to the utility's initiative, and indeed the utility has the power to decide that question.

QUESTION: Well, in Parker v. Brown the initiative came from the growers, too.

MR. BORK: Well, in Parker v. Brown, Mr. Justice Rehnquist, the State had enacted an elaborate policy particularly with respect to the prorate programs.

QUESTION: But they had to be initiated by the growers.

MR. BORK: They had triggered by some producers who wished it. However, once they triggered it by going into the

State law, that State law became compulsory as to all growers and so forth who did not want the program. So they were compelled by State law. Indeed, there were criminal penalties involved.

What I am saying here is that so far as this record shows the Michigan Public Service Commission says, in effect, "You tell us which way you would rather go -- light bulb program or no light bulb program and we will compel you either way you wish to go." That is not a State affirmative policy. In fact, there is no even showing of compulsion. They just include it in the rate.

That's why this case reminds one, I think, of Schwegmann rather than Parker v. Brown. At most here you have a State policy -- I don't think it's a policy, I think it's an inadvertence -- at most here you have a State policy which is, if you elect to have a light bulb program, all right. That is what the State said about the Fair Trade Act and that was not sufficient State action in Schwegmann to stand up against Sherman Act attack.

QUESTION: Do you know the citation of Schwegmann? I don't see it in your brief.

MR. BORK: It's in petitioner's brief. It's 341 U.S. 384.

QUESTION: Thank you very much.

MR. BORK: In fact, I think there is actually less

State action here than there was in Schwegmann because at least there the State had an explicit affirmative policy of letting the private party elect whether or not to use Fair Trade. Here so far as we can tell, we have nothing more than State inadvertence or indifference or oversight. There is no explicit policy about letting them ...

Now, I would refer to the Goldfarb case, 421 U.S. at page 790 where this Court explains why the supreme courts -- the Supreme Court of Virginia, in that case, at least mentioned advisory fee schedules, but that was all, and that was held not to be State action which would immunize the agreed-upon fees in that case. Here there is no mention of this program in any State law.

QUESTION: Mr. Solicitor General, has the Department of Justice ever argued Federal preemption in this area?

MR. BORK: Federal preemption, we may have argued in some cases, Mr. Justice Blackmun, but we are not claiming Federal preemption here.

QUESTION: I know you are not. I wondered why in a way.

MR. BORK: Because I think we do feel that Parker v. Brown is rightly decided. We do feel the Sherman Act was not intended to take away the power to regulate industries from States. So we have no desire to argue preemption in that sense.

I would refer this Court also to the opinion in

Jackson v. Metropolitan Edison with which there has been much play in this case. It seems to me that that case is dispositive in favor of a lack of immunity here. I know that Jackson v. Metropolitan Edison involved the 14th amendment, but I think if there was no State action under the 14th amendment in that case, there can be no State action for Parker purposes in this case. And I think that at a minimum the State action concept under the 14th amendment is as broad as the State action concept for Parker purposes, and indeed I would take one step further and say that it's probably broader. You can see that by transposing the facts of the Schwegmann case. There the Court said that a private party might force retailers to maintain prices and provided the procedures if he elected.

If one, in a parallel fashion, supposed a statute in which a State said a private party may force retailers to keep off a racial group from the premises of the retailer and provided procedures, I have no doubt that that would be State action for the purposes of the 14th amendment. So that I think the 14th amendment State action concept is broader than the State action concept here. If that's true, or if it's coterminus, then Jackson v. Metropolitan Edison I think is dispositive of this case in favor of the petitioner.

QUESTION: It's really -- one might not want to push the analogy too close. It's not much more than an

analogy, in other words.

MR. BORK: Jackson?

QUESTION: Yes.

MR. BORK: Well, I think it's --

QUESTION: The question is a different question.

MR. BORK: It is a different question, but as I ask myself how does State action concept differ, I think it essentially involves affirmative State policy or involvement under the 14th amendment. It involves affirmative State policy under Parker. I think it's somewhat perhaps -- I don't think it's necessary for the Court to decide which is broader, but it seems to me that it can hardly be argued plausibly that the antitrust concept of State action is broader than the 14th amendment concept, and unless that's true, then I think Jackson v. Metropolitan Edison really disposes of this case by analogy, if you wish to say it that way.

QUESTION: You say .. but it might not run the other way.

MR. BORK: I don't think it would run -- I don't see how it could run the other way.

QUESTION: That assumes that Parker v. Brown is the limit of the governmental immunity.

MR. BORK: Well, if you go further than that, Mr. Justice Rehnquist,and say that Parker v. Brown allows not only affirmative State policy, but any time the State gets into the

area and involves itself heavily, then you have done two things: One is you have said the State has the power of implied repealer over the Federal antitrust laws. I don't think that's correct. And the other thing is that you are creating an elaborate administrative mechanism into which any party can insert his program and cry sanctuary, even though the State wasn't thinking about it.

QUESTION: You have 50 of them.

MR. BORK: You have 50 of them, not to mention all the localities. And this is becoming a serious antitrust problem, and I think applying the rule as we ask does two things: It forwards Federal antitrust policy, it also begins to put some pressure on agencies to focus and to make visible decisions, visible to the electorate, to elected officials about what it is they wish to require as State policy. I think it's desirable at both ends.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

QUESTION: I have one question. On your point that the Jackson case would be dispositive, I suppose one could distinguish if one thought this was a command and the other was merely permission. Those are different State programs.

MR. BORK: If one thought this were a command, I think that is quite true, Mr. Justice Stevens. If this is a command, however, then I fear that almost any regulatory

touching of the subject will turn out to be a command.

QUESTION: I understand your position.

[Whereupon, at 12 noon, the Court recessed, to reconvene at 1 p.m. the same day.]

AFTERNOON SESSION

(1 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Reycraft, you may begin whenever you are ready.

