In the

# Supreme Court of the United States

Federal Power Commission,

Petitioner,

v.

Conway Corporation, et al.,

Respondents.

No. 75-342

Washington, D. C.
April 21, 1976

Pages 1 thru 44



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IN THE SUPREME COURT OF THE UNITED STATES

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| FEDERAL POWER COMMISSION, Petitioner, v. CONWAY CORPORATION, et al., Respondents. | No. 75-342 |

Washington, D. C.,

Wednesday, April 21, 1976.

The above-entitled matter came on for argument at 2:02 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
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ALLAN ABBOT TUTTLE, ESQ., Solicitor, Federal Power Commission, Washington, D. C. 20426; on behalf of the Petitioner.

ROBERT C. McDIARMID, ESQ., Spiegel & McDiarmid, 2600 Virginia Avenue, N. W., Washington, D. C. 20037; on behalf of the Respondents.

# 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 75-342, Federal Power Commission against Conway.

Mr. Tuttle, you may proceed, I think, whenever you're ready; as soon as the attendant has taken care of you.

ORAL ARGUMENT OF ALLAN ABBOT TUTTLE, ESQ.,

ON BEHALF OF THE PETITIONER

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

The issue in this case is whether the Federal Power Commission has the statutory authority to reduce a public utility's otherwise just and reasonable electric wholesale rate because the utility allegedly maintains artifically depressed and anticompetitive retail rates.

QUESTION: Mr. Tuttle, you didn't in your petition, I know, raise the question of the finality of the Commission's ruling that was reviewed by the Court of Appeals.

From your own knowledge, is it a common practice in agency proceedings, where a petition for intervention has been partially granted and partially denied by the Commission, for the party that is partially denied to run to the Court of Appeals at that stage and seek to get it reviewed?

MR. TUTTLE: It is not a common practice, and, of course, when it occurs, the Commission's position would ordinarily be, and indeed was in the Court of Appeals, that

the issue was premature.

As you know, the Court of Appeals in this case disagreed with that argument which we made, indicated that the Commission had obviously reached a final conclusion as to this issue, and that the interest of justice required the Court to reach the issue at that juncture, because the Commission had made that ruling in a number of other cases, and the Court felt that there was no indication that any further elaboration of that issue would help resolve the question of the Commission's power at that juncture.

The Court of Appeals having made that ruling and having reached the merits of the case, we of course proceeded to this Court, addressing the merits of the Commission's statutory power.

This litigation arose in June of 1973, when Arkansas Power and Light filed with the Commission a wholesale rate increase request, under Section 205 of the Federal Power Act.

Conway Corporation, the respondent here, is a wholesale customer of Arkansas Power, and intervened in the proceedings, alleging that the filing was made for anti-competitive purposes.

Conway asserted that it competed with Arkansas Power, its supplier, for direct sales of electricity to industry. And Conway alleged that by raising the wholesale rate to it, while keeping the retail rate to industry low, Arkansas Power

was effectively squeezing Conway out of competition for the direct industrial sales.

QUESTION: What is Conway's business?

MR. TUTTLE: Conway is a corporation -- there is a municipal electric system in Conway, and Conway Corporation manages it.

QUESTION: In the municipality of Conway?

MR. TUTTLE: Yes.

Conway urged that the increase be rejected or reduced in order to eliminate this price squeeze.

The Federal Power Commission rejected this suggestion, concluding that the relief sought, the rejection or reduction of the wholesale rate increase, was not within its power to grant.

Under Section 205 of the Federal Power Act, the Commission is charged with assuring the justness and reasonableness of wholesale electric rates in interstate commerce. It has, however, no authority to set retail rates.

The Federal Power Commission concluded that it could not, as Conway was suggesting, base the wholesale rate on the nonjurisdictional retail rates.

The Commission said -- and this occurs at page 53 of the record -- "Wholesale rates must recover allocated wholesale costs. Conway's suggested relief is a rate not related to wholsale costs but rather related to Arkansas

Power's industrial rate. However, that industrial rate," the Commission said, "is subject to the sole jurisdiction of the State Commission and not the Federal Power Commission."

The Court of Appeals reversed, holding that the Federal Power Commission had a responsibility under Sections 205 and 206 of the Federal Power Act to remedy an alleged discrimination between a jurisdictional wholesale rate and a nonjurisdictional retail rate, caused by -- and these are the Court's words -- the utility's own decision to depress certain retail revenues in order to curb retail competition from its wholesale customers.

The operative statute here is Section 205(b) of the Federal Power Act, which provides:

"No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, ... maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or class of service."

The scope of this provision and, most significantly, the significance of the limiting language"with respect to any transmission or sale subject to the jurisdiction of the Commission" can only be understand with reference to the legislative history of the 1935 Power Act and, perhaps more important, the impact of this Court's 1914 decision in the Shreveport case upon that legislative history.

Briefly, Shreveport involved the question of the power of the Interstate Commerce Commission under the Interstate Commerce Act to remedy a discrimination between jurisdictional wholesale railroad rates and nonjurisdictional intrastate railroad rates set by the Texas Railroad Commission.

Based on this Court's view of the broad and unexceptional language of the antidiscrimination provisions in the Interstate Commerce Act, this Court in 1914 concluded that the Commerce Commission could require an increase of a non-jurisdictional intrastate rate which discriminated against interstate commerce.