ORAL ARGUMENT OF GEORGE D. REYCRAFT ON BEHALF OF RESPONDENT

MR. REYCRAFT: Mr. Chief Justice, and may it please the Court: With the exception of the treble damages which the petitioner seeks here, all he seeks otherwise is available to him from the Michigan Public Service Commission. He conceded during oral argument before Judge Feikens that it may well be, theoretically at least, that the Michigan Public Service Commission can tell Detroit Edison to avoid including the cost of light bulbs in its rate base for purposes of determining its rate.

When Judge Feikens asked him whether he had ever tried to invoke the proceedings in the Michigan Public Service Commission, he admitted that it was a crucial question as to whether or not the lamp exchange program came within the jurisdiction, but he conceded that he hadn't approached the Commission at all.

It seems to us that Judge Feikens was correct in his opinion when he said certainly the antitrust court should not step in when the Commission hasn't even been approached by the plaintiff.

Now, the petitioner and the Department of Justice both seem to us to be operating under what we believe are misconceptions of both fact and law and the way the regulatory process works in the State of Michigan. The Commission's most recent order to Detroit Edison involving the lamp supply program is in Case U-4570, which is dated February 3, 1975. The Opinion and Order of the Commission begins with the language" "Therefore, It Is Ordered that:"

It goes on to say at paragraph D, "In conformance with Commission Order No. D-3096, Filing Procedures, The Detroit Edison Company shall promptly file with the Commission rate schedules substantially the same as those attached hereto as Exhibit A."

Exhibit A, which is referred to in the order is the lamp supply program. It contains the following language: "Incandescent lamps will be furnished without extra charge (1) to residents connected for the first time to the company's lines in such quantities as may be needed for all permanent fixtures, (2) as replacements of approved burned-out lamps in proportion to the use of energy for lighting purposes under the applicable rates."

The Commission then went on to say, "The Commission specifically reserves jurisdiction of the matters herein contained and the authority to issue such further order or orders as the facts and circumstances require."

QUESTION: Your argument is they were ordered and required to do it by the State.

MR. REYCRAFT: That is correct.

QUESTION: Do you think that is the standard that Parker v. Brown --

MR. REYCRAFT: Parker v. Brown says that when an agency in a State issues a command to a private entity which is within the scope of its authority, that the conduct that follows is --

QUESTION: Do you think the rule should be broader than that and probably just mere authorization?

MR. REYCRAFT: I don't, your Honor. I don't think it is necessary for us at least to go that far.

QUESTION: So you agree that the test is what the Solicitor General said it is?

MR. REYCRAFT: I would rather say that the test is what Parker v. Brown said it is.

QUESTION: Exactly. But do you think he read Parker v. Brown right or not?

MR. REYCRAFT: As I understood what he said, I think that he overread Parker v. Brown in that he appears to be imposing a broader test upon what the scope of the legislative command is.

QUESTION: Mere authorization wouldn't do it.

MR. REYCRAFT: Mere authorization, we are not

arguing that mere authorization would do it in this case.

QUESTION: Now what standard do you think the Court of Appeals acted under?

MR. REYCRAFT: The Court of Appeals adopted Judge Feikens opinion which had before it all these orders I am referring to which commanded Detroit Edison --

QUESTION: That may be true, but what standard did the Court of Appeals use in affirming the --

MR. REYCRAFT: What it said was that the district court had correctly applied the principles of Parker v. Brown and thereby affirmed it.

QUESTION: Didn't it refer to authorization or not?

MR. REYCRAFT: I believe it did say it was authorized, but it did refer to Parker v. Brown which, of course, is narrower than mere authorization.

QUESTION: How about the district judge?

MR. REYCRAFT: The district judge, I believe correctly described Parker v. Brown. I can't quote him verbatim, but I believe he correctly recited Parker v. Brown.

QUESTION: I take it you don't think there is any problem here of either court below applying it wrong, .. Parker v. Brown, saying that mere authorization is enough?

MR. REYCRAFT: I don't think so, Mr. Justice Blackmun.

QUESTION: Mr. Reycraft, . . the district court

said when a State agency acts affirmatively in approving rates and practices of utilities, there is no antitrust liability. Do you think that's a correct statement of law?

MR. REYCRAFT: I think acting affirmatively -- not only that, I would take it that the court implies that that's a command of the State.

QUESTION: That isn't what it says. That isn't what the court says.

MR. REYCRAFT: All right, it didn't use the word "command", no, sir.

QUESTION: And it isn't what the Court of Appeals said either: "In concluding that the affirmative action of the Commission in approving appellee's rate structure that provides for the distribution of light bulbs and its continuing supervision of appellee brings the challenged practice within the doctrine of Parker v. Brown.

MR. REYCRAFT: That's what it says, Mr. Justice Rehnquist.

QUESTION: It doesn't say anything about command. It says the affirmative action in approving.

MR. REYCRAFT: The action, however, which is referred to is in fact a command, and those commands were before the district court and were in the record which the Court of Appeals considered.

QUESTION: Could the company have altered its rates

without further action of the Commission?

MR. REYCRAFT: No, it could not, Mr. Chief Justice, it could not have altered its rates. It must get the approval of the Commission to either increase or decrease its rates.

QUESTION: Then do you say that the rate structure was a command even though it didn't use the word command?

MR. REYCRAFT: Rate structure is indeed a command.

QUESTION: Was the company required to file a tariff which included the furnishing of light bulbs?

MR. REYCRAFT: No. The company could have filed a tariff which did not include light bulbs, but as long as --

QUESTION: It was not ordered to file a tariff that had light bulb furnishing in it?

MR. REYCRAFT: It was not ordered to file a tariff. Its conduct is analogous to that in Parker v. Brown where producers voluntarily petitioned the Advisory Prorate Committee for a particular program. It was not commanded to file a tariff. Obviously, it seems to me, a public utility --

QUESTION: Was there some law in Michigan that required the Public Service Commission to approve the tariff if it had light bulbs in it?

MR. REYCRAFT: The law is 460.6, which, of course, is a broad grant of jurisdiction to the Public Service Commission to completely regulate public utilities within the State, including electric lighting companies and all the services

that they provide with it. There is, of course, no specific reference to light bulbs in the statute, but there is reference to electric lighting in it, and that is the authority under which the Public Service Commission was operating.

QUESTION: Mr. Reycraft, is the Solicitor General correct that years ago they stopped going to the homes to deliver bulbs and didn't change the tariff?

MR. REYCRAFT: I don't know whether that's correct or not, Mr. Justice Marshall. I believe that the practice may have been discontinued at the end of the effective tariff. In other words, when Detroit Edison filed a new tariff, I believe that that particular home delivery service may have been excluded. But that occurred back in the 1930's, and I can't represent to this Court that it was terminated before or only after the new tariff became effective, but that is my belief.

QUESTION: The State says to an industry, "You can fix prices in the industry, or you needn't fix prices in the industry, but if you want to, go ahead, just file a piece of paper up here with our Commissioner of Prices and if he says OK, go ahead." Is that all right?

MR. REYCRAFT: No, sir, that's not all right. That does not provide any trust immunity within Parker v. Brown.

QUESTION: But even if the law said, "If you want to fix prices in the industry, just file a piece of paper, and if you file a piece of paper, then you will be ordered to do it."

MR. REYCRAFT: Well, I would think that that --

QUESTION: Then you are under an order, once you have all agreed to this under an order, then the order is good, although you don't have to decide to in the first place, the law doesn't require you to fix prices. You have an option to fix prices or not.

MR. REYCRAFT: If it's optional, as I understand the Court's decision in Parker v. Brown, then the conduct is excluded from the antitrust laws.

I would like to refer to another decision of the Commission in 1964 where in Case No. 1791 the Michigan Public Service Commission specifically reviewed the lamp exchange program. At the time it was available to our commercial customers, and Detroit Edison wanted to reduce its cost so it could reduce its rates, and it did go to the Commission and it asked for permission to eliminate the lamp supply program to large commercial customers. The Public Service Commission did permit that. It said that lamp replacements of approved burned-out incandescent lights will continue to be furnished under its general service rate which applied to small business, and it also required it to continue to furnish lamps under the exchange program to residential customers. So not only did it consider the lamp supply program in 1964, but it exercised discriminatory judgment as to which parts of the program would continue and which parts would be eliminated. And in 1964

it said, it further ordered that Detroit Edison shall promptly file rate changes to be effective on service rendered after December 1, 1964, and that included the residential lamp program. And at that time it reserved jurisdiction of the matter and the authority to issue further orders as they may be required. And the order is signed by each of the Commissioners under date of November 12, 1964. There have been 18 orders of the Michigan Public Service Commission and its predecessor to Detroit Edison since 1916. The Michigan Public Service Commission and its predecessor -- well, State regulation of utilities began in Michigan in 1909. And since 1916 Detroit Edison has been at all times under an affirmative order to continue the lamp supply program.

Now, the petitioner complains that there hasn't been any antitrust type hearing, which I understand is the nature of what he thinks would be appropriate in the Michigan Public Service Commission. The reason for that, it seems to me, is that no one has ever asked for such a hearing. We don't know of any complaints which have been made to the Michigan Public Service Commission about the lamp supply program. I wouldn't say that someone may not have written a letter. There may not have been complaints. But we don't know about it.

There has been a case filed in a State court in Michigan which the petitioner refers to in his brief. It's the Grill case. It was filed in 1973 and it seeks an injunction

against the continuation of the lamp program. We haven't mentioned it in our brief, for which I apologize. But I have learned over the recess that the Circuit Court in Michigan has decided that case and had dismissed it in 1974. That's an unreported opinion and I didn't know about it, and I would like permission to furnish a copy to the Court. It decided the case, it dismissed the case on the ground that it lacked jurisdiction of the subject matter because the Michigan Public Service Commission had jurisdiction over the lamp supply program and that the petitioner, the plaintiff in that case, had failed to exhaust his administrative remedies before coming into even the State circuit court.

We think that these are State law questions that the Michigan Public Service Commission should in the first place, if the petitioner thinks that they don't have jurisdiction, he should argue to the Commission. If he disagrees with the conclusion that they reach, he has available still procedures to the circuit courts. And if he disagrees with them, he can go to the Michigan Supreme Court.

He hasn't done any of those things. He has simply gone into the antitrust court and tried to get the Federal court to decide what are, I would concede at least, realistic and significant questions of State laws to the extent of jurisdiction of the Public Service Commission.

QUESTION: Does the Parker v. Brown issue, which I

understand to be the basis of the decision in the district court turn at all on whether or not the plaintiff has exhausted his State administrative remedies?

MR. REYCRAFT: I don't believe that it does, Mr. Justice Stevens.

QUESTION: Then really it's not before us, is it?

MR. REYCRAFT: It is not except to the extent that -- I don't know that jurisdiction was argued in Parker v. Brown but here petitioner is arguing that the Michigan Public Service Commission did not have jurisdiction to order the lamp supply program into effect or to be continued. So when he says that, he is bringing into this case the State law question which I don't know was raised in Parker v. Brown.

I think it's unreasonable to expect that the Michigan Public Service Commission would on its own initiative start an antitrust type hearing on a light bulb exchange program which has been in effect in Detroit Edison and its predecessor since 1885 and has been under orders of the Commission since 1916.

I would like to go into the facts a little bit, although I know that the Court doesn't want to get into too much detail of the facts. It seems to me they demonstrate the reasonableness of the Commission's continuing to order the lamp exchange program and the reasonableness of its not initiating antitrust criteria before the Michigan Public Service Commission.