The Shreveport case figured prominently in the 1935 debates, or hearings I should say, on the Wheeler-Rayburn bill, which, with modification, became the Federal Power Act of 1935.

Section 202 of the original bill, the forerunner of Section 205, provided in part: "No public utility should establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."

At the hearings on the bill, the Solicitor of the Federal Power Commission, who was a draftsman of the bill, was asked if the Shreveport case would apply. If the retail rates were so low that for a company to exist it became necessary to charge exorbitant rates for its wholesale inter-

state business.

He argued that it would not apply to the bill as drafted, and maintained -- and this is a quote: "The intrastate rate should be determined upon its reasonableness" -- excuse me, I misspoke. "The interstate rate", the jurisdictional rate, "should be determined upon its reasonableness, its reasonableness alone without regard to what the intrastate rate is."

Despite these and other assurances as to the scope of the Wheeler-Rayburn bill, the concern remained that owing to the broad and unexceptional language of Section 202 -- that I've read to you -- that the Shreveport case might nonetheless govern the law if enacted in those terms.

Accordingly, the Act was amended, the bill was amended, and the words added, which became the words of Section 205.

Section 205, as enacted, provided: "No public utility shall" -- and these are the added words to which I want to call you attention -- "No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission ... maintain any unreasonable difference in rates", et cetera.

Following these amendments, Representative Cole, who was the sponsor of the bill, stated: "We have tried -- I think successfully -- to avoid the interjection [sic] of

federal control ... into intrastate activities in the way in which the Shreveport case might permit."

This wording of the Act has led Justice Jackson, concurring in Colorado Interstate, to make the only statement that a member of this Court has made on precisely the issue involved in this case.

And he said, at 324 U.S., at 615, "The Act forbids discrimination only as between regulated rates and does not forbid discriminations between the regulated and unregulated ones."

Despite this legislative history, the Court of Appeals concluded that Section 205, as enacted, did not require that both rates involved in a pattern of discrimination fall within the jurisdiction of the Commission. The Court argued that if Congress had intended to limit Section 205 to competitions merely between jurisdictional rates, it would have added to the end of the section the following words: "classes of service subject to the jurisdiction of the Commission." Rather than, as the Act reads, merely the words "classes of service."

Thus, according to the Court of Appeals, if the Congress had wished to limit Section 205 to discriminations between jurisdictional sales, this is what it would have had to have said:

"No public utility shall, with respect to any trans-

mission or sale subject to the jurisdiction of the Commission ... maintain any unreasonable differences in rates between classes of service subject to the jurisdiction of the Commission."

However, the repetition of the phrase "subject to the jurisdiction of the Commission" at the end of Section 205 is obviously redundant, because, by its terms the statute is already limited to "any transmission or sale subject to the jurisdiction of the Commission."

Based on Congress's failure to repeat this obviously redundant phase, the Court of Appeals said that the Commission was required to address the question or the issue of discrimination between jurisdictional and nonjurisdictional rates.

Its only concession was to say that any sanction imposed by the FPC to remedy an anticompetitive practice is to be addressed to the jurisdictional rate.

QUESTION: What if the Court of Appeals had just said the Commission could consider it, and not that it was required to consider it; would you regard that holding as wrong?

MR. TUTTLE: I would, Mr. Justice. I think that the -- our principal analysis of the statute is that we are limited in the matters that we are to concern ourselves with with matters which may not be the subject of State regulation, and our view of our statute is that the only discrimination which we may address within the ambit of Section 205 and 206 is the

discrimination between jurisdictional rates. And that is our fundamental submission in this case.

QUESTION: But, Mr. Tuttle, is it not true that in making the determination of reasonableness on the wholesale rate, you do have to make some preliminary judgment as to whether costs are properly allocated, do you not?

MR. TUTTLE: Absolutely. And --

QUESTION: Does that not involve some inquiry into the rate base for the retail rates?

MR. TUTTLE: Well, it involves an allocation, as you say, of cost, and there's no question that we may look to the retail business, to the extent of determining that the wholesale rate and the wholesale rate payers are not being loaded with more costs than would justify, according to the amount of investment which is put to that service.

QUESTION: But you say the statute makes it impermissible for you to look and see -- assume hypothetically that the retail rates were much lower than the wholesale rates and the jurisdictional rates, you couldn't even consider that fact in deciding whether the wholesale rates were reasonable. That's your position, as I understand it.

MR. TUTTLE: My position is that the wholesale rate has to look at properly allocated wholesale costs.

QUESTION: But my example might suggest a suspicion that there's something wrong with the costs; couldn't you even

look at it for that purpose?

MR. TUTTLE: We can always look at the entire company's business, in order to determine that --

QUESTION: Including rates --

MR. TUTTLE: -- the costs are correctly allocated.

QUESTION: Including the retail rates?

MR. TUTTLE: I don't think the retail rate would be relevant. I think the relevant issue would be the allocation of the costs.

QUESTION: What percentage of this company's business is retail and what percent wholesale?

MR. TUTTLE: It's a hard thing to be absolutely specific about, because it's hard to classify some of the business; but between 80 and 90 percent retail -- the revenue is 80 to 90 percent retail.