QUESTION: Mr. Reycraft, does the reasonableness of the program relate to whether there is a violation of law? But would it relate to the question whether Parker v. Brown applies?

MR. REYCRAFT: I think it relates to the question of whether the Michigan Public Service Commission procedures were adequate and whether they conducted an adequate inquiry into Detroit Edison's lamp exchange program. For example, the Public Service Commission has had rate hearings just about every year for the past five years -- 1970, '71, '72, '74, and '75. The last rate hearing involved 65 days of hearings and over 7500 pages of transcript.

QUESTION: How many of those pages were devoted to the lamp supply program?

MR. REYCRAFT: No, indeed, they were devoted to all phases of Detroit Edison's --

QUESTION: Were any of those pages devoted to the lamp supply program?

MR. REYCRAFT: Yes, sir. Those figures are included in the appendix to our brief. I would not say that they get to the level of an antitrust trial, fortunately, but there are references to the lamp supply program in that hearing and they are included in the appendix to our brief.

I think the important, Mr. Justice Stevens, is that these are thorough hearings, the rate hearings which the

Public Service Commission conducts. Their typical practice is to send four or five men into the company for a period of four or five weeks. They review every cost item and every expense on the company's books. They exclude some and include others. The cost of the lamp supply program is specifically included in an account as it's required to be under Michigan law. The Michigan Administrative Code requires these costs to be included in customer installation expense which is where they are included.

This is also consistent with the treatment which the Federal Power Commission requires and has required since 1937. So that there isn't any mystery about the fact that there has been a lamp supply program that Detroit Edison has had in effect since 1885.

Now, my friend on the other side has said that the lamp supply program has made Detroit Edison the best-loved utility in the country, and if that's the result of the lamp program, which I understood is what he is saying, it seems to me that that certainly demonstrates the widespread use and knowledge of the existence of the lamp supply program.

We had a survey conducted some years ago which indicated that 94 percent of our customers use the lamp supply program. There are about a million and a half households in Detroit Edison's service area which gets service from Detroit. If 94 percent of them use the lamp supply program, it's hardly

any secret. At least we have not kept it a secret, and in fact the exhibit which petitioner's counsel referred to in the appendix which shows the availability of the different sized light bulbs demonstrates that this program is well publicized.

QUESTION: Mr. Reycraft, are you arguing that a plaintiff before he can prosecute in a Federal antitrust suit has to exhaust procedures before a State agency?

MR. REYCRAFT: I've got some alternative grounds, Mr. Justice Rehnquist, on which I think that this case can and should be disposed of,where there is an available State procedure, I think he should be required to exhaust it.

QUESTION: But there is no authority, at least from this Court, for that proposition, is there?

MR. REYCRAFT: No, I would agree with that. I think the closest authority is the Ricci case where the Court referred an antitrust plaintiff to the Commodity Exchange Authority before the Court decided ..

QUESTION: Here you are dealing with two acts of Congress, really.

MR. REYCRAFT: Yes, sir.

QUESTION: .. and also you are dealing with an instance where the authority of the agency extended to deciding the kind of an issue that was up in the antitrust court.

MR. REYCRAFT: I agree, it was a Federal issue --

QUESTION: And here the State proceeding is a rate-making proceeding. And as you said the hearings certainly didn't proceed as though it had any anticompetitive included in it.

MR. REYCRAFT: My basic point is that the petitioner is arguing that the command which the Michigan Public Service Commission did issue was outside the scope of their authority and the ultra vires, as the Solicitor General referred to it, and I think that the determination of that question is a State question.

All right. Now, I think if that's the basis of his argument that this is antitrust violation --

QUESTION: Apparently both courts below accepted the order as valid, didn't they?

MR. REYCRAFT: They did, and I think correctly.

I have started to talk about some of the facts which show the reasonableness of the exercise by the Public Service Commission of their jurisdiction. These include the fact that the cost of the light bulbs were passed through to the consumer without any profit or any markup on the part of the company as required by the Michigan Public Service Commission.

The petitioner argues that the customer service offices are part of Detroit Edison's rate base and that therefore there may be some element of those facilities in Detroit's profits. The fact is that these customer service offices perform

a wide variety of services, and they would have to be continued even if the lamp exchange program was discontinued. Detroit Edison's profits are allowed as a percentage of its rate base. The current percentage allowed is 8.7 percent. And that is not applied in any way to the cost of the light bulbs. These are passed through as a cost of service and included in the customer's rate base. There are 50 of these customer service centers and 35 agents who distribute the bulbs.

QUESTION: That sounds like an argument to me that it doesn't cost them anything because it's there anyway.

MR. REYCRAFT: We paid in 1972 about $2 million for the offices. The offices don't cost very much as far as the extent to which they are allocated or devoted to the lamp supply program. They would have to be there in any event for such things as customers coming in and talking about their bills, whether they have the proper charge, whether some special installation is required for their electric light hookup.

QUESTION: We have that kind of argument at home.

MR. REYCRAFT: Sir? Yes. Well, in Detroit you could send somebody down to the customer service center and have the argument there.

QUESTION: Your rates could be entirely reasonable and that wouldn't be a defense to an antitrust action, would it?

MR. REYCRAFT: My argument, Mr. Justice Rehnquist,

is as to the reasonableness of the procedures of the Michigan Public Service Commission. The petitioner has complained that there was no antitrust criteria for the Michigan Public Service Commission and the fact that the program is a program which is beneficial to the public, the fact that it does not return a profit to Detroit Edison, the fact that the cost of the bulbs is far below what the consumer could get the bulbs for on the open market, all explaining to my satisfaction at least why the Michigan Public Service Commission did not hold an extended antitrust type trial, which is what petitioner seems to be asking here.