QUESTION: And you may not look at those rates at all in performing your function, you say?

MR. TUTTLE: We may look at the rate base and the allocation of costs, but we may not look at that rate. Our job is to determine first what is properly allocated to -- in terms of cost to the retail -- to the wholesale business. And then determine whether, or what is the appropriate rate of return on that investment.

And that's what Congress has charged us with doing here, as we read the statute.

QUESTION: Mr. Tuttle, if the facts are as alleged by the intervenors here, do they have any remedy at all for the situation?

MR. TUTTLE: They have several remedies, in my view, Mr. Justice. They have -- of course, if this is an artifically depressed retail rate, which, in my view, it has to be -- assuming the allocations are correct.

QUESTION: They artifically depress their rates for 90 percent of their business in order to do this, then?

MR. TUTTLE: I said -- well, you see, I'm not saying for a moment, Mr. Justice, that a price squeeze really exists here. We are dealing with the face of the pleading that alleges a price squeeze. And so I assume --

QUESTION: But a price squeeze can rise in two ways: either by having extravagantly high rates in the wholesale field and normal rates in retail; or vice versa. And here, I assume, with 90 percent of the business in retail, they probably didn't depress those rates; if anything, the wholesale rates were too high.

MR. TUTTLE: They probably didn't depress any rates. You see, my point is that it's like -- I'm dealing with this thing on the face of a pleading --

QUESTION: On those rates.

MR. TUTTLE: -- and I have to accept the allegation that there is a price squeeze and an unlawful price squeeze,

because the respondent says so, and we refused to hear their argument.

QUESTION: All right. Excepting that, what is their remedy?

MR. TUTTLE: Well, first of all, I'd like to address the question of the fact that it, you say, could occur from a artificially inflated wholesale rate. And I'll come to that in a moment; but the point I'd like to make just initially is that our ordinary ratemaking standards with respect to the wholesale rate would forbid inflated wholesale rates and inflated wholesale costs, without looking to the issue of discrimination.

So it's not going to arise under our own standard, it's not going to arise on the wholesale side.

QUESTION: Assuming you've done an adequate job of investigating the company and the total cost picture, but --

MR. TUTTLE: Yes, but we accept our responsibility and it hasn't been questioned in this case that we have.

QUESTION: But now answer my question: What is their remedy?

MR. TUTTLE: Well, their remedy, assuming that I am right, that the rate is caused by a depressed retail rate, of course that is a matter subject to the jurisdiction of the State Commissions, and they could intervene in rate proceedings in the State Commission and allege that it's an improper

remedy.

QUESTION: Do they have standing? Because they're not -- they have no interest in that rate any more than -- don't they have the same problem there?

MR. TUTTLE: No, because that would be a rate that if our other assumptions are correct, is a rate that's artificially low, and anticompetitive. And although the retail -- the State Commission might say, Well, we have to look at our rate and our rate by itself, and I would say they would be right in saying that.

QUESTION: Well, let me just back up to be sure I understand you. Assume there's no pending State proceeding before the Arkansas State Commission, what do they do, do they go in --

MR. TUTTLE: They make a complaint.

QUESTION: They file a complaint with the State Commission and say that you used to cause the utility to charge higher prices?

MR. TUTTLE: That's one remedy.

Of course, another remedy, you must --

QUESTION: Has that ever been successful? I've never heard of such a case, but --

MR. TUTTLE: I don't know -- I know there have been interventions in --

QUESTION: Yes, but that's not our example, that's --

our problem is they don't have such a pending proceeding under our hypothesis.

MR. TUTTLE: Does Conway now have such a pending proceeding? No.

QUESTION: No. What does Conway do about the problem it alleges exists if there's no pending Arkansas State proceeding?

MR. TUTTLE: It could file a complaint, alleging that the rate is improper. And that's only one remedy, Mr. Justice. It would seem that under the ordinary standards of the antitrust law, that if an artifically -- if there is a price squeeze caused by a manufacturer artificially raising the rate to his wholesaler in order to squeeze his wholesaler out of business for retail business, that would be a violation of the antitrust laws.

QUESTION: But would not the utility have a complete defense, because both of those rates are compelled by regulatory agencies, and then wouldn't Parker v. Brown apply?

MR. TUTTLE: That's a very interesting question, and my suggestion is that probably Parker v. Brown would not govern. Parker v. Brown, of course you -- this Court knows, and is currently considering the Detroit Edison case, which will address the question of just exactly what the impact of a State-ordered rate would be.

But my analysis would be that this case falls between,

somewhere between the act of sovereignty which is immune from the antitrust laws under Parker v. Brown, and the State allowed anticompetitive conduct, which was held not to be a defense of the antitrust laws under the Goldfarb case.

Because there's no indication that there is any State policy here favoring an anticompetitive, an artificially low and anticompetitive rate, and I think proof of that would be that the Arkansas Power has in fact filed rate increases since the beginning of these proceedings in Arkansas, and they have been processed and they have been granted.

So my judgment would be that there is no State policy here requiring this rate.

QUESTION: If you assume a situation in which the rate, the State rate has been approved by the State agency, isn't that a sufficient expression of State policy?

MR. TUTTLE: Well, that -- if the State looks at the rate -- you see, the way Arkansas works is more or less like --

QUESTION: I assume they don't approve it without looking at it.

MR. TUTTLE: Well, they do in this sense: that Arkansas is like the federal government, in that one files a rate and it can become effective under suspension with the posting of a bond before a ruling is made upon its justness and reasonableness. If it turns out that after a complete

analysis of the State rate filing, the State determines that this is indeed a compensatory rate and one that they wish to impose, and there remains a price squeeze, where the federal side has been through its process and determined that the wholesale rate is just and reasonable under federal standards; and the process has been completed on the State side and there is this State finding of justness and reasonableness on the State side and there, nonetheless, remains a differential.

That's simply a fact of life. I don't -- it's by hypothesis that there's no violation of law.

QUESTION: And the plaintiff has no remedy then.

And the answer is the plaintiff has no remedy -- or the intervenor has no remedy. Because I suppose they cannot look at the wholesale rate any more than you can look at the retail rate?

MR. TUTTLE: I would agree -- oh, but only if the process has gone through the point of the State determining that this is indeed the rate that they think ought to be applied.

QUESTION: With the rate filed, they had an investigation, they didn't -- they let it go into effect? That's the normal procedure, isn't it?

MR. TUTTLE: If -- if -- if the allegation were that it simply went into effect, without an investigation, it would seem to me that under the antitrust laws, the doctrine

of Parker v. Brown would not create an immunity and one could perhaps achieve a remedy in federal court.

Of course, not all problems have remedies and not all problems with respect to this situation necessarily have remedies in the federal system. We have a responsibility to assure that the wholesale rate is just and reasonable, and the remedy for this discrimination, if -- and the only thing it could be in my judgment is an artificially depressed retail rate lies with the State that's allowing that circumstance to obtain. And if the State doesn't do it, it's because they're not doing their job, not because we're not doing ours.

We think that beyond the jurisdictional limitations that I've mentioned, that the remedy suggested by the Court of Appeals is addressed to the wrong rate, and, in any event, is an inadequate remedy.

We've already discussed, in my discussions with Justice Stevens, the fact that a squeeze might arise in three ways: either from an inflated wholesale rate, or a depressed retail rate, or something that was an end product of analysis of both rates.

And I have assumed that, as the Court of Appeals did, that the discrimination alleged here is caused, or alleged to be caused by an artificially depressed retail rate. I make that assumption because, as I have indicated,

our ordinary standards of ratemaking would require us, in the first instance, to determine that the whole costs are not artificially inflated, and thus that no price squeeze caused by artificially inflated wholesale rates could ever arise.

So the price squeeze, if it exists at all, exists by virtue of an artificially depressed retail rate.

It's our view that that of course is a rate over which we have no jurisdiction. That's my first point that I wish to make with the Court.

But, in any event, it seems to me that the ordinary federal standards of ratemaking would forbid us to remedy this discrimination by lowering the wholesale rate, which is the remedy that the Court of Appeals suggested, and the remedy that Conway has suggested.

Because the wholesale rate has to recover allocated wholesale costs, and the relief that Conway suggests, the reduction of the wholesale rate, is not related to wholesale costs but it's related to retail rates.

This Court, in the Shreveport case, in discussing circumstances where the Court found the power to address a discrimination between a jurisdictional and a nonjurisdictional rate, held that that situation cannot be remedied by sacrificing federal standards of ratemaking. And the Court said -- and this is at 234 U.S. 255 -- "It is clear that in removing the injurious discriminations against interstate

traffic arising from the relationship of the intrastate to the interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard."

Thus, our obligations are to assure a just and reasonable jurisdictional rate. And we're not in a position, and we're not allowed under our ratemaking responsibilities, to sacrific that rate in order to remedy a discrimination caused by an anticompetitive nonjurisdictional rate.

The Court of Appeals suggested that this whole problem of not being able to lower the wholesale rate might be avoided by reference to its concept of a zone of reasonable wholesale rates, and suggested that we might reduce the wholesale rate to the lower range of the zone of reasonableness, and therefore have some effect on the price squeeze situation.

We don't think that there is an adequate zone, or a zone in wholesale ratemaking which allows us to effectuate this kind of remedy. In setting rates, the Commission is required to set a rate which will assure adequate and reliable electric power at the least cost, while maintaining the financial integrity of the utility.

In setting that rate, the Commission does not locate a zone of reasonable rates and then select a rate within the zone; rather, it attempts to find the just and reasonable rate. It evaluates items of cost, such as plant

investment, fuel costs, labor and management expenses, capital costs, depreciation and taxes. These are knowable, measurable figures. They can and should be precisely quantified, and their evaluation does not create a zone of reasonableness.

The only zone of reasonableness that might be found in utility ratemaking is the range of potentially appropriate rates of return on that investment rate base, specifically rate of return on common equity.

But we don't think that here is an appropriate place to make an adjustment because of allegations of anticompetitive conduct.

The Commission must select a rate of return which is commensurate with the risks associated with investment, which will maintain the existing investment, which will attract new investment at a reasonable cost.

And we think that it doesn't make sense to select that rate on any other grounds than those criteria stated, because of allegations of anticompetitive conduct.