In 1972, for example, there were 18 --

QUESTION: Suppose, Mr. Reycraft, your analysis is correct -- and, of course, it's summary judgment, so I guess we have to take your opponent's version whether it's a dispute -- but if your analysis is correct, you have demonstrated that giving the customers an option, they still take the free light bulbs.

MR. REYCRAFT: That may well be.

QUESTION: So that we are really deciding about whether it should be optional or mandatory.

MR. REYCRAFT: Well, I think what we are -- I'm not sure about that. I think that if the program became optional, I'm not sure that Detroit Edison would apply to have a program in its tariff, and I'm not sure whether if it became optional

it would be sufficiently large.

QUESTION: Wouldn't there be the same number of people who take the light bulbs if it's such a bargain?

MR. REYCRAFT: I don't -- obviously, that's a matter of opinion. I don't know.

QUESTION: If your premise was correct, you would think the conclusion follows.

MR. REYCRAFT: I think it's very likely true, yes, very likely true.

QUESTION: May I ask one other procedural question while I have interrupted you? Was there a class determination in this case?

MR. REYCRAFT: No, your Honor, there was no motion for a class determination. No class determination has been made. And I might say at that point that the petitioner has testified in this case that he sold -- I believe it was over a two- or three-year period -- light bulbs with a retail gross value of about $135. He also testified that his cost for those bulbs was about $90. His specific price per bulb for a 100 watt bulb was 21 cents. He sold them for 32 cents.

The average cost of bulbs for customers in the Detroit area in 1972 was $1.80 through the Detroit Edison program, which, of course, is included in our rate base.

Another reason why we are able to furnish light bulbs at this cost is because Detroit Edison gets competitive bids

from the light bulb manufacturers. There are three principal manufacturers -- General Electric, Westinghouse, and Sylvania. Detroit Edison puts together specifications and asks for bids. And it buys from the manufacturer which submits the best bid, and these savings, as I testified, are passed on to the consumer.

In addition, the bulbs that they will get, because they will ask for competitive bids, has a longer life than a generally available commercial bulb. The average bulb, the average life of a 100-watt bulb is 1,350 hours, whereas the generally available commercial bulb has only 750 hours of light.

QUESTION: Mr. Reycraft, how many utilities are there in Michigan, do you know?

MR. REYCRAFT: No. There are at least three in Michigan who do have lamp supply programs, however, and I wanted to --

QUESTION: Are there a good many others that don't?

MR. REYCRAFT: I don't believe there are many others throughout the country, Mr. Justice White.

QUESTION: I know, but in Michigan are there a good many others who do not have the program?

MR. REYCRAFT: I think there are at least some who do not have the program, yes, sir.

QUESTION: And they are free not to have it under

Michigan law.

MR. REYCRAFT: Well, they are free not to have it only because the tariff --

QUESTION: They are the ones who decide what kind of a tariff to file.

MR. REYCRAFT: Yes. In the first instance, of course, it is voluntary action on the part of the utility.

QUESTION: And do you know of any instance where the Commission has ordered a utility to have a lamp program against its will?

MR. REYCRAFT: No, I don't.

QUESTION: And the statute doesn't say so.

MR. CRAFT: No, the statute does not say that electric utilities shall have lamp supply programs. No, it does not.

The Michigan Public Service Commission is an agency, of course, created by the State of Michigan, and unlike the Advisory Prorate Commission in Parker v. Brown, it does not consist of a group of private self-interested persons who are acting in a quasi-governmental capacity. Each of the Commissioners is appointed for a term of 6 years by the Governor with the advice and consent of the Senate. They are prohibited from having any pecuniary interest in any regulated utility during the time that they are on the Commission. They pervasively regulate rates in Michigan. A utility can't increase its rates directly or increase its rates indirectly

by reducing service, and that includes eliminating the light bulbs, without specific permission of the Michigan Public Service Commission. So before raising rates or reducing service, they need the approval of the Commission.

As I said, the procedures are extensive; 65 days of hearings in the last rate case and over 7500 pages of testimony.

This Court recently considered the Parker v. Brown issue in Goldfarb v. Virginia State Bar and repeated the holding that if private conduct is required by the State acting in its capacity as sovereign, the conduct is not subject to Federal antitrust laws. There, unlike the Michigan Public Service Commission, the Virginia State Bar was only a State agency for very limited purposes and certainly was not under any command from the Virginia State Supreme Court to fix minimum prices for attorneys offering their services.

QUESTION: Mr. Reycraft, getting back to Michigan, if the Detroit Edison company decided to stop dealing in light bulbs, did so, and filed an amended tariff cutting its rates, is there any question in your mind that it would be approved?

MR. REYCRAFT: There is a question in my mind --

QUESTION: What is it?

MR. REYCRAFT: -- Mr. Justice Marshall. I don't know the answer to the question.

QUESTION: What would your question be?

MR. REYCRAFT: The question in my mind would be that if the choice is between continuing a lamp supply program at all or continuing on its present basis because it's more economical in that sense --

QUESTION: I said they would cut the rates. They could then decide the rate one way or the other. That's all they would do, isn't it?

MR. REYCRAFT: The Michigan Public Service Commission could say to Detroit Edison, "We are going to require you --

QUESTION: Could they say you must continue to furnish the light bulbs?

MR. REYCRAFT: They can say that, yes, sir.

QUESTION: How? What authority?

MR. REYCRAFT: By their general authority in 460.6.

QUESTION: Well, have they ever told anybody in Michigan that they had to do it?

MR. REYCRAFT: No, sir.

QUESTION: If they have never done it before, why should they do it now?

MR. REYCRAFT: Well, let me explain my answer. They have told Detroit Edison Company 18 consecutive times since 1916 that they must continue the lamp supply program.

QUESTION: I thought they said you may continue.

MR. REYCRAFT: No, sir. They said, "You are ordered."

QUESTION: Where do they say they ordered them to continue the light bulbs?

MR. REYCRAFT: I'm sorry, I didn't hear you.