But our fundamental contention is that Justice Jackson was right when he said, in the Colorado Interstate case, "The Act forbids discrimination only as between regulated rates and does not forbid discriminations between the regulated and unregulated ones."

And we don't think that this conclusion creates a

regulatory gap requiring the Court to expand on the plain words of Section 205.

I've already addressed the possibilities of remedy, but I also think it's worth noting that a price squeeze is an unlikely event in the nature of things.

As I've indicated, the Commission's ordinary rate-making standards with respect to wholesale rates assure that there will be no artificially inflated wholesale rates; so that no price squeeze caused by such rates could arise.

Moreover, in an industry where 80 to 90 percent of the business comes from retail revenues, it seems unlikely that a truly anticompetitive rate would be created or maintained on the retail side.

Of course, if it does, if this does happen, there is another remedy, Mr. Justice Stevens, I didn't mention: Congress can expand upon the powers of the Commission and, in fact, there are currently pending four separate bills addressed to Congress's responsibility with respect to unfair methods of competition.

Alternatively, of course, as I have suggested, there may be remedies before the State Commission or remedies under the antitrust laws.

Accordingly, I submit that the judgment of the Court of Appeals should be reversed.

QUESTION: Mr. Tuttle, could I ask you -- I note

that Mr. Bork approved a filing of a petition by the Power Commission. Was his approval required by law?

MR. TUTTLE: It has always been our custom to allow the Solicitor and the Justice Department to determine whether petitions would be filed with this Court. Our statute allows us to represent ourselves in any case in court. It makes no specific reference to the Supreme Court.

And what happened here, of course, --

QUESTION: Are you suggesting that the Solicitor General isn't the authorized representative of the Federal Power Commission in this Court?

MR. TUTTLE: I'm saying that we have always construed our statute to --

QUESTION: That isn't what I'm asking you.

MR. TUTTLE: In essence, I'm saying yes, he is the authorized representative.

QUESTION: Well then, I take it, it necessarily follows that the views in this brief are his views, too?

MR. TUTTLE: I think I have to say what happened, in order to answer that question.

QUESTION: Well -- you can't answer it yes or no?

MR. TUTTLE: I can say that of course he has expressed no dissent to the views expressed in this brief.

QUESTION: Well -- so your answer is, you don't know?

MR. TUTTLE: My answer is that I don't know; I know

that he --

QUESTION: In any event, if he is required to represent the Federal Power Commission before this Court, we do not know whether we have his views or not?

MR. TUTTLE: You have his -- you have his authorized file --

QUESTION: Do we have his views -- do we know whether we have his views or not?

MR. TUTTLE: I think -- I think that these are the views of the United States as authorized to be expressed by the Solicitor General. That's the best answer I can give you.

QUESTION: Well then, the answer is, I take it, we do not know whether we have his views or not.

Now, does the organization plan of the Department of Justice assign some responsibility within the Department with respect to the Federal Power Commission petitions?

MR. TUTTLE: It does. But a problem can arise --

QUESTION: I understand. Now, just let me ask you: Is there any evidence in this, in these papers that you have filed here, as to what the views of the Antitrust Division are?

MR. TUTTLE: There is -- the evidence is that the Antitrust Division has not dissented and has made no filing of its own.

QUESTION: Thank you.

QUESTION: Mr. Tuttle, let me supplement Justice White's question. Does the law make the Solicitor General the exclusive representative of the Power Commission in this Court -- not the authorized, the exclusive? That is, when they come here alone.

MR. TUTTLE: I think that it does, Mr. Chief Justice. I think that in circumstances where the Solicitor General wishes to, he may authorize an independent regulatory agency, with litigating powers, such as our own, to file our own petition; which is what he did in this case.

QUESTION: Thank you.

QUESTION: What is this Supplemental Memorandum of the United States?

MR. TUTTLE: Supplemental Memorandum?

QUESTION: For the United States. The Solicitor General says -- he's speaking for the United States, doesn't he?

MR. TUTTLE: I'm not sure what document you're talking about. What case do we have?

QUESTION: Which one have I got here now?

Yes, I must have the wrong case.

MR. TUTTLE: There's no filing in this case by the Solicitor General.

QUESTION: Yes. I've got the wrong one. Sorry.

MR. CHIEF JUSTICE BURGER: Mr. McDiarmid.

ORAL ARGUMENT OF ROBERT C. McDIARMID, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. McDIARMID: Mr. Chief Justice, and if it please the Court:

There is a serious question in this proceeding, and it's a good deal broader, I think, than the question as stated by the FPC.

Looked at most broadly, I think, the question here is one of how the Federal Power Commission fits into the picture of the societal control of the basic economic structure of the society.

It's very plain that sales of electricity have been, since the inception thereof, regulated in one form or another either at common law, as common carriers of public utilities at common law; or by agencies set up by either States or federal government.

The FPC's position here is one of what I would characterize as being selective myopia; they're looking at a particular portion of a particular section of the statute, I think misreading it, without attempting to see how it fits into the structure at large or into the whole set of their statute.

And I have here -- I hope I may be forgiven for saying so -- a sense of view three years ago, I stood here while the FPC was saying similar things in the Gulf States

case.