QUESTION: Ordered them to continue to give light bulbs.

MR. REYCRAFT: Yes.

QUESTION: When did they say that?

MR. REYCRAFT: They said it 18 consecutive times --

QUESTION: They said "ordered."

MR. REYCRAFT: Yes. They said, "You are ordered." They said that -- I quoted the language a little earlier. They said, "It is hereby ordered that the Detroit Edison Company shall promptly file rate sheets substantially the same as the sheets attached hereto as Exhibit A to be effective on service rendered on and after December 1, 1964." And Exhibit A includes the lamp exchange program.

QUESTION: And how much more?

MR. REYCRAFT: Sir?

QUESTION: And how much more? The light bulb and about a hundred other items.

MR. REYCRAFT: Well, not a hundred, it's --

QUESTION: It's just one of a whole group of items.

MR. REYCRAFT: It is a paragraph which describes --

QUESTION: But you say perfectly honestly that Detroit Edison could not stop furnishing these light bulbs?

MR. REYCRAFT: Not under our existing tariff, Mr. Justice Marshall. If we went back to the --

QUESTION: That's right. And then they furnish another tariff which takes into consideration and cuts the rate that much, that the Commission wouldn't approve it.

MR. REYCRAFT: The Commission does have the power to order Detroit Edison to continue the lamp supply program as it exists, to make it optional, or to discontinue it altogether. What they would do if the issue were presented to them in that way, I cannot honestly say that I know. That kind of a proceeding in a rate proceeding generally requires no .. service area, so that there are wide rights of intervention and appearance of witnesses in the rate proceeding so that consumers could come in and say, "We want it this way, we want it that way." And I don't know, Mr. Justice Marshall, honestly how that would come out.

But the present case, the antitrust case, is simply a private fight between --

QUESTION: Your real trouble is that agreeing to and ordering are the same thing.

MR. REYCRAFT: Well, if I understand --

QUESTION: Approving and ordering are the same thing.

MR. REYCRAFT: This --

QUESTION: Isn't that what you are saying?

MR. REYCRAFT: The Michigan Public Service Commission

used the precise language "order." They used it on a number of occasions.

QUESTION: And they got it right straight out of the form book, didn't they?

MR. REYCRAFT: Well, sir, to my simple mind whether it's out of a form book or not, it's an order, and if I don't comply with it, I'm in trouble whether it's a court or the Michigan Public Service Commission.

QUESTION: I should think if you ask somebody to order you to do something, you would agree with it.

MR. REYCRAFT: That, of course, is what happened in Parker v. Brown. The raisin producers asked the Prorate Commission to order them to -- it had a price-fixing effect, withdraw substantial --

QUESTION: Isn't that what you asked here?

MR. REYCRAFT: No, we are asking and we have asked --

QUESTION: Didn't you ask them to order you to issue these light bulbs?

MR. REYCRAFT: Oh, yes, we did. Yes, we did that. And we have done it since 1916 on 18 separate occasions, yes, sir.

Now, it seems to me that the Michigan Public Service Commission could easily, if it's brought to its attention, take into account antitrust policy. Michigan has an antitrust law, so the antitrust laws in competition are

tne State policy of Michigan just as are the national policy of the United States under the Federal antitrust laws. So that in State utilities, public utilities can be the first line of defense against anticompetitive practices which may later turn out to be antitrust violations. So that the petitioner has a forum before the Michigan Public Service Commission, there is a procedure under which it can intervene, it could appear as a witness in a separate complaint procedure which he could use if he really wants a determination as to whether this light bulb program should continue rather than to have a nice lawsuit with a big class action which at some time might produce treble damages. He is not interested in any of the lamps supply programs; what he is interested in is treble damages and reasonable ..

So we submit that the Public Service Commission did clearly issue numerous commands to Detroit Edison. They did result from voluntary applications on the part of Detroit Edison just as is the case in Parker v. Brown. We submit that that conduct is within Parker v. Brown and that the Fifth Circuit and the district court were correct in their determination.

MR. CHIEF JUSTICE BURGER: Mr. Trienens.

ORAL ARGUMENT OF HOWARD J. TRIENENS AS

AMICUS CURIAE ON BEHALF OF RESPONDENT

MR. TRIENENS: Mr. Chief Justice, and may it please

the Court: I represent a group of Michigan utilities who locally couldn't care less about light bulbs. Some are electric companies who do not have this provision; others are gas and telephone companies. Our concern is not with this particular tariff or the provisions, merits, public interest, anticompetitive or otherwise features of it. Our interest is in the position taken by petitioner and the Solicitor General which would make life absolutely impossible for a utility to operate and would be grossly unjust.

Let me just as an illustration of the point that has just been discussed by Mr. Justice White and Mr. Justice Marshall, I don't think it makes the slightest difference whether the utility proposed this tariff, or whether the Chairman of the Commission drafts it, or the Speaker of the House drafts it. The point is, no matter who submitted this tariff, the utility does not have the option. If Detroit Edison files a tariff with this lamp provision in it, the Commission can take it out. If the utility files a tariff with the provision out, the Michigan Commission can put it back in.

The authority for that is under the pervasive regulatory statute which is common in the public utility regulatory matters where in addition to fixing rates, the Commission may by order also establish such rules and conditions of service as shall be just and reasonable.

Now, you are absolutely right, Mr. Justice Marshall, there are hundreds of these conditions of service and these tariffs just bristle with problems. Who puts the meter where, who takes the pipe how far in, and who pays how much to get a cable put in in a subdivision. These are just full of problems. And they bristle with antitrust problems. And this is just one of them.

My point is that under the pervasive regulation it doesn't matter who wrote the first draft. The important thing is that the Michigan Commission is the one who decides it.

Now, there is more to it than that, and this is critical and it's something I hope I can emphasize enough. The standards are different. Under Parker v. Brown you can't just say, "Let's forget competition." There has to be a State policy that competition is displaced, eliminated, or subordinated.

And that isn't enough. You also have to substitute machinery whereby the State imposes its views of what the proper decision is under the other standaard. In the utility field they call it the public interest standard.

Now, in Michigan, the Michigan Supreme Court said in the case of .Fern ? here in 1951 that the right to exclude competition where the general public convenience and necessity so require has been delegated by the legislature to the Michigan Public Service Commission.

The standard is not the same as the standard under the antitrust laws.

QUESTION: Are you arguing this case or some other case?

MR. TRIENENS: I am arguing this case, because the question here is really one of standards. The question here is the --

QUESTION: Are you arguing about light bulbs or not?

MR. TRIENENS: I am arguing about this case because the whole point of the Solicitor General's argument -- I am arguing as amicus on exactly the same --

QUESTION: Are you arguing that the Michigan Public Service Commission does have authority to and regularly does consider competitive considerations?

MR. TRIENENS: No, sir. I am saying they don't have to and that's irrelevant, because the statute has said -- and as Mr. Justice Frankfurter said in connection with a Federal statute regarding these public utilities, surely it cannot be said that competition is of itself a national policy in areas like public utilities.

Now, that's shown not only -- I'm reading from FCC v. RCA Communications, 346 U.S. 92. That's also made abundantly plain by the legislative -- and shown by Congress --

QUESTION: What competition was he referring to there do you think?

MR. TRIENENS: He is referring there to two overseas cables as to whether -- there is no doubt that competition was aided by allowing another cable to come in, and he says there is more to it than that, that competition is not the national policy, the be all and end all, when you are dealing with these regulatory matters where it's pervasively regulated under a public interest standard.

Now, that is the critical distinction here because there has been a different standard and the machinery for enforcing that standard substituted for competition -- substituted for competition. That's what public utility regulation is all about.

The Solicitor General speaks of a trend. He says there has been a trend here where, as he would put it, some people are starting to use mechanisms of States to frustrate national policy. Now, as I have read, the national policy is not -- and I emphasize "not" -- to impose competition as part of the standard of regulating public utilities. It's simply not. And the Federal Power Act, the Federal Communications Act, the Natural Gas Act all use the public interest standard, and most importantly here, leave to the States, leave to the States as to these local distribution matters like Detroit Edison the question of their regulation under their public interest standard.

Now, if you go to a Federal antitrust court -- and

that's what this is all about -- whether you are going to have a hearing on whether these light bulbs last long and whether they are good or bad or indifferent, you are going to have a hearing in an antitrust court. That's what these people want. It may be that the petitioners want treble damages, but what the Solicitor General wants is to take over in the antitrust courts the imposition of Federal antitrust standards. He says he doesn't preempt. He preempts in practical effect by imposing Federal antitrust standards through the Federal courts on the States.

QUESTION: Suppose the Commission in Michigan tells the Podunk Gas Company in Michigan that you must furnish light bulbs with your electricity.

MR. TRIENENS: They may do that.

QUESTION: Well, suppose they say you must also furnish electric stoves.

MR. TRIENENS: I think they could do that, too.

QUESTION: Where would it stop? Could they go to electric automobiles?

MR. TRIENENS: Where would they stop. It would not stop, in my view, because the Federal antitrust court started trying all these tariff matters. If they took over too much beyond the traditional public utility regulation and the Commission did that, which I doubt, and the State court affirmed, which I doubt, this Court still sits to review. If there is

a commerce problem or a due process problem, or they have gone too far, this Court sits. You do not make every tariff issue into an antitrust case in order to deal with that kind of speculative problem that is not before us.

QUESTION: Mr. Trienens --

MR. TRIENENS: Yes, sir.

QUESTION: -- in my home town of Phoenix, there are two utilities both serving the same general area and there is, as I said, a conscious policy of division of territory which is approved by the Arizona Corporation Commission. Do you understand under the Solicitor General's theory that because the two utilities agree that they should be ordered to do that by the Utility Commission that that territory allocation would be actionable?

MR. TRIENENS: I think that the answer is yes. While he would say they don't preempt, he has suggested to you this morning that there be some antitrust court "review" of each and every decision of that kind to find out whether they had stated the State policy precisely enough.

Now, that's a fine business for the Federal courts to be in, to see whether these agencies have each stated their findings precisely enough, whether the order has been formal enough, whether the findings are adequate sound That doesn't strike me as the business of the Federal courts, either on the territorial allocations or on any of the hundreds of items of

conditions on rates, all of which could be an antitrust case. If you really wanted to --

QUESTION: If I understand your theory, it sounds to me like you are asking for a complete exemption from the antitrust laws for any industry that's subjected to State regulation that follows a different standard than competition.

MR. TRIENENS: Yes, sir.

QUESTION: What do you do with Ottertail?

MR. TRIENENS: Ottertail is a case, your Honor, where the Court found in a very closely divided vote, 4 to 3, and I can see the problem why that is a close case, that the Federal Power Act on interstate was not pervasive regulation. That's what both opinions said. I accept that finding. Therefore I do not here challenge Ottertail.

If you have pervasive --

QUESTION: What do you do with Southeastern Underwriters

MR. TRIENENS: Southeastern Underwriters said that the question there was not the regulation of individual insurance company rates, but rather the insurance companies agreeing among themselves in a rate bureau to fix rates, and the Court distinguished Parker v. Brown and found that there was no State regulation of those combinations. There was no pervasive --

QUESTION: You think the McCarran Amendment was unnecessary?

MR. TRIENENS: I think it scared them to death and they weren't taking any chances.