There it said that it didn't have to worry about anticompetitive problems under Section 204 of the Federal Power Act, because it could deal with such problems by treating the actual problems when they occurred, the acts of the company rather than the finances.

That Court -- that case was while review was being had of a decision of the court below here, the same court. Also unanimous.

In that case, the majority of this Court agreed that the FPC did have the responsibility to look at what it then claimed was nonjurisdictional problems, anticompetitive problem, and to deal with it within the context of Section 204.

The minority of this Court, in a decision written by Mr. Justice Powell, agreed that the Commission had the responsibility to deal with anticompetitive problems when the problem was presented to it in the course of a case where the conduct was being challenged, such as ratemaking.

We thought the FPC's position at that time was something of a shell game, in trying to find jurisdiction somewhere else, without quite saying where it was, and we think it's similar here.

The Conway Corporation is a corporation which was set up during the 1930's in order to raise some money that

couldn't be raised under Arkansas law to bail out two colleges, Your Honor. It's a city-owned corporation. It and the other eight customers here are all publicly owned.

Mr. Tuttle asserts that the problem here must somehow be one of discriminatorily low retail rates.

We've stated at some length the problems that we see with the Federal Power Commission's regulations and why that isn't so. Perhaps it's stated best, however, by an amicus brief, which we received, I believe, yesterday, filed by Commonwealth Edison, to which we're happy to consent, incidentally.

As they pointed out, there are at least a dozen methods, accepted methods of ratemaking, differential allocations, differential assumptions of rates.

The FPC, for example, sets rates on the basis of estimates of cost, not actual cost, but estimates of cost made by the company in advance, a year in advance. Most State Commissions do not; Arkansas does not.

The FPC may or may not be allowing various kinds of tax normalizations. That's not too clear. Most State Commissions do not.

There are lots of things like this that are spelled out in some detail in our brief.

But the fact of the matter is that it's very easy for a power company to file a higher rate at the FPC; the FPC

does not typically do anything with it in the near-term future; this rate was filed in 1973. Hearings are not complete.

We've had three judges. One is retired, one has moved on to better things. And that's not uncommon. Recently the FPC decided a rate case filed in January 1970, and they decided that in August of last year.

QUESTION: Well, of course, your tactic here of appealing to the Court of Appeals on an interlocutory motion isn't really designed to expedite the final decision of this sort of case, is it?

MR. McDIARMID: Oh, I think not, Your Honor, the final -- the case has been processed in as expeditious a manner as we could, at the same time that this was going ahead. I assure you we would like very much to get some money back.

We've been paying all this time.

What we contended, originally, was that there is a historic responsibility and a statutory responsibility of the FPC to avoid discrimination. We said this was a discrimination case.

As a discrimination case, there is a fast procedure for dealing with these matters. Not one where we are now paying the second pancake rate increase, without any judgment as to the first. The Arkansas Commission has had two findings on the two cases which have been filed there. They've cut them both down.

What we've said, that this is a discrimination case, and in a discrimination case you can go ahead very quickly, you can decide if there appears to be discrimination, as there plainly does here. You can require the company to show cause why that discrimination should not be ended, and end it there.

Then you can go on to have the rest of the hearing, eliminate the discrimination, if there is still a rate increase pending, go ahead and hold the rest of the hearing on that. That we can survive.

What we can't survive, and it is not an uncommon problem, this problem has been raised at the FPC and probably in a dozen cases since 1973. We cannot survive the situation where the company charges a much lower retail rate than its wholesale rate. And I'm taking into account the assumption that the cost justification for the difference is taken into account.

QUESTION: But that's really the merits of your case, isn't it?

MR. McDIARMID: Yes, it is.

But in this case, Your Honor, the Commission had decided that this was not a discrimination case, they would not deal with it, they would not allow us to collect information on it, they would not allow us to put on a case on it. They wouldn't deal with it.

And if the Commission is going -- if we're going to wait until after the Commission spends five years hearing the case, then go to court, then spend the three years that this has taken, for example, to get that issue decided, then go back, nobody is going to be alive who paid that, and these clients of mine are going to be out of business.

There is a very real and very present problem, and a serious one.

Now, we pleaded here a discrimination in historic terms; we also pleaded a discrimination in price squeeze terms under the Sherman Act, under the Alcoa and Southern Photo line of cases.

The FPC concedes for this purpose, for the purpose of this case, that that must be the basis upon which this decision is made; and I think, in fact, that we will have no problem proving it.

But the Commission urges that it has no jurisdiction.

I find it very difficult to follow its reading of the statute. One way in which the statute could easily have been written by Congress, if it meant what the FPC said it meant, is if it had written it the same way the FPC quoted it in its application for certiorari in this case -- misquoted, just adding an "s". But the Commission isn't claiming that any more.

But this is an element of a very historic kind of

control. Originally, monopolies of this type were controlled by common law. The most common problem that arose at common law was when there was discrimination, and the courts found no problem in those cases, in saying: It is very simple, just end the discrimination. Where you don't have to worry about what the costs are, and the discrimination; raise both rates, or lower them both.

The Sherman Act provides for a remedy under the anti-trust laws -- treble damage, not single damage.

The Robinson-Patman Act, if it applies, would provide for a treble-damage remedy.