If they go to a hearing -- now, say this is on a public interest standard. If they go to a hearing, I don't know how it's going to come out any more than any of the counsel here. But the Public Service Commission in Michigan would have the hearing. People in Detroit who want or don't want light bulbs could come to that hearing. The Commission would decide it. They would either knock the provision out or change it, as they did in .. or they could have two kinds of rates, one with and one without. or any other alternative. The point is it would be decided on the public interest standard of Michigan and not under the be all and end all sole aim which is the antitrust law.

I'm not here arguing that these utilities in Michigan are engaged in a State action any more than the raisin growers in Parker v. Brown were in State action. What I am saying is and what Parker v. Brown means is that where the State defines an area, defines an area where it doesn't believe that the State's interest is served, public interest is served, by having competition be the sole standard.

And that's not enough. Where they also substitute regulatory machinery which is pervasive, then that does displace the antitrust laws, not because of some implied immunity, but because that is what the antitrust laws meant,

that is what they meant since Olsen v. Smith in 1904, that's what they have never meant. And what the Solicitor General is suggesting in adding to the business of the Federal court is a radical departure that if it has merit -- I say it does not economically -- if it has merit, that's a matter for Congress. There is a raging dispute in Congress about deregulation, and if there is deregulation, the antitrust laws come in. You can argue that in surface transportation, you can argue it in electricity. All I am saying is it's a legislative matter, and Parker v. Brown, which simply construes and applies the Sherman Act should not be given this vast extension. This is a matter that should be left for Congress.

Now, there is a fairness question here, too.

QUESTION: What about the question I asked Mr. Reycraft, if the State had a general statute that said that if industries would like to substitute price fixing for competition,they may. They just -- anybody who wants to fix prices can come in and apply to the Price Commissioner and get permission.

MR. TRIENENS: I say that's Schwegmann and it's not permitted. I say under Parker v. Brown it's much closer to that than this case, because under Parker v. Brown whether there was going to be any displacement of competition depended on the initiative of the petitioning raisin growers. Here it doesn't depend on any initiative of Michigan Consolidated Gas or on

Detroit Edison. They are regulated, their rates are fixed --

QUESTION: I know, but the decision whether or not to furnish light bulbs is their decision.

MR. TRIENENS: No. It is the Commission's decision.

QUESTION: Well, they haven't ordered anybody to furnish light bulbs.

MR. TRIENENS: Why should they?

QUESTION: I didn't ask you that.

MR. TRIENENS: I am sorry, your Honor. What I mean is, they've got lots to do. They have got hundreds of these tariff provisions. Here is one that's been in for years.

QUESTION: I know, but look to see who it was in the first place who put in the tariff.

MR. TRIENENS: Oh, it was there when the Commission was invented.

QUESTION: Who started this?

MR. TRIENENS: Detroit Edison.

QUESTION: Then could they take it out if they wanted to?

MR. TRIENENS: Could who take it out? Detroit Edison?

QUESTION: Detroit Edison.

MR. TRIENENS: Detroit Edison could file a tariff which in effect asks for relief from the outstanding order and ask the Commission to relieve them of doing that with a corresponding rate adjustment. The question of whether the --

QUESTION: Some other utilities do not furnish light bulbs.

MR. TRIENENS: That's correct. And some of them have another alternative, where they are ordered to keep furnishing them if the customer wants them, but not furnish them if the customer doesn't.

QUESTION: What kind of a State policy is that with respect to this?

MR. TRIENENS: The State policy is that electric companies are pervasively regulated and all the terms and conditions of the rate, what service is provided, how far it goes, and who maintains what, is to be decided by the Michigan Commission in the public interest with competition not being the be all and end all as it would be under the antitrust laws.

QUESTION: Or even a factor, it doesn't have to be in your view.

MR. TRIENENS: It doesn't have to be a factor. A State can eliminate or subordinate it, as they wish.

QUESTION: And you say in effect then all the Michigan utilities, the ones that furnish light bulbs and those that don't, are subjected to this same pervasive regulatory standard.

MR. TRIENENS: Yes, sir. Yes, sir. All of them on the face of the statute, and my colleague's comment was simply --

QUESTION: And you would say the same thing, I suppose,

if all the Michigan utilities on the side agreed among themselves to furnish light bulbs.

MR. TRIENENS: And they submitted to the Commission and the Commission found it was in the public interest and the Commission --

QUESTION: They didn't submit to the Commission the agreement.

MR. TRIENENS: There is the question that Mr. Justice Stevens asked me about.

QUESTION: I want your answer.

MR.TRIENENS: I don't believe they do. I don't believe they can get together and conspire to do it. I think they have to make their own judgment on what they think is in the public interest, make their draft of the regulation, submit it to the Commission, and whether the Commission let's it go into effect or not is for the Commission to decide in the public interest.

If I may make just one comment here. Looking at it from the point of view of the utility itself, to subject a utility to duplicate but inconsistent standards, one where competition is the sole aim, the other, the public interest where it isn't. It's an impossible position to put a utility. Whether the Commission drafts these orders or whether the utility comes with a proposal, he can't do it when he's got two masters. It's just basically unfair and is not intended

by the Sherman Act.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Weinstein, you have about five minutes left.

REBUTTAL ARGUMENT OF BURTON I. WEINSTEIN

ON BEHALF OF PETITIONER

MR. WEINSTEIN: I hope I don't use all of that, your Honor.

The existence of a State remedy is no bar to a Federal remedy here. There is no reason to require us to go back to the Michigan Public Service Commission. In fact, in the briefs I don't believe they have given any substantial reason why we can go back there.

Simply, there is no command here by the State. The NPSC will command whatever the company asks.

QUESTION: Could I ask this one question. Does the record show that there are other Michigan public utilities that do not have lamp programs or that have optional programs?

MR. WEINSTEIN: The record does not show that.

The Michigan Public Service Commission will do what the utility wants. The company would at most just have to file a new tariff and lower the rates, and it could drop the light bulb program.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:48 p.m., oral argument in the above-entitled matter was concluded.]