Under Part I of the Federal Power Act, the original Water Poer Act of 1920, it is very clear that the Federal Power Commission would have had jurisdiction to deal with this discrimination, and this discrimination precisely. If there were no State Commissions.

Arkansas Power and Light is a licensee of the nation's water resources. Part I plainly makes a licensee subject to the jurisdiction of the Federal Power Commission to avoid discrimination.

And that jurisdiction terminates as to those matters for which a State provides a regulatory agency to deal, but only as to those matters.

The Commission and Arkansas say that there is no State agency to deal with this discrimination, and they say

the Federal Power Commission can't, either. We think that's wrong.

Prior to 1927, when this Court decided the Attleboro case, it seemed clear that a State Commission could resolve this discrimination problem. In Attleboro, this Court decided that the so-called Attleboro gap existed, that the States could not control sales at wholesale for resale.

The Federal Power Commission was, in 1935, as part of the Public Utilities Act of 1935, given the responsibility to deal with the matters which had been left open by this Court in Attleboro, or opened.

This Court has said, on numerous occasions -- most frequently, FPC v. Florida Power and Light, also in FPC v. Southern California Edison -- that Congress intended fully to plug the so-called Attleboro gap, to fill that responsibility.

But the FPC here says no, they don't.

Mr. Tuttle's position is sort of strange, I am not quite sure that I follow it. I understand him to say that the FPC has exclusive jurisdiction over wholesale rates. And therefore, I presume, that he will argue that we cannot attack the wholesale rates as being part of a price squeeze, if we go into antitrust crout, where we resist to go.

The State Commission would undoubtedly urge that Parker v. Brown applied; certainly if it applies to light bulbs,

it applies to rates.

This Court has before it the question of whether it applies to light bulbs, andhow far it goes, in the Detroit Edison case.

But suppose we were to go to court under the anti-trust laws? The court would presumably award us damages and continuing damages to the extent of the discrimination.

In substance, therefore, we would be going to court to get the damages which the FPC could have awarded us, because of the differential in rates, the discrimination.

That seems a rather roundabout way, and an unnecessary burden upon the courts, to do something which the FPC has the expertise to do.

If the suggestion is that we should go to court and we get an order directing the company or the State Commission to raise the rates, then we're doing by indirection precisely what the people who objected to the original draft of Part II, in 1935, objected to.

Judge Hooker from the State Corporation Commission in Virginia, in 1935, objected -- and it's in our brief -- that if that language was not changed, the FPC would have the authority that the ICC had had to come into Virginia, or any State, and force it to raise the retail rates. And that was why -- I think a reading of the legislative history makes it quite clear that that's why -- the amendments that were made

were made to prevent the FPC from directly going in and requiring retail rates to be raised.

Mr. Tuttle's solution would apparently have us do that indirectly by a court order. There are constitutional problems with that as well, but I don't think we need get into those.

Some of the amici says we should go to the State agencies and ask them to raise the rates. There is, indeed, a standing problem. We have tried this for a couple of our clients in other cases, and we have been thrown out. Indeed, in the Arkansas case, some of our clients here attempted to intervene for limited purposes, and were allowed to intervene for very limited purposes; much more limited than we would be allowed.

But the problem is we don't think that the State agencies are wrong in the way they set rates. The FPC is prepared to allow much higher rates, and prepared to do it on a different basis, than the State Commission. And the cities believe that they have a responsibility to their citizens, as well, and to other citizens.

And we don't believe it's our responsibility, we don't believe it's right to go to court and say: Arkansas Power and Light, raise your retail rates.

We have no problem with the way the Arkansas Public Service Commission is setting those rates. Our problem is

with the FPC.

The FPC suggests that there is a magic to the way it sets wholesale rates. But that's easily answered. If there were, as there are in some instances, two wholesale rates, one by Arkansas Power and Light to an affiliate, which then sold at retail in the area where it sells and one to us, the FPC would have no problem with saying: Lower the higher rate, or raise them both; end the discrimination. End the discrimination and then set a just and reasonable rate. But end the discrimination first.

In this case, they say, well, somehow or another, there is a magic to the way we set a just and reasonable rate, and we'll get to it five or six years down the road, and you'll then be saved. Maybe. But we won't do anything about the discrimination.

That's not a satisfactory answer, or we don't find it a satisfactory answer.

The FPC was set up to fill the Attleboro gap, not to reopen it.

Before the Attleboro decision, we wouldn't have had the discrimination problem.

Nowhere in the legislative history is there any suggestion that it was intended to reopen this kind of a gap, to leave us hanging out there, exposed to the worst kind of discrimination.

QUESTION: But I thought the gap -- I thought the gap was power over wholesale rates.

MR. McDIARMID: Indeed, Your Honor. The gap as to -- excuse me.

QUESTION: That gap was closed by Part II of the Act.

MR. McDIARMID: Was it? If it was closed, Your Honor, where is our protection against discrimination?

QUESTION: Well, you've got protection against unreasonable wholesale rates.

MR. McDIARMID: We have protection against what the FPC decides are unreasonable wholesale rates, after the FPC finally decides it, five years down the road.

QUESTION: Well, --

MR. McDIARMID: If we're still around.

QUESTION: Well, that's their job.

MR. McDIARMID: It may be their job, Your Honor, but we say that before the gap was open, we had protection against discrimination in the interim, while people were deciding what the reasonable wholesale or retail rate was.

After that decision, we didn't. Unless we go to court.

The FPC seems to say, plainly says, they can't give us that protection.

QUESTION: Well, the lack of protection against

discrimination, you suggest, was part of the so-called gap.

MR. McDIARMID: Yes, Your Honor.

When the gap was opened -- prior to the time the gap was opened, all such sales were thought by most States to be regulated by them. They were -- I don't know of any State agency that does not have a discrimination provision in its charter. That's the very element, the very basic element of regulation of utility rates or, indeed, of anything else in the kind of required monopoly service in the society.

QUESTION: By the way, if you were going to try to seek an antitrust remedy, what antitrust law would you think might be relevant?

MR. McDIARMID: Sherman II, I would think.

QUESTION: Attempt to monopolize -- monopolization; attempt to monopolize?

MR. McDIARMID: Yes.

QUESTION: And what's your objection to attempting that route?

MR. McDIARMID: Our objection to attempting that route -- our only real objection to attempting that route, Your Honor, is -- are two --

QUESTION: There's bound to be more.

MR. McDIARMID: In Parker v. -- well, the first question is can it be done.

QUESTION: Yes.

MR. McDIARMID: And there you have the Montana-Dakota Utilities case, which this Court decided in 1947, I think, which seems to say that as to an FPC rate, the only place you can challenge that is at the FPC.

QUESTION: Well, on reasonableness.

MR. McDIARMID: No, Your Honor, the -- I don't know; possibly.

I certainly don't want to preclude that possibility in the off chance that we lose.

[Laughter.]

MR. McDIARMID: Obviously we would have to try that.

The other problem is Parker v. Brown. But, in substance, what you would be doing is you have to go back into the cost justification, exactly the same kinds of sticky problems that --

QUESTION: Well, Parker v. Brown isn't going to bother you if you're attacking a wholesale rate.

MR. McDIARMID: That's right, Your Honor.

QUESTION: Well, don't worry about it, then.

MR. McDIARMID: Okay.

QUESTION: Then what about the -- especially if the FPC claims it has no authority whatsoever.

MR. McDIARMID: I don't understand it to be saying that, quite, Your Honor. They said a very carefully phrased thing. They have said, in a footnote to their main brief,

that they have exclusive authority over wholesale rates.

But that we can go through again about the low retail rates, what they have emphasized.

QUESTION: But this aspect of the wholesale rate, they -- whether it's discriminatory or not, they said they have no authority over.

MR. McDIARMID: They certainly say they have no authority over it.

QUESTION: They certainly do. And so Parker v. Brown, which is only talking about State authority anyway, doesn't worry you -- it wouldn't bother you very much with the Sherman II, would it?

MR. McDIARMID: No. Not if the --

QUESTION: It might bother the court, though.

MR. McDIARMID: It might.

[Laughter.]

MR. McDIARMID: Not if the primary question is the wholesale issue, and this Court made clear that the wholesale problem is not precluded.

The second problem, however, is one of costs.

Now, I do not suggest for one minute that FPC proceedings are cheap.

QUESTION: Or fast.

MR. McDIARMID: Or fast.

[Laughter.]

MR. McDIARMID: Neither, however, are Sherman II cases.

Now, Arkansas Power and Light, in its current filing, claims something like $80,000 for regulatory expenses for the year, which they want us to pay of course, for their wholesale case. And we have to pay that. The FPC will charge it to us.

There are other things, probably, in there, too. In companies that break it out entirely of regulatory expense, I've seen it as high as $500,000 a year.

Intervenors have to spend money, too; not quite at that rate, thank God; but they're still expensive. But they aren't as expensive as treble-damage cases.

The other problem, I think, is really one of the proper function for the courts. As I was beginning to say, the States and the federal government found, beginning with the Act to regulate commerce in the 1890's, that regulation by court of rather technical and detailed and long problems with cost justification were taking an awful lot of time, were not something with which the courts had or wanted any particular expertise.

The Arkansas Power and Light case, on cost justification, is now in thirty-odd days, I guess, of hearing. Some of them have gone as long as seventy, at the FPC; and on not inappropriate questions.

That's not a kind of burden I would want to see imposed on the court system.

At the rate the problems are piling up at the FPC, which does have the expertise, whatever else it does or doesn't have, I think it is plain that we would put a tremendous burden upon the district court system, and one which I don't think very many district judges would like to bear, or should be asked to bear.

Your Honor, it's a very serious problem. We think there's an easy answer to it. It's the answer that the Court of Appeals below gave. We don't think in its entirety. In traditional discrimination terms, the range of reasonableness, whatever it may be, is not the whole answer; the FPC claims there is no range of reasonableness.

My colleague just handed me a case where the FPC said there is a range of reasonableness; we're picking the higher range, the higher end of the range. Just after Conway came down.

The FPC is the place that has the authority to deal with it, it's the place that's set up to deal with it, it can deal with it fairly rapidly on the traditional kind of discrimination basis.

We ask you, Your Honors, to close the gap the FPC wishes to open, which we thought was closed in 1935.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:00 o'clock, p.m., the case in the above-entitled matter was submitted.]

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